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A
HANDBOOK OF CRIMINAL CASES ^{cf}

CONTAINING
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OF
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CALCUTTA SERIES, I. L. R.,
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A COMPLETE DIGEST.

COMPILED BY
D. E. CRANENBURGH,
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PREFACE.

THIS Handbook contains, as will be seen from the title-page, a verbatim reprint of all criminal cases reported in the Calcutta Series of the Indian Law Reports, Vols. I. to XVI.

The object of this work is to obviate, so far as criminal cases are concerned, all reference to the original Reports, which are very costly, and therefore beyond the reach of many.

To enhance the usefulness of the work, I have added the following :—

1st.—A nominal index of all cases reported in this book.

2nd.—A table showing the volume and the page in which each case is printed in the Calcutta Series of the Indian Law Reports, and the corresponding page in this book.

3rd.—An index in the form of a digest, which will be found to be very useful for reference.

D. E. CRANENBURGH.

Oct. 6, 1890.

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XI.	91	604	XIV.	60	718
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XI.	160	608	XIV.	141	723
XI.	236	610	XIV.	164	727
XI.	267	611	XIV.	169	730
XI.	271	614	XIV.	174	733
XI.	349	617	XIV.	175	734
XI.	365	620	XIV.	245	735
XI.	410	626	XIV.	314	737
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XI.	449	630	XIV.	357	739
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CRIMINAL CASES, VOL. I.

ORIGINAL CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

THE QUEEN *v.* HURRIBOLE CHUNDER GHOSE.

Evidence Act (I. of 1872), ss. 25, 26, and 167—Admissibility in evidence of Confession—Police-officer also a Magistrate—Deputy Commissioner of Police in Calcutta—Letters Patent, 1865, s. 26—Case certified by Advocate-General.

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The prisoner, on his arrest, made a statement in the nature of a confession which was reduced into writing by one of the inspectors in whose custody the prisoner was, and subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of Police at the Police Office, the Deputy Commissioner receiving and attesting the statement in his capacity as Magistrate and Justice of the Peace. At the trial of the prisoner at the Criminal Sessions of the High Court, this statement was tendered in evidence against him, and admitted by the Judge, who overruled an objection on behalf of the prisoner that, under s. 25 of the Evidence Act, it was inadmissible. On a case certified by the Advocate-General under cl. 26 of the Letters Patent, *held* that the confession was, under s. 25 of the Evidence Act, not admissible in evidence.

Per GARTH, C.J.—S. 26 of the Evidence Act is not to be read as qualifying the plain meaning of s. 25. In construing s. 25, the term "police-officer" is not to be read in a technical sense, but in its more comprehensive and popular meaning.

Per Curiam.—S. 167 of the Evidence Act applies as well to criminal as to civil cases.

Per GARTH, C.J. (PONTIFEX, J., doubting).—The Court which under that section is to decide upon the sufficiency of the evidence to support the conviction is, in a case coming before the Court under s. 26 of the Letters Patent, the Court of review, and not the Court below. Such decision is to be come to on being informed by the Judge's notes, and if necessary by the Judge himself, of the evidence adduced at the trial.

Per Curiam.—Apart from s. 167, the Court has power, in a case under cl. 26 of the Letters Patent, to review the whole case on the merits, and affirm or quash the conviction.

HURRIBOLE CHUNDER GHOSE and Keshub Chunder Mannah were tried at the February Sessions of the High Court, and were convicted by a special jury, the latter of using as genuine certain forged documents, and the former of abetting the same offence, and were sentenced by Macpherson, J., to ten years' transportation. During the trial, the *Standing Counsel* tendered as evidence against the prisoner, Hurribole, a statement made by him in the nature of a confession, in the house of his father at Kidderpore, in the presence of two inspectors of police and the other prisoner. At the time the statement was made, the prisoners were in the custody of the police, Hurribole having shortly before been arrested under a warrant issued by Mr. Lambert, the Deputy Commissioner of Police for Calcutta. The statement was, upon being made, reduced into writing by one of the inspectors of police, and on the removal of the prisoners

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to Calcutta, it was signed and acknowledged by Hurribole as correct, in the presence of the Deputy Commissioner of Police, at his private residence over the Police Office, and Mr. Lambert signed his name beneath that of the prisoner as a Magistrate and Justice of the Peace.

The statement, on being tendered in evidence, was objected to by the Counsel for the prisoner, Hurribole, as being, by s. 25 of the Evidence Act, not admissible in evidence against him; but the objection was overruled by Macpherson, J., who held that the statement was admissible in evidence against Hurribole under s. 26. Macpherson, J., refused to reserve the point under s. 25 of the Letters Patent; but a special case was submitted to the Advocate-General, who gave a certificate under s. 26 of the Letters Patent that the point of law should be further considered, and the case accordingly came on for hearing on review under that section.

Mr. Jackson and Mr. R. Allen for the prisoner.

The *Standing Counsel* (Mr. Kennedy) for the Crown.

Mr. Jackson contended that the reception in evidence of the statement admitted was expressly barred by s. 25 of the Evidence Act, it being a confession made to a police-officer. The fact that the police-officer was in this case also a Magistrate does not alter the effect of the section: it does not make him the less a police-officer. He cannot separate his functions as police-officer and Magistrate, and therefore was not such a Magistrate as is contemplated by s. 26. To read s. 25 otherwise would be to add to it, after the word "police-officer," the words "unless he be a Magistrate," which would be making a new law, not interpreting an existing one. It is submitted further that Mr. Lambert was not a Magistrate of Police, and had no power to act as a Magistrate of Police in Calcutta. Under Bengal Act IV. of 1866 there is no power given to appoint the Deputy Commissioner of Police a Magistrate of Police for Calcutta. S. 6 says, "The Commissioner of Police shall not ordinarily be a Magistrate of Police," but he may be appointed to that office by special sanction of the Governor-General in Council. S. 7 provides for his appointment as a "Justice of the Peace;" but unless he is vested with the jurisdiction of a Magistrate of Police, he shall act as a Justice only so far as may be necessary for the preservation of peace, the prevention of crimes, and the detection, apprehension, and detention of offenders in order to their being brought before a Magistrate of Police, and so far as may be necessary for the performance of the duties assigned to the Commissioner by this Act." The section further provides that the Deputy Commissioners may be appointed Justices of the Peace; and if so appointed they are to act as Justices "subject to the above restriction." S. 22 gives the Lieutenant-Governor power to appoint a sufficient number of fit persons to be Magistrates of Police for Calcutta: but it is submitted that the exercise of such power must be governed by ss. 6 and 7, which only provide for the appointment of the Commissioner, under special circumstances, to be a Magistrate of Police, and for the appointment of the Deputy Commissioner as a Justice of the Peace, but not for the appointment of the Deputy Commissioner as a Magistrate of Police. It would be unlikely that the legislature intended the Commissioner to be appointed only by sanction of the Governor-General, but the Deputy Commissioner to be appointed without it. If he were appointed, his appointment would be illegal and void, and he could not act as a Magistrate. There is no other Act under which he could be appointed. The appointment of the Deputy Commissioner as a Magistrate of the 24-Pergunnahs would not enable him to act as a Magis-

trate in Calcutta, or make him, for the purpose of this case, a Magistrate within s. 26 of the Evidence Act, and even if it did, the procedure prescribed by s. 122 of the Criminal Procedure Code should have been followed before this statement would be admissible in evidence, but that was not done.

It is submitted this was clearly a statement made to a police-officer, and it was therefore not admissible. This point arose before Markby, J., in 1874, and he decided in favour of the prisoner—*Queen v. Macdonald*.¹

Mr. Allen on the same side.—The intention of s. 25 was totally to disable a person who is a police-officer from receiving a confession which could afterwards be used against a prisoner. [PONTIFEX, J.—Suppose the Chief of the Police in Calcutta were sitting as a Magistrate in Calcutta, do you say, because he is a police-officer, that a man who came before him for trial, and confessed his guilt, could not be convicted and sentenced by him?] No, then he would be acting judicially; the prisoner's statement would be a plea of guilty, not a confession. [The Standing Counsel.—Mr. Lambert is not a member of the Calcutta Police Force; see s. 13 of Bengal Act IV. of 1866.] He is a police-officer; his appointment as Superintendent of Police in the mofussil is in the *Calcutta Gazette* of 24th July 1872, though he is Deputy Commissioner in Calcutta. [PONTIFEX, J.—S. 24 draws a distinction between police-officer and Deputy Commissioner of Police. GARTH, C.J.—Could the Commissioner serve a summons himself under that section?] Yes, it is submitted he could. [GARTH, C.J.—See s. 10. Under that section could the Commissioner fine or dismiss the Deputy Commissioner as being a member of the Police Force?] S. 5 gives the Lieutenant-Governor special power to dismiss him; otherwise the Commissioner would have had power. He comes under the same pension rules as other members of the force, and the time he serves as Deputy Commissioner would not be deducted. [GARTH, C.J.—Every member of the Police Force is appointed by the Commissioner, and is to receive a certificate; see ss. 10 and 13.] Special provisions are made for the appointment of the Deputy Commissioner; but that does not make him less a police-officer. Besides, he would still be a police-officer by virtue of his appointment of Superintendent of Police. [GARTH, C.J.—Do you say by reason of that, and without express appointment or orders, he could exercise the functions of a police-officer anywhere?] No, but that is not the case here. Mr. Lambert has been appointed Deputy Commissioner: that is an appointment where the duties of a police-officer are brought into requisition: no doubt, he was appointed as being an efficient police-officer. Independently of Bengal Act IV. of 1866, he is a police-officer within the meaning of s. 25 of the Evidence Act.

The Standing Counsel.—By the appointment of Mr. Lambert to be Deputy Commissioner he ceased to be a member of the Police Force while he is in Calcutta. Mr. Roberts was appointed Police Magistrate directly from the Police Force, but he did not afterwards retain his character of police-officer. As to the contention that a police-officer is a police-officer wherever he is, that is not so, see Act V. of 1861. A police-officer under s. 25 is a person authorized to exercise, and actually exercising, his functions at the place where the confession is made. A person appointed police-officer in the mofussil would not be a police-officer in Calcutta. [GARTH, C.J.—Suppose a man, appointed a police-officer in a particular part of Bengal, were to go to another part; then, taking into consideration that the Evidence Act extends over the whole of India, would a statement made to him in the latter

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place be inadmissible under s. 25 as being made to a police-officer?] No, it is submitted it would not. The intention was to prevent confessions from being extorted by intimidation. The Commissioner and Deputy Commissioner are not police-officers; the language of Bengal Act IV. of 1866 is inconsistent with their being so: they have not to perform any of the duties of a police-constable; the only officers of police are those enumerated in the schedule to the Act—Form A. The Commissioner of Police performs, or did perform until a late date, much the same duties as were performed by a Magistrate of a District; Justices of the Peace exercised the executive portion of the work of a Magistrate of a District, but were not to exercise his judicial functions. Persons in the position of a Commissioner and Deputy Commissioner of Police are not persons who are generally considered police-officers. [PONTIFEX, J.—If a police-officer were to hear a confession as a private individual in his private house, he would be bound to take notice of it, showing that you cannot separate his private and police capacities; why then should you be able to separate his police and magisterial capacities. Then, again, it must be taken into consideration how Mr. Lambert lives; here he lives as a police-officer among police, not as a Magistrate.] It is submitted his police functions are merged in his magisterial ones: his duties and functions are magisterial and judicial; in this case he issued a search-warrant, which is a magisterial act. Under the old Criminal Procedure Code, Act XXV. of 1861, the Commissioner of Police had to exercise judicial functions; see s. 84, which provides procedure to be adopted on the arrest, within the local limits of the jurisdiction of the Supreme Court, of a person against whom a warrant is issued by a Magistrate. Under that section, if the argument of the other side is to prevail, if a prisoner were taken before a Magistrate of Police, a confession made by him would be admissible; but if he were taken before the Commissioner of Police, it would not; see also s. 87. Ss. 84 to 100, taken with ss. 148 and 149, show what were the police-officers meant by the latter sections, which are in the same terms as ss. 25 and 26 of the Evidence Act. If Mr. Lambert were only a Justice of the Peace, he would still be a Magistrate within the meaning of s. 26 of the Evidence Act; any person, who was a Justice of the Peace, would come under that meaning. A confession, as in this case, made to him in both characters, must be taken to have been made to him as a Magistrate, his character as a police-officer being merged in that of Magistrate.

GARTH, C.J., intimated that the Court was of opinion that the statement was not admissible in evidence, and ought to have been rejected: but that Macpherson, J., had given a certificate that without the statement there was sufficient evidence to justify the conviction.

Mr. Jackson then contended that, if the statement had been improperly received in evidence, the prisoner was entitled to an acquittal. The case cannot be sent back, but under s. 26 of the Letters Patent must now be decided by this Court, if at all. But it cannot be decided at all; s. 167 of the Evidence Act, which provides that "the improper admission or rejection of evidence shall not be ground of itself for the reversal of any decision in any case," does not apply to a criminal case tried by a jury, but only to a case where the matter has been decided by a Judge without a jury. The Criminal Procedure Code, Act X. of 1872, makes special provisions as to the improper admission of evidence in trials by jury; see s. 283. And s. 280 gives the Appellate Court power to pass any order it thinks fit: s. 283 was unnecessary if s. 167 of the Evidence Act applied. In *Reg. v. Navroji Dadabhai*,¹ the applicability of

¹ 9 Bom. H. C. R. 358.

s. 167 to such cases as this was raised, but the question was only fully gone into by one of the Judges, Bayley, J., and was not made a ground of their decision by Sarjent, C.J., and Green, J., though they adverted to it. Bayley J., gave a strong opinion that the section was not applicable to such a case as this. The word 'decision' in that section is inapplicable to the verdict of a jury. It seems to have been admitted that the Court of Review was the proper Court to decide on the sufficiency or otherwise of the evidence. [GARTH, C.J.—That point was not raised.] No, but it was not suggested that the Court before whom it was argued was not the proper Court after long argument on all points. [PONTIFEX, J.—It appears to me clear the other way, *viz.*, that the Court in s. 167 means the Court that tried the case. [GARTH, C.J.—In that case the Judge who tried the case was one of the three Judges before whom the case was heard on review.] Yes, and he delivered a fresh judgment as one of the Court of Review. This case differs in that it is one certified by the Advocate-General, not reserved by the Court. It is submitted that s. 167 does not apply to criminal trials at all; the section is identical with s. 57 of Act II. of 1855, which has never been applied to criminal trials. The words are "the Court before which such objection is "not was raised." It does not apply to cases tried by a jury: it would be impossible to say what the result on the minds of the jury would have been, if the evidence improperly admitted had not been before them. The prisoner ought to be discharged.

Mr. Allen followed on the same side.

The Court took time to consider their judgment, and on a subsequent day called on Mr. Ingram, who then appeared with the *Standing Counsel* for the Crown, on the point as to s. 167 of the Evidence Act, but the learned Counsel said he thought it was unnecessary for him to argue the point.

The following judgments were delivered:—

GARTH, C.J.—In this case, the prisoner Hurribole Chunder Ghose was tried and convicted, at the February Sessions of the High Court, for using certain forged documents, and sentenced to ten years' transportation. At the trial before Macpherson, J., it was proposed on the part of the prosecution to put in a confession made by the prisoner. The confession was made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police, Mr. Lambert, at the Police Office in Calcutta, where he again affirmed the truth of his former statement to Mr. Lambert, and Mr. Lambert, in his capacity of a Magistrate, received and attested the statement.

Upon this confession being tendered in evidence, it was objected to by the prisoner's Counsel, upon the ground that it was a confession made by the prisoner to a police-officer, and therefore not admissible, by reason of the 25th section of the Evidence Act (I. of 1872). In answer to this objection, it was urged on the part of the prosecution, 1st, that Mr. Lambert was not a "police-officer" within the meaning of this section; 2nd, that, if he were, the statement was made to him as a Magistrate, and not as a police-officer; and that the 26th section was intended to qualify the 25th, so as to make a statement even to a police-officer admissible, if made in the presence of a Magistrate. The learned Judge at the trial admitted the evidence, and declined to reserve the point; but the Advocate-General having since given a certificate, under s. 26 of the Letters Patent of the High Court, that the point was a proper one to be considered, it has been brought before this Court for review, and has been well and fully argued before us.

It was urged by Mr. Jackson, for the prisoner, that the terms of s. 25 are imperative; that a confession made to a police-officer, *under any circumstances*, is

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not admissible in evidence against him, and that the 26th section is not intended to qualify the 25th, but means that no confession made by a prisoner in custody, to any person other than a police-officer, shall be admissible, unless made in the presence of a Magistrate. I am of opinion that this is the true meaning of the 25th section. Its humane object is to prevent confessions obtained from accused persons through any undue influence being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th.

But then comes the question whether Mr. Lambert was a police-officer within the meaning of s. 25. It was argued, and with some force, that the term "police-officer" did not mean a Deputy Commissioner of Police; that it comprised only that class of persons who are called in the Bengal Police Act (Bengal Act IV. of 1866) "members of the Police Force;" and that the object of the Evidence Act was not to prevent a gentleman in Mr. Lambert's position from taking a confession, but only ordinary members of the Police Force, who are personally and constantly engaged in the detection of crime and the apprehension of offenders.

There is no doubt that, looking at the various sections of Bengal Act IV. of 1866, the Deputy Commissioner of Police is not a member of the Police Force within the meaning of that Act, and, moreover, on looking back to the Police Act of 1861, it will be found that the term "police-officer," as used in that Act, has generally the same meaning as a member of the Police Force in the Act of 1866; but, in construing the 25th section of the Evidence Act of 1872, I consider that the term "police-officer" should be read not in any strict technical sense, but according to its more comprehensive and popular meaning. In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police, or in other words "police-officers," quite as much as the more ordinary members of the force; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a section such as the 25th, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification.

I am of opinion, therefore, that the confession made by the prisoner in this case ought not to have been admitted at the trial.

But then comes the further very important question what should be the effect of this improper admission of evidence on the proceedings? The 167th section of the Evidence Act provides that "the improper admission of evidence shall not be ground of itself for the reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision;" and I was certainly disposed to think, before hearing Mr. Jackson's argument, not only that this section applied to criminal as well as civil cases, but that the Court which had to determine whether independently of the evidence objected to, there were sufficient materials to justify a conviction, was the Court below, before which the case was originally tried; and, upon this assumption, my learned colleague and I consulted Macpherson, J., who certified that there was ample evidence in the Court below, independently of the admission, to justify the conviction in this case.

Mr. Jackson, however, desired to be heard upon the effect of s. 167, and he had urged upon us,—first, that the section does not apply at all to criminal cases, and, secondly, that, if it does, the Court to determine whether conviction ought to stand is not the Court which tried the case, but the Court before whom the point of the admissibility of the evidence was argued. Mr. Jackson insisted that the word “decision” used in s. 167 was one inapplicable to a criminal case tried on the original side of this Court, and that it never could have been intended by the Legislature that a case tried by a jury, and of the facts of which a jury alone are the proper judges, should be virtually re-tried by any Court not consisting of a jury; and in aid of his argument, he cited the case of *Reg. v. Navroji Dadabhai*.¹

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I am unable, however, to discover any sufficient reason why the 167th section of the Evidence Act should not apply to criminal as well as civil cases. It is perfectly true that the word “decision” is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and, if it was the intention of the Legislature to use an expression which would apply equally to civil as to criminal proceedings, there is probably no other word which would have answered their purpose better. Many other provisions of the Evidence Act apply equally to all judicial enquiries, and, if the nature of the mischief which the section was intended to remedy is considered, there is at least as much reason why it should apply to criminal as to civil proceedings. The Court have no power in a criminal case to order a new trial, and, if, in each instance, where evidence is improperly admitted or rejected, the conviction is to be quashed, a lamentable failure of justice would often be the consequence.

I am of opinion, therefore, that s. 167 does apply to criminal cases, but, upon consideration, I think that the Court mentioned in that section which is to decide upon the sufficiency of the evidence to support the conviction is the Court of Review, and not the Court below. The point is certainly “raised,” properly speaking, in the Court below, but it is both raised and argued in the Court of Appeal, and we think that the proper course of proceeding is for the Court of Appeal to decide upon the case, upon being informed from the Judge’s notes, and, if necessary by the Judge himself, of the evidence adduced at the trial.

Apart, however, from s. 167 of the Evidence Act, I think that, under s. 26 of the Letters Patent, by virtue of which this case has been submitted to us for review, we have a right either to quash or to confirm the conviction, as we may think proper. The section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that, upon the evidence properly received, there is sufficient ground to convict the prisoner, I consider that we ought to allow the conviction to stand. In the present case, therefore, we have obtained copies of the Judge’s notes at the trial, and have also obtained information from the Judge as to what particular portion of the evidence applied to the prisoner Hurribole Chunder Ghose, and we are now prepared to hear the case argued upon its merits, as to whether there is sufficient evidence, apart from that improperly admitted, to support the conviction.

PONTIFEX, J.—I also am of opinion that the confession made by the prisoner in Mr. Lambert’s presence ought not to have admitted at the trial.

¹ 9 Bom. H. C. R. 358.

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Without going so far as to say that s. 25 of the Evidence Act renders inadmissible a confession made to any person connected with the police, for there are cases in which a person holding high judicial office has control over and is the nominal head of the police in his district, I think that, in the present case, it was impossible for Mr. Lambert, residing in the house allotted to him as Deputy Commissioner of Police, and surrounded by police immediately under his control, to divest himself of his character of a police-officer. I also agree that, under cl. 26 of the Letters Patent, which clause deals with cases tried before a jury, we are bound to consider the admissible evidence in this case, and to pass such judgment and sentence as we shall think right, and I come to this conclusion without reference to s. 167 of the Evidence Act.

I agree that such last-mentioned section is applicable to criminal trials, but I have some doubt whether, if we were proceeding under it alone, we should be the proper Court to consider the sufficiency or insufficiency of the evidence in relation to the verdict.¹

Attorney for the Crown : The *Government Solicitor*, Mr. Sanderson.

Attorney for the prisoner : Mr. Carruthers.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Pontifex, and Mr. Justice Morris.

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THE QUEEN v. ZUHIRUDDIN AND OTHERS.

Criminal Procedure Code (Act X. of 1872), s. 64—Power of Judge acting in English Department.

An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits or affirmation in the usual way.

THE Assistant Magistrate of Patna, by an order dated the 10th of February 1876, committed the accused for trial by the Sessions Judge of Patna, on the charge of having, on the 5th of June 1875, committed murder and cognate offences, alleging in the order of commitment that the delay in bringing them to justice was caused by the undue influence exercised by the accused in the district. On this ground he applied, through the District Magistrate, to the High Court for an order under s. 64 of Act X. of 1872 transferring the case to some other district. A copy of the grounds of commitment was furnished to the accused on the 20th of February. The application to the High Court to transfer the case was made by the District Magistrate by letter directed to the Registrar of the High Court, who placed it before Jackson, J., sitting in the English Department, who thereupon, without notice to the accused, made an order transferring the case from the Sessions Judge of Patna to the Sessions

¹ The Counsel for the prisoner then went through the evidence to show that it was insufficient, apart from the confession, to justify the conviction being upheld. A certificate by a majority of the jury who tried the case, to the effect that if the confession had not been in evidence they would have given a verdict of acquittal, was tendered, but was rejected by the Court. The Court took time to consider their judgment, and eventually upheld the conviction on the evidence.

Judge of Shahabad. The trial before the Sessions Judge of Patna would have been by a jury, while that at the Sessions Court at Shahabad would be by the Judge with assessors.

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On the above facts, Mr. *Evans* applied for a rule calling on the Crown to shew cause why the order should not be quashed on the ground that it had been made without jurisdiction, and was not a valid exercise of any power vested in the Court, and moreover was made without notice to the accused, and without any proper application to the High Court on proper and sufficient grounds.

The application was made before GARTH, C.J., and PONTIFEX, J., who ordered a rule to be issued in terms of the application.

Mr. *Macrae* (the Junior Government Pleader, Baboo *Juggodanund Mookerjee*, with him) on behalf of the Crown now appeared to show cause, and contended that there was no necessity for giving any notice to the accused before making the order, no such procedure having been suggested by the Legislature: and after referring to s. 297 of the Criminal Procedure Code (Act X. of 1872) which authorizes the High Court to commit for trial an accused person improperly discharged when such matter should "come to its knowledge" when such person had not the right to be heard, argued that it might fairly be contended that the High Court having such large powers, the Legislature did not require notice to be given in the lesser matter of transferring cases. [GARTH, C.J.—When an order, if made, will affect an accused person, I certainly think he should have notice before it is made. PONTIFEX, J.—In cases coming before the High Court under s. 297 of the Criminal Procedure Code, the evidence has, at a former stage, already been taken in the presence of the accused person.] The learned Counsel further argued from the fact that the power of transferring cases under ss. 63 and 64 was possessed by the Governor-General in Council and by the Lieutenant-Governor, for whom it would be impossible to follow the procedure demanded on behalf of the prisoners, the transfer was made administratively. By s. 13 of the Charter Act, the powers of the High Court may be exercised by one Judge under the rules of 4th June 1867; see Broughton's Civil Procedure Code, p. 704. Therefore, if the matter be non-judicial, and affecting the administrative and executive authority only, such a Judge has power to dispose of it himself. [PONTIFEX, J.—Will cl. 36 of the Letters Patent enable a single Judge to perform functions under s. 64 of Act X. of 1872?] Cl. 13 confers judicial powers on the High Court; cl. 15 confers administrative power; the power to transfer cases is conferred by the latter section as belonging to the administrative rather than judicial acts of the Court.

Mr. *Woodroffe* (Mr. *Evans* and Moonshee *Mahomed Fusoof* with him) in support of the rule.—Even if in point of form the letter sent by the Registrar be an order of the High Court, the High Court cannot issue an order administratively, and if it could so issue it, the English Department has not the power to issue such an order; the High Court, when it makes an order under s. 64, acts judicially, and not administratively. The Legislature could not have intended to confer power of such an unparalleled character as to allow it in certain cases to act both administratively and judicially. S. 520 of the Criminal Procedure Code is the only section under which the High Court has power to make an order not judicial. The considerations which would move the Governor-General in Council are different from those which would move the High Court.

I. L. R., Cal. 2.

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ZUHTRUDDIN,

Cal. 219.

No argument can be deduced from ss. 63 and 64A to support the contention that the powers exercised by the High Court are other than judicial proceedings. There is nothing to show that an order under s. 64, made by High Court, is anything other than a judicial order. Any person liable to be prejudicially affected by an act of the Legislature has the right to have an opportunity of defending himself, unless such right has been expressly restricted; see Maxwell on the interpretation of Statutes, p. 325. The powers of revision given to the High Court by s. 297 are with reference to matters judicial; see *The Queen v. Bundoo*.¹ The Court can only act on matter brought before the Court in the regular way by the prosecution or by the defence; not on information obtained from other sources, as newspapers, letters, &c. Applications in other cases have been made by the accused for transfer of cases, but these have always been treated judicially. Some of them have been so treated by *Macpherson, J.*, and *Pontiflex, J.* We have not been able to discover a single instance of an application such as this being made by the accused person to the English Department. [JACKSON, J., referred to three cases in which the application was made on behalf of the accused to the English Department.] Those are cases where the applications were made possibly in the interest of the accused, but not by him, but by the Magistrate on account of his being connected with the case as either a witness or prosecutor. The learned Counsel referred to the *Queen v. Pogose*,² a case in which an application made by the Judge of Dacca to the English Department to transfer the case from that district had been refused on the ground that it could not be dealt with administratively, and asked the Court to send for the papers in the case.

On the re-assembling of the Court on the following day, the following judgments were delivered :—

GARTH, C.J.—I am happy to say that, since last evening, some papers have been discovered, which will render any further discussion of this rule unnecessary.

It appears that, in 1869, in a case which, in its circumstances, very closely resembled the present, it was decided by no less than nine Judges of this Court that the proper course was to apply to the Court, sitting in its judicial capacity, upon affidavits, in the usual way; and I am extremely glad to find that no less distinguished a Judge than Mr. Justice *Louis Jackson* was one of the Judges who took part in that decision.³ An application in that case was made by Mr. *Herchel*, the Officiating Sessions Judge of Dacca, to the Registrar of this Court, suggesting that an order should be obtained for the transfer of the proceedings to the High Court for trial. I will read his letter, dated the 11th of June 1869 :—

“I have the honor to request that you will lay before the Hon'ble Judges of the High Court the following circumstances, and solicit orders thereon for me. The Magistrate of Dacca has committed the four principal Armenian residents of this city on a charge of misappropriating a large sum of money, the property of the wealthiest Armenian of Dacca, on his decease. The charge is brought on behalf of Government on the motion of the Educational Department, who claim the money as intended for a school. Technically the Government is prosecutor also under s. 68. The case is as important a case as well could occur in the eyes of the educated classes of Dacca; and the decision of it is natu-

¹ 22 W. R., Cr., 67.

² Not reported.

³ This was the case of *The Queen v. Pogose* referred to by Mr. Woodroffe,

rally looked forward to with great interest. But it appears to me advisable that it should be tried at Calcutta, and not here. My jury list is very ill adapted for such a case."¹

Upon this letter being received by the Registrar, it appears to have been laid before the Chief Justice, Sir *Barnes Peacock*, who recorded upon it the following minute: "It appears to me that the Court ought not to interfere upon the application of the Sessions Judge made by letter. If Government (or the prosecutor, if the case is not prosecuted by Government), or any of the accused, think fit to apply to the Court by motion supported by affidavit or affirmation, the Court will decide what ought to be done.—June 16th, 1869. (Signed) *B. Peacock*." This view of the learned Chief Justice was concurred in by the Judges of the Court as under: "I agree with the Chief Justice."—*J. P. Norman*. "And I."—*C. Hobhouse, G. Loch, H. V. Bayley*. "I agree."—*D. N. Miller*. "Seen."—*W. Markby, E. Jackson*. And further it was agreed to, as I have already mentioned, by my learned colleague, Mr. Justice *Louis Jackson*.

This decision having been arrived at in 1869, it appears to us to set the matter at rest; and I think that Mr. *Macrae*, on the part of Government, will feel that he cannot with propriety contest the point further.

Mr. *Macrae* assented.

JACKSON, J.—I wish to add a few words by way of explanation of what seems to be an inconsistency on my part.

My acquiescence in the course taken on that occasion was in this degree marked, that while the other Judges had merely attached their initials in token of their concurrence, I wrote a separate note, and that note is in these words: "I quite agree with the Chief Justice that such an application could only be entertained, if made in the way stated by him. I take the opportunity of pointing out that it has been a very common practice for Sessions Judges to make recommendations for the transfer of cases from one district to another by letter, and that cases have often been so removed by a mere letter based on such recommendations. It may be worth considering whether some rule ought not to be laid down for dealing with such applications. The same thing also happens in respect of civil cases."

It would seem, therefore, that I not only concurred in that view, but considered it desirable that the Court should lay down a formal rule, which should regulate the procedure in such cases, and should be a notice and a guidance to Judges and Magistrates when they should think fit to make such references in future. Immediately afterwards I left the country, and was absent for four or five months, during which time no one took any steps in the matter. The result was that no formal rule was made, and this case appears to have passed out of sight. Two years afterwards I had the honor to succeed to the charge of the English Department, and found that, notwithstanding this case, the practice continued to be such as it had formerly been, and therefore the course I took in this case was in strict conformity to the old practice which had not been departed from notwithstanding this case.

I do not hesitate to say that the procedure suggested by Sir *B. Peacock* is the proper one when there are parties concerned; but the practice being such as I have stated, I consider myself justified in making the order which I did.

¹ The letter then went into details to show the difficulty of obtaining a proper jury in the district to try the case, and suggested that the case should be transferred to the file of the High Court.

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GARTH, C.J.—I desire to add that I personally do not regret that this matter has been thoroughly ventilated and discussed in open Court. It is extremely desirable that the public should fully understand that in this country there is the same law for the Government as for the subject ; and that there is not one course of practice for the Crown, and another for the prisoner. Wherever the rights of the subject are concerned, it is quite right that the matters should be dealt with by us in open Court in our judicial capacity, and that each application should be made, supported by affidavit or affirmation, in the regular way.

In the present case the rule will be made absolute to set aside the order complained of, and the Crown will be at liberty, if so advised, to make a substantive application to the Court for the transfer of the case to some other district.

MACPHERSON, J.—I concur in thinking that the Crown has shown no good cause against the rule ; and that the rule should be made absolute.

PONTIFEX, J.—I also agree.

MORRIS, J.—I also agree.

Rule Absolute.

APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Morris.

THE QUEEN v. GOBIN TEWARI AND ANOTHER.

1876.

April 7.

1 Cal. 281.

Criminal Procedure Code (Act X., 1872), s. 272—Arrest pending Appeal.

In an appeal under s. 272 of Act X. of 1872, the High Court has power to order the accused to be arrested pending the appeal.

In this case, the accused, Gobin Tewari and Jodoo Lall, had been tried on a charge of murder by the Sessions Judge of Bhaugulpore, and released : and against this acquittal, the Government appealed. On the admission of the appeal, the *Legal Remembrancer* applied for the re-arrest of the accused.

[MACPHERSON, J.—Why should not the prisoners be re-arrested under s. 92 of the Criminal Procedure Code ?]¹

The Legal Remembrancer (Mr. H. Bell) submitted that the Court had power to order the arrest of the accused persons. It was true that s. 272 did not expressly give the Court this power, but it was a power which was impliedly vested in the Court. Where a Court had jurisdiction over an offence, it had of necessity power to bring the persons accused of the offence before it—*Bane v. Melhuen*.²

The admission of the appeal revived the charge against the accused ; and it was absurd to treat persons accused of murder as mere respondents in an appeal. Before the appeal was heard, the accused ought to be in the custody of the law. If the accused were treated as respondents, and merely served

¹ See *Queen v. Gholam Ismail*, 1 L. R., 1 All. 1.

² 2 Bing. 63.

with notice of the appeal, it would be open to them, after the appeal had been heard, and a capital sentence had perhaps been passed upon them, to plead that they had never been served with notice of the appeal. In such a case what would the Court do? There was no provision in the law for rehearing an appeal. Under s. 297, when the Court ordered that an accused person who had been improperly discharged be tried, it was not disputed that the Court could order the re-arrest of the accused person, though there was no express provision on the point in the section: and in the same way he submitted that the Court had equal authority to direct the re-arrest of the accused on the admission of an appeal under s. 272.

MACPHERSON, J.—Let the Magistrate be directed to re-arrest Gobin Tewari and Jodoo Lall, and keep them in custody till the hearing of the appeal.

Application granted.

APPELLATE CRIMINAL.

Before Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Morris.

IN THE MATTER OF THE PETITION OF MOHESH MISTREE AND ANOTHER.¹

Criminal Procedure Code (Act X. of 1872), ss. 294, 295, 296, and 297—Order of Discharge under s. 215—Revival of Proceedings.

1876.
March 28.

1 Cal. 282.

An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s. 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*.

As the case was one of improper discharge, and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under s. 297, have directed a re-trial.

The case of *Sidya bin Satya* differed from.

APPLICATION to set aside an order of the Magistrate of Alipore for the revival of certain criminal proceedings against the petitioners, discharged by the Cantonment Magistrate of Barrackpore under s. 215 of the Code of Criminal Procedure.

The facts of the case material to this report are as follow:—In July 1875, one Gopal Malla charged the petitioners with causing hurt to him, in the Court of the Cantonment Magistrate of Barrackpore, then presided over by Colonel Elderton, who heard the evidence for the prosecution, and called upon the petitioners for their defence. Before the disposal of the case, however, he was relieved in his office by Captain Hopkinson, who refused to decide the case on the evidence taken before his predecessor, and heard the case *de novo*. Captain Hopkinson, who was a Magistrate of the first class, did not believe the evidence tendered on behalf of the prosecution, and discharged the petitioners.

The complainant thereupon applied to the Magistrate of the district, praying for a revival of the case on the ground that all his witnesses were not examined by Captain Hopkinson. The District Magistrate, upon such *ex-parte*

¹ Criminal Motion, No. 53 of 1876, against the order of the District Magistrate of the 24 Pargannas, dated the 19th February 1876.

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 1 Cal. 282.

statement, on the 10th of February 1876, ordered the revival of the case, holding that, "as the case was one triable under Chapter XVII. of the Criminal Procedure Code, the order for the discharge of the accused persons should not have been passed without hearing all the witnesses for the prosecution." The Magistrate also added that he had no doubt that the High Court would quash the order of discharge if the case came before them; but he did not think it necessary to make any reference, inasmuch as a discharge under s. 215 was not equivalent to an acquittal, and did not bar a fresh enquiry into the same facts. He accordingly directed the Joint-Magistrate to proceed afresh with the case against the petitioners under Chapter XVII. of the Criminal Procedure Code.

The petitioners applied to the High Court, on the 1st of March 1876, to have the above order quashed as illegal and made without jurisdiction, and, upon such application, a rule was issued by *Macpherson* and *Morris*, JJ., on the prosecutor, to show cause why the order of the 10th of February should not be set aside, and the records were sent for under s. 294 of the Criminal Procedure Code. There being some doubt on the point raised before the High Court, owing to the case of *Sidya bin Satya*, decided by the Bombay High Court, and referred to in the notes to s. 215 in the 5th edition of *Prinsep's Criminal Procedure Code*, the rule came on for hearing on the 28th of March before three Judges, *vis.*, *Macpherson*, *Markby*, and *Morris*, JJ.

Baboo *Brojonauth Mitter* for the petitioners.

No one appeared for the Crown.

The judgment of the Court was delivered by

MACPHERSON, J.—It seems to us to be clear that this case came before the Magistrate of the 24-Pergunnas under s. 295 of the Criminal Procedure Code, and that it was in the first instance dealt with by the Magistrate under that section. That being so, his proper and only course was to proceed under s. 296, to report the case for orders to the High Court, which (under s. 297) might have ordered the accused persons to be tried, if of opinion that they had been improperly discharged.

A case (re *Sidya bin Satya*) quoted by Mr. Prinsep in his latest edition of the Criminal Procedure Code, as having been decided by the Bombay High Court, has been referred to as showing that the Magistrate was right in the course he adopted. But that case is not reported in the regular reports of the Bombay High Court: nor have we been able to find any report of it. The full facts with which the Bombay Court had to deal are not before us, and we are unable to say how far the Court may really have gone. The note we have of this decision is therefore of little value; and, taking it as it stands, we are not prepared to agree with it as regards cases coming before the Magistrate under s. 295.

Dealing with the matter under ss. 294 and 297, we think there is material error in the Magistrate's proceeding, and that his order, directing the Joint-Magistrate to entertain the fresh complaint now made and all the subsequent proceedings, ought to be quashed.

Whatever may have led to the various delays which have occurred in the prosecution of this case since the 21st of July 1875, there is no doubt that very great and unfortunate delays have taken place. It is, as a rule, most unfair and undesirable in every way to order an accused person to be tried over and over again for the same offence, unless under very peculiar circumstances.

In the present instance, there is nothing peculiar in the circumstances to warrant a third trial; and it seems to us wrong and improper (within the meaning of s. 294) that an order should be made directing the prosecution to be now recommenced.

The order of the 10th of February and all the subsequent proceedings are quashed.

Order quashed.

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ORIGINAL CRIMINAL.

Before Mr. Justice Pontifex.

THE QUEEN ON THE PROSECUTION OF MORAD ALI v. HADJEE JEEBUN BUX.

1876.
April 13.

1 Cal. 354.

A& X. of 1875 (High Courts' Criminal Procedure Act), s. 147—Case transferred to High Court—Refund of Fine on Quashing Conviction—Notes of Evidence taken by Magistrate.

The High Court has no power, under s. 147, A& X. of 1875, to order a fine to be refunded on quashing a conviction.¹

The Court, in this instance, decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial.

In this case a rule had been granted by *Phear, J.*, on the 30th March, calling on Mr. *Dickens*, Police Magistrate for the Northern Division of Calcutta, and Morad Ali, the complainant in the case, to show cause why the case should not be transferred to the High Court under s. 147, A& X. of 1875. The facts were, that the complainant and defendant lived in adjoining houses, between which there was a party-wall. A hole was found to have been made in the wall, apparently from the defendant's side, and Morad Ali instituted a charge against Hadjee Jeebun of having committed criminal mischief. On that charge Hadjee Jeebun was convicted by the Magistrate, Mr. *Dickens*, and fined Rs. 50, which was ordered to be paid to the complainant. The ground of the application for transfer to the High Court was that there was no evidence adduced at the trial of any intention on the part of the defendant to commit mischief.

Mr. *Branson* and Mr. *Evans* now appeared to show cause against the order.

Mr. *Jackson* and Mr. *Bonnerjee* contra.

On the part of Morad Ali an affidavit of Mr. *Pittar*, and on behalf of Hadjee Jeebun Bux, a joint and several affidavit of Mr. *Leslie* and Hadjee Jeebun Bux, were filed. To the latter affidavit was annexed an attested copy of the notes of the evidence taken by the Magistrate at the hearing of the charge.

Mr. *Branson* went into the merits of the case, and contended that the defendant had been rightly convicted. [Mr. *Jackson*.—The notes of the evidence taken before the Magistrate must be taken to be the materials on which the Court is now to decide. See *In re Louis*.² Affidavits cannot be used to supplement that evidence.] There the case had been brought up under s. 147; this is an order calling on us to show cause why it should not be sent up. The

¹ In *In re Louis*, 15 B. L. R., Ap., 14, the Court ordered the fine to be refunded,

² 15 B. L. R., Ap., 14.

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notes do not comprise all the evidence taken before the Magistrate. He is not bound to take notes at all. [PONTIFEX, J.—Is it a case of mischief at all? The wall appears to be a party-wall. But even if it had been the complainant's, the defendant's conduct seems to have been trespass, not criminal mischief.]

Mr. *Evans* on the same side.—Mr. Leslie's affidavit mentions evidence which does not appear in the notes of evidence taken by the Magistrate. Where it appears that all the evidence is not before the Court, the Court ought to call for the whole of the evidence, or it might re-hear the case.

Mr. *Jackson* submitted that all the materials necessary for decision were before the Court, and that on those materials the conviction ought to be quashed.

The Court was of opinion that on the evidence which had come up from the Police Court there was no case for convicting the defendant of mischief, inasmuch as there was no evidence to show that the hole was made in the wall maliciously or for the purpose of annoying the prosecutor. The conviction was, therefore, ordered to be quashed.

Mr. *Jackson* applied for an order for refund of the fine; but the Court was of opinion it had no power under the section to order repayment of the fine.

An application by Mr. *Jackson* for costs was refused, the Court being of opinion that the defendant was not wholly free from blame in the matter, and that the prosecution did not appear to have been a malicious prosecution.

Conviction quashed.

Attorney for the complainant—Mr. *Pittar*.

Attorney for the defendant—Mr. *Leslie*.

ORIGINAL CRIMINAL.

Before Mr. Justice Phear and Mr. Justice Markby.

THE QUEEN *v.* UPENDRONATH DOSS AND ANOTHER.

1876.
 March 9,
 16, & 20,
 1 Cal. 356.

Act X. of 1875 (*High Courts' Criminal Procedure Act*), s. 147—Case transferred to High Court—Notice to Prosecutor—Penal Code, ss. 292 and 294—Specific Charge—Procedure on transfer to High Court.

In an application for the transfer of a case under s. 147, Act X. of 1875, in which the prisoner has been convicted, and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *prima facie* cause shown, that the case be removed, without notice to the Crown.

Semble.—A charge under ss. 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should, in his decision, state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under s. 147, Act X. of 1875, may either try the case *de novo*, or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained.

THE prisoners had been charged with offences under ss. 292 and 294 of the Penal Code, and had been, on conviction, sentenced by the Magistrate for the Northern Division of Calcutta to one month's simple imprisonment.

On their application to the High Court, Phear, J., made an *ex-parte* order under s. 147 of Aft X. of 1875, removing the case to the High Court, and allowed the release of the prisoners on bail under s. 148. The case now came on for hearing.

Mr. Branson, Mr. M. Ghose, and Mr. Palit appeared for the prisoners.

The *Standing Counsel* (Mr. Kennedy) for the Crown.

Mr. Branson contended that the conviction could not be sustained, first, on account of the vagueness of the charge, inasmuch as it did not specify the nature of the crime charged; secondly, that the prisoners had committed no offence under ss. 292 and 294; and, thirdly, that the evidence did not justify the conviction. He also contended that the Magistrate had no power to dispose of the case summarily.

The *Standing Counsel* raised an objection to the order made removing the case to the High Court, inasmuch as no notice thereof had been given to the Crown. The Court offered to adjourn the case if the Crown required time to enable them to proceed with it, but the *Standing Counsel* said he thought an adjournment was unnecessary. He then contended that the Magistrate had power to try, and dispose of, the case summarily, and that on the evidence the conviction ought to be upheld. After hearing Mr. Branson in reply, the Court took time to consider its judgment, which, on a subsequent day, was delivered by

PHEAR, J.—This case now comes before us by reason of its having been removed to this Court from the Court of the Magistrate of Calcutta, Northern Division, by an order made under s. 147 of the High Courts' Criminal Procedure Aft.

The learned *Standing Counsel*, on behalf of the Crown, objected that the order had been irregularly made, because the Crown was not served with notice of the application for it, and was not given an opportunity of being heard upon that application. We are of opinion, however, that when, as in the present case, a conviction has been arrived at by the Magistrate, and the petitioner is actually suffering imprisonment thereunder, it is within the discretion of this Court to order, for sufficient *prima facie* cause shown, on the application of the prisoner, that the case be removed, without notice to the Crown. We intimated our readiness to give time to the *Standing Counsel*, if he required it, for the purpose of this hearing, but he said he was quite prepared to go on with the case without delay.

The charge preferred against the petitioners and some other person, upon which they were tried by the Magistrate, appears in the Court book which the Magistrate has sent up to us in the following words:—"Defendants are charged with having, on 1st March, at Beadon Street, in Calcutta, exhibited to public view certain obscene representations. Defendants are further charged with having, at the time and place aforesaid, uttered or recited certain obscene words to the annoyance of others: ss. 292 and 294 of the Penal Code;" and the original order or conviction made and signed by the Magistrate after hearing the evidence given on both sides appears to have been as follows:—"Defendants (2) and (3), Upendronath Doss and Omirtolall Bose" (the two petitioners to this Court) "are found guilty under ss. 292 and 294 of the Penal Code, and sentenced to suffer imprisonment for one month."

The scope of each of the two ss. 292 and 294 of the Penal Code is wide; and it is much to be regretted that the charge against the prisoners was not made specific in regard to the representations and words alleged to have been

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1 Cal. 356

exhibited, uttered, and to be obscene, before at least the accused persons were called upon to answer it. And it was certainly very important, both in the interest of the accused persons, and of the public, that the Magistrate, in his decision of the matter, should have stated distinctly what were the particular representations and words which he found in the evidence the convicted persons had exhibited and uttered, and which he adjudged to be obscene within the meaning of these sections.

Had the case remained as the Magistrate's book represents it, we should have been reduced to the alternative of either practically trying the case *de novo* or of dismissing it upon the ground that the Magistrate had come to no finding upon which his conviction could be sustained. Fortunately, however, since the conviction has been impeached by the making of the application for the removal of the case to this Court, the Magistrate has formally drawn up his specific findings of fact and his order thereon, and we may now safely assume that this document discloses all that in the opinion of the Magistrate is established by the evidence against the petitioners within the scope of ss. 292 and 294 of the Penal Code. (After going through the specific findings of the Magistrate, his Lordship found that the evidence was not sufficient to justify the findings of fact arrived at by the Magistrate, and that the words and passages were not obscene within the meaning of ss. 292 and 294, and continued :) It thus appears to us that the grounds upon which the Magistrate has placed his conviction in this case fail; and we can discover in the evidence no other ground upon which it could legally be supported. It follows that the conviction must be quashed, the sentence set aside, and the petitioners released from the obligation of their recognizances.

Conviction quashed.

Attorney for the Crown—The Government Solicitor, Mr. Sanderson.

Attorney for the defendants—Baboo G. C. Chunder.

APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Morris.

THE QUEEN v. BAIJOO LALL AND OTHERS.

1876.

Aug. 23.

1 Cal. 450.

IN THE MATTER OF THE PETITION OF BAIJOO LALL AND ANOTHER.¹

Criminal Procedure Code (Act X. of 1872), s. 471—Act XXIII. of 1861, s. 16—Order sending Case to Magistrate for enquiring into Offence of giving false Evidence—Preliminary Enquiry—Vagueness of Charge.

Although s. 16 of Act XXIII. of 1861 gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471 of the Criminal Procedure Code, the whole law as to the procedure in cases within those sections is now embodied in s. 471 of the Criminal Procedure Code.

In a suit brought to recover possession of certain property, the Judge decided one of the issues raised in the plaintiff's favour, but on the important issue as to whether the plaintiff ever had possession, he found for the defendant. The plaintiff was not examined, but on the issue as to possession he called two witnesses. The Judge disbelieved their statements, and considering that the plaintiff had failed to prove his case, he gave judgment for the defendant, without requiring him to give evidence on that issue. In the concluding paragraph of his judgment, the Judge directed the depositions of the two wit-

¹ Criminal Motion, No. 189 of 1876, against the order of the Judge of Zillah Gya, dated the 22nd June 1876.

nesses above referred to, together with the English memoranda of their evidence, to be sent to the Magistrate with a view to his enquiring whether or not they had voluntarily given false evidence in a judicial proceeding, and he further directed the Magistrate to enquire whether or not the plaintiff had abetted the offence of giving false evidence, on the ground that as the witnesses were the plaintiff's servants, he must personally have influenced them, and also to enquire whether the plaint which the plaintiff had attested contained averments which he knew to be false. On a motion to quash this order, *held* that, under s. 471 of the Criminal Procedure Code, the Judge has no power to send a case to a Magistrate except when, after having made such preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i.e.*, ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge into which the Magistrate ought to enquire, and that the order was bad, because the Judge had made no preliminary enquiry, and because it was too vague and general in its character.

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THIS was an application to quash an order of the Judge of Gya, sending the plaintiff in a civil suit and two of his witnesses to a Magistrate for enquiry into charges of giving false evidence and of abetment of that offence. In that suit the present petitioner, Baijoo Lall, sought to recover possession of certain property, from which, he alleged, the defendant in the suit had illegally evicted him. He claimed, as sub-lessee of one Rajun Kunwar, who, he stated, was lessee of the property under Ranee Sunut Kunwar, the owner thereof. Amongst other issues raised in the case was an issue as to whether Ranee Sunut Kunwar had executed any lease to Rajun Kunwar; another issue was whether the plaintiff had ever been in possession. Evidence was gone into at the trial, and the Judge decided the former issue in favour of the plaintiff, but on the important issue as to possession he found for the defendant; and for that reason he dismissed the suit. Upon the issue as to possession no witnesses were called for the defendant, and the only witnesses called for the plaintiff were two persons, Juggernath Singh and Nowrangi Lall, the former of whom joined in the present application. The Judge disbelieved the statements of these two witnesses, and, considering that the plaintiff had failed to prove his case, gave judgment for the defendant without calling upon him to go into evidence on that issue.

In the concluding paragraph of his judgment the Judge ordered as follows:—

“The depositions of Juggernath Singh and Nowrangi Lall, together with the English memoranda of their evidence, will be sent to the Magistrate with a view to his enquiring whether or not they have voluntarily given false evidence in a judicial proceeding; and as the witnesses are the servants of the plaintiff in this suit, Baijoo Lall, he must presumably have influenced them. I further direct that an enquiry be made by the Magistrate whether or not the said Baijoo Lall has abetted the offence of giving false evidence in a judicial proceeding; and also whether the plaint, which he has attested, contains an averment which he knew to be false. In the course of that enquiry it may be well that the Magistrate should examine those witnesses who were cited by the defendants to rebut the plaintiff's allegation of possession, but whom I considered it unnecessary to examine, as the plaintiff's witnesses so completely broke down.”

The petitioners, Baijoo Lall and Juggernath Singh, now moved the High Court to quash this order on the following grounds:—That there was no evidence to show that the statements of Juggernath Singh were false, or that Baijoo Lall had abetted the offence of giving false evidence, and the mere circumstance that his witnesses had deposed in his favour did not warrant the inference that he had abetted such an offence; that the enquiry as to whether the plaint contained an averment which the plaintiff knew to be false was too general and vague,

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especially where important issues had been decided in the plaintiff's favour; that the Judge had failed to comply with the requirements of s. 471 of the Code of Criminal Procedure, and had made no preliminary enquiry, nor recorded any proceeding showing that he was of opinion that there was sufficient ground for enquiring into the charge; that the order should have specified the particular acts or statements which constituted the offence charged; that his reasons for disbelieving the evidence were highly conjectural, and that it was beyond the scope and object of the law that such prosecutions should be allowed upon such reasons, and that the order was made without jurisdiction.

Upon this motion the High Court sent for the record, and called upon the Judge to show cause why his order should not be set aside.

In his return to the High Court, the Judge stated that he had made the order in exercise of the powers vested in the Court by s. 16 of Act XXIII. of 1861; that he made no preliminary enquiry, as the statement of the witnesses and their demeanour satisfied him that they had given false evidence, and he submitted that "the necessity or the reverse which existed for a magisterial enquiry was all that the preliminary enquiry of the Civil Court could decide;" and that "the framing of a technical charge was the duty of the Magistrate, and not of the Court directing the Magistrate to hold an enquiry; the duty of the Court was limited to a reasonable indication of the nature of the offence to be enquired into."

Mr. C. Gregory, for the Crown, showed cause.

Mr. Branson and Mr. Sandel, in support of the rule.

The judgment of the Court was delivered by

MACPHERSON, J.—This is an application to quash an order of the Judge of Gya, under s. 471 of the Criminal Procedure Code, sending the plaintiff in a civil suit and two of his witnesses to a Magistrate for enquiry into charges of giving false evidence, &c.

I say the order was made under s. 471 of the Criminal Procedure Code, because, although s. 16 of Act XXIII. of 1861 gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471, there can be no doubt that the whole law is now embodied in s. 471, and our jurisdiction to interfere in the matter is not affected by a suggestion that the order in question was, or might have been, made under s. 16 of Act XXIII. of 1861, and not under s. 471.

(The learned Judge stated the facts of the case, and continued:)

It is contended for Baijoo Lall and Juggernath that the Judge had no power to make that order, inasmuch as he never made any preliminary enquiry, and had no sufficient ground on which to base such an order as required by s. 471.

We think the objection is valid, and that the Judge had no jurisdiction to deal with these persons as he did. As regards Juggernath, although the Judge disbelieved his evidence, no witness had been called to contradict him. And as regards Baijoo Lall, he was not examined before the Judge at all, and there is absolutely nothing to show that he abetted the offence of giving false evidence excepting the one naked fact that he was the plaintiff in the cause. The Judge says he must presumably have influenced his own witnesses. There is no such legal presumption, and we may add that, if there were, it would put an end to litigation in the Civil Courts, for no plaintiff would be safe. The Judge, because he disbelieved the two witnesses called for the plaintiff, considered no "preliminary enquiry" necessary. But that is in contravention of

the law ; for the law permits the Judge to send the case on to the Magistrate only if, after having made such a preliminary enquiry as may be necessary, he is of opinion that there is sufficient ground (*i.e.*, ground of a nature higher than mere surmise or suspicion) for directing judicial enquiry into the matter of a specific charge.

That the Judge did not make any preliminary enquiry, and did not know what specific charges he wanted the Magistrate to enquire into, is clear. The Magistrate is directed to enquire generally whether or not the two witnesses have voluntarily given false evidence in a judicial proceeding, and as regards Baijoo Lall, "whether the plaint which he has attested contains an averment which he knew to be false." S. 471 does not warrant the Judge in issuing a general roving commission such as this to a Magistrate to inquire generally into the truth or falsehood of depositions or of averments in a plaint, and the Judge was bound to indicate the particular statements or averments in respect of which he considered that there was ground for a charge into which the Magistrate ought to enquire. The Judge says: "The duty of this Court was limited to a reasonable indication of the nature of the offence to be enquired into;" and again: "The necessity or the reverse which existed for a magisterial enquiry was, I submit, all that the preliminary enquiry of the Civil Court could decide." We think that this view of the law is incorrect. Something more than a mere indication that a witness has spoken falsely is needed before a Civil Court is justified in initiating a prosecution for giving false evidence. There must be, it seems to us, evidence of a direct and substantive nature before the Court, evidence going to show that the statement made by the witness is absolutely false. There must be, in the words of the law, "sufficient ground" for enquiring into the matter of a specific charge.

Altogether, we think that the Judge's order is bad, he having made no preliminary enquiry as was clearly necessary, and the order being too vague and general in its character. In thus deciding, we follow the course taken in the case of *Kali Prosunno Bagchee*.¹

The power given by s. 471 should be used with care and after due consideration. And it is by no means in every instance in which a party fails to prove his case, that the Judge who has decided against such party is justified in exercising the powers given him by this section. So long as it is a case as to which there is any possible doubt, or in which it is not perfectly certain that the Judge's decision must be upheld in the event of there being an appeal in the civil suit, the Judge acts indiscreetly and wrongly if the moment he has given his judgment in the civil suit he exercises the power given him by this section. At the same time, if in the course of the civil trial the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he, on consideration, thinks it necessary to proceed at once, of course it may be right to do so. Judges should, however, bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the civil suit; and they should be careful not to lend themselves to such suggestions too readily. They should also recollect that when they proceed under s. 471, the responsibility for the prosecution rests upon the Judge entirely; such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party, and merely sanctioned by the Court under s. 468.

Order quashed.

¹ 23 W. R., Cr. Rul., 39.

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APPELLATE CRIMINAL.

*Before Mr. Justice Macpherson and Mr. Justice Morris.*THE QUEEN v. BHOLANATH SEN.¹

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Criminal Proceedings—Irregularities—Effect of Waiver by Prisoner—Disqualifying interest of Judge—Judge giving Evidence.

The jailor of a district jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was enquired into by the District Magistrate, and the jailor was, by the Magistrate's order, placed on trial before a Bench of Magistrates, consisting of the District Magistrate himself, L, the Officiating Superintendent of the Jail, and three other Honorary Magistrates. The prisoner and his pleaders were alleged to have stated before the commencement of the trial on being questioned that they had no objection to the composition of the Bench, but, after the charges had been framed, the prisoner's Counsel objected to the Bench as formed. The District Magistrate directed the Government pleader to prosecute, and both the District Magistrate and L gave evidence for the prosecution. After the case for the prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oil-seed than he actually purchased, and that he had received payment for certain oil at a higher rate than he credited to Government. The moneys, the receipt of which were the subject of the first charge, were obtained by the prisoner on the strength of certain vouchers which he had induced L to sign as correct, and L had sanctioned the sale at the rates credited to Government. Upon the prisoner's giving the names of the witnesses he intended to call in his defence, L was deputed by his brother Magistrates to examine some of them who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction,—

Held that L had a distinct and substantial interest which disqualified him from acting as Judge.

Held further that although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.

Held further that the recording the statements of the prisoner's witnesses was irregular.

Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and, if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.

THE prisoner, Bholanath Sen, while occupying the post of jailor of the District Jail at Midnapore, was accused by one of the jail clerks of falsifying his books and defrauding the Government. The matter was enquired into by the District Magistrate, Mr. Harrison, by whose order the prisoner was placed on trial for criminal breach of trust as a public servant before a Bench of Magistrates, consisting of Mr. Harrison himself and four Honorary Magistrates. One of the latter was a Mr. Larymore, who, at the time of the commission of the alleged offences, and at the time of the trial, was the Officiating Superintendent of the Jail and the prisoner's immediate superior. In his judgment in the case, Mr. Harrison stated that the prisoner and his pleaders were asked before the com-

¹ Criminal Motion, No. 800 of 1876, against the order of the Sessions Judge of Midnapore, dated the 11th February 1876.

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mencement of the trial whether they had any objection to the composition of the Bench, and that they distinctly said they had none whatever. The prisoner's consent, however, was not formally recorded, and after the charges were drawn up, the prisoner's Counsel objected to the Bench as formed. Under instructions from Mr. Harrison, the Government Pleader appeared to prosecute, and both Mr. Harrison and Mr. Larymore gave evidence for the prosecution. After the case for the prosecution was closed, two distinct charges against the accused were framed—the first of debiting Government with the price of more oil-seed than he actually purchased, and the second of receiving payment for certain oil at a higher rate than he credited to Government. As regards the first charge, the prisoner was alleged to have received money for the oil-seed on the strength of certain vouchers which he had induced Mr. Larymore to countersign as correct, and with respect to the second charge the prisoner's defence was that Mr. Larymore had himself sanctioned the sale at the rate credited to Government. Upon the accused giving the names of the witnesses he intended to call in his defence, Mr. Larymore was deputed by his brother Magistrates to examine some of them who were connected with the jail, and to take down their statements at once in the presence of the agents of both parties in order to prevent any suggestion that the witnesses had been tampered with, and "to guard against subsequent deviation." The depositions so taken were placed on the record "for the use of either party, though not themselves as evidence." Separate judgments were written by the various members of the Bench, but all five joined in signing the finding and sentence of the Court convicting the accused on the two charges of criminal breach of trust under s. 409 of the Penal Code, and sentencing him to two periods of rigorous imprisonment, amounting in all to two years, and to a fine of Rs. 1,000, and in default of payment of the fine to six months' additional imprisonment.

An appeal by the prisoner to the Sessions Court was dismissed, and he now moved the High Court to quash the conviction.

Mr. *M. Ghose* (Baboo *Boidonath Sen* with him) for the prisoner.—The conviction is bad not merely on the ground of the serious irregularities which marked the whole course of the proceedings, but because the Bench of Magistrates, as constituted, was incompetent to try the case. The District Magistrate who presided at the trial was virtually the prosecutor, and Mr. *Larymore* was materially, in fact pecuniarily, interested in the result of the trial, and therefore disqualified from acting as Judge: *Queen v. Meyer*,¹ *Queen v. Hiralal Das*;² and the presumed consent of the prisoner would not cure the disqualification: *Queen v. Bertrand*.³ Further, it was illegal, or at least highly improper, for these gentlemen to be both witnesses for the prosecution and Judges of the prisoner's guilt or innocence. Taylor on Evidence, 5th ed., 1197. The Bench of Magistrates, in deputing Mr. *Larymore* to take the depositions of the witnesses for the defence, committed a grave irregularity, and one which has materially prejudiced the prisoner in his defence.

The judgment of the Court was delivered by

MACPHERSON, J.—This is an application to the High Court under s. 297 of the Criminal Procedure Code.

The petitioner, Bholanath Sen, has been convicted by a Bench of Magistrates at Midnapore on two charges of breach of trust under s. 409 of the In-

¹ 1 Q. B. D. 173.² 8 B. L. R. 422.³ L. R., 1 P. C. 520.

dian Penal Code. He was sentenced to two periods of imprisonment, amounting, in all, to two years' rigorous imprisonment, with a fine of Rs. 1,000, and, in default of payment of the fine, six months' additional imprisonment.

We are asked to quash the conviction on the ground of various substantial illegalities and irregularities, most of which are set forth in the petition presented to this Court.

The seventh of the grounds stated in the petition is, that it was illegal and improper that a certain Mr. *Larymore* should have been one of the Bench of Magistrates who tried this case. It appears to us that this is a good ground of objection, and that, under the circumstances, the presence of Mr. *Larymore*, who had a substantial interest in the prosecution, vitiated the proceedings, and makes it necessary that the conviction should be quashed.

The prisoner, Bholanath Sen, was the jailor of the District Jail at Midnapore, of which Mr. *Larymore* was the Superintendent at the time of the trial and at the time of the commission of the offences for which Bholanath Sen was tried. Bholanath Sen was Mr. *Larymore's* immediate subordinate in the management of this Jail, and the moneys, the receipt of which was the subject of the first charge, were drawn by him from Government on the strength of certain bills or vouchers which (although in fact incorrect) Mr. *Larymore* had been induced by the accused to countersign as correct; while as regards the second charge, which was for receiving payment for certain oil at a higher rate than he credited to Government, the defence was (and Mr. *Larymore* proved it to be true) that Mr. *Larymore* had himself sanctioned the sale at the rate with which the prisoner credited the Government.

The whole case was, that the prisoner, by deceiving and imposing upon Mr. *Larymore*, had fraudulently got the sums of money, the receipt and appropriation of which was charged against him as criminal breach of trust. Mr. *Larymore* being the Superintendent in charge of this Jail, and being connected in this manner with the sums which the prisoner was alleged to have misappropriated, it is evident that he was most substantially interested in the matter, and that he was by no means free from the possibility of pecuniary responsibility in respect of it. That being so, it was most unfortunate that the District Magistrate should have thought fit to select Mr. *Larymore* to sit as one of the Judges in the case.

The Magistrate says that Mr. *Larymore* was friendly to the prisoner, and that it was with a desire to assist the prisoner that he put Mr. *Larymore* on the Bench. But the Magistrate really erred if he selected Mr. *Larymore*, because he was supposed to be specially friendly to the prisoner, almost as much as he would have erred had he selected him for the opposite reason. A criminal prosecution is not in the nature of a friendly arbitration. It is a penal proceeding of a very grave and serious kind, in which it is impossible to proceed too strictly according to the rules prescribed by law. Connected as Mr. *Larymore* was with the prisoner in the very matters which were the subject of the trial, it is impossible that his sitting as one of the Judges could be right. It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as Judge in a case in which he has a substantial interest. That is the law of this country as much as it is the law of England. [See the decision of a Full Bench of this Court in the case of *The Queen v. Hiralal Das*¹ and the cases there referred to. See also a very recent case in England—*The Queen v. Meyer*.²]

¹ 8 B. L. R. 422.

² 1 Q. B. D. 173.

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The District Magistrate says that Mr. *Larymore's* interest in the matter was very indirect. In this we cannot agree with him; for it is quite clear, even from the evidence given by Mr. *Larymore* himself, that he had a most distinct and substantial interest. Under certain circumstances it might have proved a direct pecuniary interest. The District Magistrate himself says as to the second head of charge: "There is this to be said in palliation of it, that Mr. *Larymore's* consent was obtained to the price, while the quantity sold was probably fixed in the accounts with a view to square the monthly statements."

We think that, were it on this ground alone, the conviction ought to be quashed.

But, in addition to this, there are several other very serious irregularities to which our attention has been called.

The Bench of Magistrates consisted of the District Magistrate, Mr. *Harrison*, Mr. *Larymore*, the Officiating Superintendent of the Jail, Dr. Bachelor, and two native gentlemen, being a Bench of five. In the course of the trial, both Mr. *Harrison* and Mr. *Larymore* were examined as witnesses for the prosecution. Without saying that it is illegal for a Magistrate to give evidence in the witness-box in a case with which he is dealing judicially, it clearly is, on general principles, most undesirable that a Judge should be examined as a witness in a case which he himself is trying, if such a contingency can possibly be avoided. (See the Full Bench case—*The Queen v. Hiralal Das*¹—already referred to.) The mere fact that Mr. *Harrison* and Mr. *Larymore* were necessary witnesses for the prosecution was a most cogent reason why neither of them should have been members of the Bench by which the prisoner was to be tried. Mr. *Harrison* was almost as much out of place on the Bench as was Mr. *Larymore*. For the whole alleged fraud was discovered by Mr. *Harrison* himself; the prosecution was initiated, and the Government pleader was instructed by him; and he was one of the most important witnesses for the prosecution. That being the District Magistrate's position, we cannot conceive why he did not place the case (which is really a very important one) before some Magistrate in no way connected with it, who might have disposed of it himself, or might have committed the accused for trial to the Sessions, instead of going out of his way to have the case tried by a Special Bench composed of Magistrates, of whom two were manifestly objectionable.

In making these remarks, we do not say that a Magistrate is incapacitated from dealing with a case judicially, merely because in his character of Magistrate it may have been his duty to initiate the proceedings. We only say that it was wrong that the District Magistrate should deal with a case judicially when there was no sort of necessity for his doing so, when he had himself discovered the alleged fraud and initiated the prosecution, and when he was one of the principal witnesses against the prisoner.

Then, again, we find that, after the case for the prosecution was closed, and formal charges were drawn up, and the accused had given the names of the witnesses whom he intended to call, Mr. *Larymore* was deputed by his brother Magistrates to go and take the depositions of some of these witnesses. Mr. *Harrison* in his judgment says: "When the witnesses for the defence were named, most of them were connected with the jail. As it would certainly be said by whatever party they gave evidence against, that they had been tampered with, the Court suggested, and both sides agreed, that these statements had better be taken down at once in the presence of the agents of both parties and of one of the Honorary Magistrates, to guard against subsequent deviation.

¹ 8 B. L. R. 422.

Accordingly, they were questioned, and their answers recorded in this way on the 12th and 13th November, and the statements are placed with the record for the use of either party, though not themselves as evidence." We are unable to understand what such a proceeding is supposed to mean. Here is a man being tried on a very serious charge, who names the witnesses whom he means to call. Thereupon "the Court" suggests that "to guard against subsequent deviation," the statements of these witnesses should be taken down at once in the presence of one of the Honorary Magistrates and of the prisoner's agent. Accordingly, the statements are taken down by Mr. *Larymore*, and the depositions so recorded "are placed with the record for the use of either party, though not themselves as evidence." This was a most irregular and unfair proceeding. The Court had no possible right to receive from Mr. *Larymore* or from any body else statements recorded after such a fashion; or to place these statements with the record, if they were not themselves evidence. As a matter of fact, those statements were taken down, and were placed with the record, for the sole purpose of being used against the prisoner. And they are practically so used by the Magistrate, Mr. *Harrison*, who, in his judgment, says: "Now, Uma Churn Chatterjee's evidence, I have already said, I consider quite unworthy of credit, and it will be observed that, when his statement was taken before Mr. *Larymore* on November 13th, he was never questioned about these purchases, or said anything about them."

In our opinion, the deputing Mr. *Larymore* to take, in an irregular way, the statements of the witnesses whom the prisoner meant afterwards to call in support of his defence, was most unfortunate. It was quite illegal and unjustifiable. The District Magistrate, Mr. *Harrison*, in his judgment, says that when the Court suggested "that these persons should be examined at once in the presence of one of the Honorary Magistrates," both sides agreed "that this had better be done. And doubtless he relies on that agreement," as justifying and sanctioning what was done. So, as regards the objection taken to Mr. *Larymore's* being on the Bench, and to Mr. *Harrison's* own presence there, he relies on the consent given by the prisoner in the first instance.

The District Magistrate has, throughout these proceedings, treated them very much as if they had been proceedings pending in a civil suit, and has lost sight of the wide difference which exists between a civil suit and a criminal prosecution. Criminal proceedings are bad, unless they are conducted in the manner prescribed by law; and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner. When the irregularities are all unfavourable to the prisoner, as in our opinion they clearly were in the present case, it is impossible for any Court to consider a waiver or consent as binding on him. It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure; and then attempting to protect themselves against the consequences of such departure by getting the accused person to say he consents to it. In the mofussil, most prisoners, not properly defended, would probably assent to any irregularity which the Judge or Magistrate trying him chose to suggest. There would be an end to all procedure, if such an assent were held to warrant material and important irregularities.

But, after all, what really was the nature of the consent given by the prisoner as to the composition of the Bench? After the witnesses for the prosecution had been examined, formal charges were, on the 10th of November, drawn up, and the plea of "not guilty" was recorded. The accused gave the

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names of his witnesses, and the further hearing was adjourned to the 4th of December. In his judgment, Mr. *Harrison* says: "After the charge was drawn up, and the case resumed after the long adjournment for the defence, the accused's Counsel objected to the composition of the Bench, both to Mr. *Larymore's* presence on it and to mine. Except under the special circumstances of the case, Mr. *Larymore's* presence on the Bench might obviously, be questionable, and hence, before commencing the trial, the accused and his pleaders were expressly asked if they had any objection to the composition of the Bench, when they distinctly stated that they had none whatever, &c.

It is to be noted that the objection was raised and pressed before the case had proceeded further than the point of drawing up formal charges and recording the plea of "not guilty;" also that before that time both Mr. *Harrison* and Mr. *Larymore* had given evidence as witnesses on behalf of the prosecution. But it is not stated, and there is nothing to lead us to suppose, that, when the prisoner was asked whether he objected to the composition of the Bench, he was warned that Mr. *Harrison* and Mr. *Larymore* were both very important witnesses for the prosecution. The record of the case does not show that, when the prisoner was first brought before this Bench, he was asked whether he objected to its composition, except that Mr. *Larymore* deposes to the fact which is confirmed by Mr. *Harrison* in his judgment. It is a matter of comparatively little consequence whether it is recorded or not. But if the Magistrates really intended to rely on the prisoner's consent, that consent ought to have been formally and accurately recorded at the time it was given.

On these grounds, and without entering into the other objections which the prisoner's Counsel take to the conviction, we think it clear that there have been most serious and material errors in the proceeding in this case, which have been greatly to the prejudice of the prisoner. We, therefore, set aside the conviction and sentence, and order that the prisoner be discharged, and that the fines, if paid, be refunded to him.

The Magistrate of the District, no doubt, had authority to direct that this case should be tried by a Bench of Magistrates. But a complicated and somewhat difficult case like this is by no means one which it is desirable to place before such a Court. And the result shows that this is so. The case is one in which the strictest accuracy is necessary, whereas the proceedings have been diffuse and loose in the highest degree. Moreover, there is not one "judgment" by the Court, but a series of judgments, which, to say the least of it, is most inconvenient. Mr. *Harrison* writes the judgment (a most voluminous one) on the first charge, and says that he concurs with Mr. *Larymore's* judgment on the second charge. Mr. *Larymore* writes a judgment on the second charge, and says he concurs in Mr. *Harrison's* judgment on the first charge. Dr. *Bachelor* writes that he concurs in the judgments of Mr. *Harrison* and Mr. *Larymore*. And the two native Magistrates write a long judgment of their own. All the five Magistrates, however, so join in signing, in a regular way, the final "finding and sentence" of the Court. The case comes before us under somewhat peculiar circumstances; for the prisoner availed himself (as to a portion of his case at least) of his right of appeal to the Sessions Judge. The appeal was unsuccessful, although he, in his petition, repeated his objections to the constitution of the Court which tried him. Notwithstanding that the appeal was dismissed, it appears to us that the irregularities on which we have dwelt are so serious and so important as to render it imperative on us even now to quash the whole proceedings.

Conviction quashed.

APPELLATE CRIMINAL.

*Before Mr. Justice Markby and Mr. Justice Mitter.*IN THE MATTER OF JUGGUT CHUNDER CHUCKERBUTTY.¹*Criminal Procedure Code (Act X. of 1872), ss. 294 and 297—Revision—Power of High Court—"Material Error."*1876,
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2 Cal. 110.

In a case of apprehended breach of peace, the Magistrate bound over the parties in sums of money aggregating on the whole to Rs. 60,000 or upwards. The High Court quashed the order, holding that it was altogether unreasonable.

Per MARKBY, J.—Ss. 294 and 297, Act X. of 1872, do not debar the High Court from interfering where, in cases requiring the exercise of discretion, it appears upon the face of the proceedings that the Magistrate has exercised no discretion at all, or has exercised his discretion in a manner wholly unreasonable.

Per MITTER, J.—Under s. 297, the High Court has the power of interfering with judgments, sentences, or orders of Courts subordinate to it, if there has been a material error in any judicial proceeding of such Courts, meaning thereby any error appearing on the face of a judicial proceeding resulting in an unjust order.

APPLICATION under s. 297 of the Criminal Procedure Code (Act X. of 1872).

The petitioner in this case had been bound over by the Joint-Magistrate of Backergunge for an apprehended breach of the peace in a recognizance of Rs. 10,000 with two sureties for Rs. 5,000 each. A dispute had existed between the petitioner and one Baroda Chuckerbutty on the one hand, and one Sabir Myan on the other, in respect of a plot of land. It was found by the Joint-Magistrate that until Aghran last all the ryots, except a small minority, had paid the rent to Sabir Myan, but in that month, in consequence of his oppression, several of them went over to Baroda Chuckerbutty. Up to that time there had been much litigation between the parties, but no attempt to break the peace. A breach of the peace being, however, then apprehended, police were stationed near the land in dispute, which, from the Magistrate's judgment, appeared to have been effectual in preventing any disturbance. The Magistrate, nevertheless, thought it desirable to take some further security. Summonses were accordingly issued against four persons, including the petitioner, Baroda, Sabir, and two of their respective servants. After enquiry the Joint-Magistrate bound over the principals in recognizances of Rs. 10,000 each, with two sureties of Rs. 5,000 each, and the servants in small sums.

An application was made to the Sessions Judge, among others, on the ground that the recognizance was excessive. In dealing with this objection, the Judge used the following words: "Lastly, it is urged that the amount of the recognizance is excessive. Here I quite agree with the petitioners, and if I could only have seen my way, I should certainly have referred the case to the High Court for this reason alone; but this is a point on which the High Court decline to interfere."

The petitioner thereupon preferred the present application to the High Court.

Baboo Ashoolosh Dhur for the petitioner.

No one appeared for the Crown.

¹ Criminal Motion, No. 232 of 1876, against the order of the Joint-Magistrate, dated 22nd February 1876, and against the order of the Sessions Judge of Backergunge, dated the 7th June 1876.

1876.

IN THE
MATTER OF
JUGGUT
CHUNDER
CHUCKER-
BUTTY,
2 Cal. 110.

The following judgments were delivered :—

MARKBY, J. (after stating the facts as above, continued) :—The Sessions Judge is quite right in supposing that this Court would not ordinarily interfere with the discretion of Magistrates as to the amount of security to be taken in cases of this kind. The Magistrate is in a much better position than this Court for judging what would be the proper amount of security, which must vary with the danger to be apprehended and the means of the parties. But the Magistrate cannot make an order that is altogether unreasonable. Here the Magistrate, although there has been as yet no breach of the peace, and apparently no very strong determination to resort to violence, has required the parties to enter into bonds amounting altogether to upwards of Rs. 60,000. The parties do not appear to be wealthy; and, had the security ordered been really required, in all probability it could not have been furnished. We find, however, that one of the parties, who has been accepted as surety for Rs. 5,000, is described as a kotwal and another as a mookhtear, and all the bonds were executed on the very day the order was made. It would thus appear as if the amounts mentioned in the bond are merely nominal, and that no real security to that extent was required.

I consider that in this case the Joint-Magistrate has not done that which the law requires. Either he has wholly failed to exercise the discretion which the law requires him to exercise in taking security for good behaviour, or, if he has exercised it at all, he has exercised it in a manner which is altogether unreasonable. Whichever be the case, I do not think we ought to allow such an order to stand.

No one appears on behalf of Government to support the order, and the Magistrate has offered us no explanation. We have nevertheless thought it necessary to consider whether this is a case in which we ought to interfere under the powers of superintendence and revision over the subordinate Courts conferred upon the High Court by Ch. XXII. of the Code of Criminal Procedure. It has been held, notwithstanding the very general words of ss. 294 and 297, that this Court ought not, in the exercise of these powers, to go into the evidence, and examine the conclusions of the Court below upon the facts. I desire to adhere to those decisions. It seems to me necessary to do so, as otherwise an appeal would virtually lie against every decision of the subordinate Courts, which was clearly not intended by the Legislature. But, nevertheless, I do not think that we are excluded from interference where, in cases requiring the exercise of discretion, it appears upon the face of the proceedings that the Magistrate has exercised no discretion at all, or has exercised his discretion in a manner wholly unreasonable. I think that we have the power and ought to interfere in such cases, just as we have the power and ought to interfere where a Magistrate has been guilty of misconduct. I did not myself intend to say anything contrary to this in *In the matter of Debichurn Biswas*.¹ Nor do I think that the decision in *In the matter of Belilios*² lays down anything contrary to this view. No doubt, the language of Pontifex, J., in that case, and my own language in the other case, might be pressed to the extent of confining this Court, when exercising powers of revision, strictly to errors in law. As a general rule, that is so. Cases of misconduct or utter want of discretion are rare and exceptional, and were not, I think, contemplated when those decisions were given. I am of opinion that this Court, when exercising its powers of revision, is justified in dealing with such cases, and that we may do this without in any way inter-

¹ 20 W. R. Cr. 40.

² 12 B. L. R. 249.

fering with the rule that this Court will accept the conclusions of the Court below upon the evidence in the case.

Upon the ground that it appears upon reading the proceedings that the Joint-Magistrate has either exercised no discretion at all in fixing the amount of security, or that he has exercised his discretion unreasonably, and that the Magistrate has given us no explanation, I think we ought to set aside his order.

MITTER, J.—I am also of opinion that we ought to set aside the order of the Joint-Magistrate in this case. Under s. 297, this Court has the power of interfering with judgments, sentences, or orders of Courts subordinate to it, if there has been a “material error in any judicial proceeding” of such Courts. These words, it seems to me, mean any error appearing on the face of a judicial proceeding resulting in an unjust order. For the reasons given by my learned colleague, there appears, on the face of the proceeding of the Court below, such a material error as would warrant this Court in setting aside the order passed by it.

Order quashed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Mitter.

IN THE MATTER OF PURSOORAM BOROOAH, PETITIONER.¹

Powers of Magistrates—Summary Jurisdiction—Transfer—Criminal Procedure Code (Act X. of 1872), ss. 56 & 222—Furlough.

1876.

June 10.

2 Cal. 117.

The petitioner had been convicted by Mr. Carnegy, the Assistant Commissioner of Kamroop, in the exercise of a summary jurisdiction under s. 222 of Act X. of 1872. This Officer was, in the year 1872, in charge of the Jorehaut Division in the District of Seesaugor, “with first-class powers and powers under s. 222” of the Act. In 1874 he proceeded on furlough to England, and, on his return in 1875, was posted to the District of Kamroop, and invested with the powers of a Magistrate of the first-class.

Held that s. 56 of Act X. of 1859 did not apply, and that Mr. Carnegy had no summary jurisdiction in Kamroop.

Per MARKBY, J., on the ground that, by the terms in which the Government had conferred that jurisdiction on Mr. Carnegy, it had in effect “directed,” within the meaning of s. 56 of Act X. of 1872, that he should not exercise that jurisdiction anywhere but in Seesaugor.

Per MITTER, J., on the ground that the office to which Mr. Carnegy was appointed in Kamroop was not equal to, or higher than, that which he had held in Seesaugor.

Quare per MARKBY, J., whether the posting of Mr. Carnegy to Kamroop, after his return from furlough, was a transfer from Seesaugor within the meaning of s. 56 of Act X. of 1872.

Baboo *Rash Behary Ghose* and *Krishna Komul Bhuttacharjee* for the petitioner.

The Junior Government Pleader (Baboo *Juggadanund Mookerjee*) for the Crown.

THE facts and arguments are sufficiently stated in the judgment of *Markby, J.*, which was as follows:—

In this case an important question is raised as to the powers of a Magistrate in the province of Assam.

¹ Criminal Motion, No. 92 of 1876, against an order of the Assistant Judicial Commissioner of Kamroop, dated the 3rd December 1875.

1876.

IN THE
MATTER OF
PURSOORAM
BOROOAH,
Cal. 117.

It appears that one Pursooram was, in December last, tried summarily and convicted by Mr. *Carnegy* for the offence of giving false information to a public servant. A reference was made upon the subject to this Court by the Judicial Commissioner of Assam upon other points than those now before us, and this Court, upon that reference, refused to interfere. A petition was then presented on the 5th April on behalf of the prisoner, praying that the conviction and sentence be set aside upon the ground that Mr. *Carnegy* had not the power to try the prisoner summarily.

The circumstances of the case, so far as they bear upon the power of Mr. *Carnegy* to try this prisoner summarily, appear to be these:—

Mr. *Carnegy*, in the year 1872, held the office of Assistant Commissioner in the district of Assam, which was then what is called a Non-Regulation District under the Local Government of Bengal. On the 1st of January 1873, a Resolution of the Local Government of Bengal was published in the *Calcutta Gazette*, by which it was directed, under the provisions of the Code of Criminal Procedure, that the officers and others whose names appeared in the schedule therewith published should, in each case, exercise the powers shown opposite their names in the districts shown in the schedule. In the schedule we find, under the heading "Seesaugor District," the name of Mr. *Carnegy*, and opposite his name are the words "charge of Jorehaut Division, with first-class powers and powers under s. 222." This latter section is the one which relates to summary trials.

No earlier gazette or appointment of Mr. *Carnegy* has been produced before us; but I think this is sufficient evidence that Mr. *Carnegy* was the Magistrate of the Jorehaut Division of the District of Seesaugor (see s. 28 of the Code of Criminal Procedure) at that time, and had the power to try offences summarily in that district.

On the 6th February 1874, certain territories, including the districts of Seesaugor and Kamroop, were removed from the Government of the Lieutenant-Governor of Bengal, and placed under a Chief Commissioner. In April 1874, Mr. *Carnegy*, having obtained furlough on medical certificate from the Government of India for one year, left India shortly afterwards. Several officers in succession were appointed, whilst Mr. *Carnegy* was absent, to take charge of the Jorehaut Sub-division. In the month of September 1875, Mr. *Carnegy*, having obtained leave from the Secretary of State to return to duty, arrived in India. He never returned to the district of Seesaugor, nor up to this time has he resigned or vacated his office as Magistrate in that district, otherwise than he may have done so by reason of the circumstances above mentioned. On the 25th of September there appeared a notification in the *Assam Gazette* that Mr. *Carnegy*, Assistant Commissioner, was "posted" to the district of Kamroop, and on the same day there appeared a further notice in this gazette that Mr. *Carnegy* was vested with the powers of a Magistrate of the first-class.

Upon these facts it seemed to us, when the matter was before us on a former occasion, that Mr. *Carnegy* had no power to try prisoners summarily in the district of Kamroop. The exercise of those powers was originally limited to the district of Seesaugor, and when Mr. *Carnegy* was posted to Kamroop (whatever that may mean), whilst on the one hand he was expressly authorised to exercise the powers of a first-class Magistrate in the district of Kamroop, the remaining power which had been formerly conferred upon him of trying prisoners summarily was not re-granted.

It was at this juncture that we released the prisoner upon bail, but we abstained from quashing the conviction, because the matter being one which affected the jurisdiction of a judicial officer, and possibly of many judicial officers, we thought the Local Government ought to be represented.

Baboo *Juggadanund Mookerjee* has now appeared for the Local Government. He has not given us any additional information, but he relies entirely upon the provisions of s. 56 of the Code of Criminal Procedure, by virtue of which he contends that all the powers conferred upon Mr. *Carnegy* in Seeb-saugor are extended to Kamroop.

That section provides as follows: "Whenever any person holding an office in the service of Government, who has been invested with any powers under this Act or any enactment hereby repealed in any district, is transferred to an equal or higher office of the same nature within another district, he shall, unless the Local Government otherwise directs, continue to exercise the same powers in the district to which he is so transferred."

Upon this section two questions have been raised: 1st—Was Mr. *Carnegy* "transferred" within the meaning of the section; 2nd—Is the operation of the section prevented because the Local Government has "otherwise directed."

Neither of these questions is free from difficulty. With regard to the first it is said that, by going on furlough, Mr. *Carnegy* vacated his former appointment, and could not, therefore, on his return, be transferred; that no order transferring him has been made, and that the term "posted" indicates not a transfer, but a fresh appointment. But that word is ambiguous, and, before deciding the question upon this ground, it would be necessary to see whether Mr. *Carnegy* ever really vacated his former appointment. Upon this matter there is, as far as I am aware of, no rule laid down by authority. Prior to 1868 it was, I believe, always understood that any officer going on furlough vacated his appointment, and, under an order of the Government of India of the 16th December 1861, it is expressly declared that "Civil Servants taking furlough will vacate their offices." Mr. *Carnegy* was not a Covenanted Civil Servant, and to what furlough rules he may have been subject prior to 1868, I am not quite sure; but I believe the rule that officers going on furlough vacated their appointments was universal.

On the 16th June 1868, however, an order was published, which directs that, except as hereinafter provided, "an officer, when on furlough, shall retain a lien on his substantive appointment or on an appointment of similar character and not less salary." This is applicable to all officers, whether covenanted or uncovenanted. It seems to me extremely doubtful whether the effect of this last rule is that the officer taking furlough retains his appointment. To my mind it rather indicates the contrary. The matter, however, may not depend entirely upon those rules, which are furlough rules only issued by Government in the Financial Department. It may be that what really vacates an office is not the going on furlough, but the appointment of another person to the office; and, as far as I have seen, no person was specially appointed to succeed Mr. *Carnegy* in his office as Magistrate in the district of Seeb-saugor. The number of Subordinate Magistrates in a district being unlimited, there was no necessity for doing so. And this seems to be the view of the Local Government of Assam; for whilst Mr. *Carnegy's* powers were conferred afresh, it does not appear that he ever received any fresh appointment as Magistrate. He is, no doubt, treated as having ceased to be Magistrate of a division of a district, but he is apparently treated as being still, on his return, a subordinate Magistrate

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in or of a district, which district could have been no other than the district of Sebsaugor.

I should, therefore, desire further consideration before holding that Mr. *Carnegy* vacated his former appointment by going on furlough, and that on this ground he was not transferred to the district of Kamroop within the meaning of s. 56; I desire to be understood as expressing no opinion upon this point.

But there remains the second question, whether the operation of the section is prevented, because the Local Government has otherwise directed.

If we take s. 56 quite literally, it would seem to indicate that the "direction otherwise" there alluded to was a direction contemporaneous with the transfer. This would render a special direction necessary in every case of transfer where the powers had already been locally restricted under s. 38. But when the Local Government had already declared its intention on this subject, this would seem to me to be superfluous. And it does not appear to me necessary to put this construction on s. 56. I think that the words, "unless the Local Government otherwise directs," reasonably construed, will include a previous restriction under s. 38, as well as one imposed when the transfer is made. This accords with the view taken by the Local Government of Assam, which (as before pointed out) clearly treated the powers conferred upon Mr. *Carnegy* as having come to an end.

Upon this last ground, therefore, I hold that Mr. *Carnegy* has no summary powers under s. 222 in the district of Kamroop; and I, therefore, think that we ought to quash the conviction, and discharge the sureties.

MITTER, J.—I am also of the same opinion. It seems to me that the effect of the Government Resolution, dated 1st of January 1873, was to confer upon Mr. *Carnegy* powers under s. 222 of the Criminal Procedure Code within the Sub-division of Jorehaut only. That being so, it cannot be said that he was "transferred to an equal or higher office" of the nature of that which he held in the district of Sebsaugor; because, supposing he was transferred within the meaning of that section, and that he never vacated his appointment, the office to which he was transferred in the district of Kamroop is neither equal to nor higher than that he held in the district of Sebsaugor. A reference to ss. 27 and 28 of the Code will show that the powers of a Magistrate of a division of a district are higher than those of a Magistrate of the first-class not in charge of any Sub-division. I am, therefore, of opinion that, under the section (56) referred to above, Mr. *Carnegy* did not continue to exercise the same power which he had while in charge of the Sub-division of Jorehaut.

Conviction quashed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

THE EMPRESS OF INDIA *v.* DILJOUR MISSER.¹

Conviction of offence committed before the Penal Code came into operation—Reg. IV. of 1797—Act XVII. of 1862—Act I. of 1868 (General Clauses Consolidation Act), s. 6.

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Feb. 20.

2 Cal. 225.

The prisoner was found guilty, and sentenced, under Reg. IV. of 1797, to transportation for life, for a murder committed in 1861, before the Penal Code came into operation; and the case was sent up to the High Court to confirm the sentence. Reg. IV. of 1797 was repealed by Act XVII. of 1862, and that Act was wholly repealed by Acts VIII. of 1868 and X. of 1872. *Held*, on a reference to a Full Bench, that the conviction was illegal, s. 6 of Act I. of 1868, which provides that the repeal of any Act or Regulation shall not affect any offence committed before the repealing Act shall have come into operation, not being applicable.

The prisoner was charged with murder, alleged to have been committed on 24th May 1861, before the Penal Code came into force, and he had evaded arrest up to the time of his apprehension. The prisoner was, on 7th August 1876, found guilty by Mr. A. V. Palmer, Sessions Judge of Shahabad, of culpable homicide not amounting to murder, and sentenced to transportation for life. The case was referred by the Judge under Reg. IV. of 1797, s. 3, for the orders of the High Court, and, on its coming before Markby and Ainslie, JJ., the following note was made thereon by those Judges:—

“Reg. IV. of 1797 was repealed by Act XVII. of 1862 with some reservations, but, as appears by a case² just decided, those reservations have been also repealed, so that the Sessions Judge was not empowered to make the reference he has done. Nor are we aware of any Regulation in existence under which the prisoner could be punished for culpable homicide committed on the 24th of May 1861. Unless, therefore, some cause be shewn to the contrary, the conviction must be set aside as illegal.”

¹ Criminal Reference, No. 176 of 1876, from an order of A. V. Palmer, Esq., Sessions Judge of Shahabad, dated the 7th August 1876.

² *R. v. Lall Shaha, Criminal Appeal, No. 438 of 1876.* In this case the prisoner was convicted, in May 1876, of robbery committed in 1857, under s. 3, Reg. LIII. of 1803, and s. 3, Reg. XVI. of 1825, and was sentenced, under s. 395 of the Penal Code, to seven years' rigorous imprisonment. His appeal came before Markby, Ainslie, and Mitter, JJ., on 17th August 1876, when the following judgment was delivered:—

MARKBY, J.—In this case the prisoner has been tried for robbery by open violence, and sentenced to seven years' rigorous imprisonment, under Reg. LIII. of 1803, s. 3, and Reg. XVI. of 1825, s. 3. He has appealed to this Court, and his first ground of appeal is that, those Regulations having been repealed, the conviction is illegal. These Regulations were repealed by Act XVII. of 1862 with a certain saving as to past offences. Act XVII. of 1862 was repealed by Act VIII. of 1868, except ss. 3, 4, 5, and 6. These sections were repealed by the Code of Criminal Procedure of 1872. It would, therefore, seem that this ground of the prisoner's appeal is well founded. From another case of a somewhat similar character, which is now before us, we gather that there is an opinion prevalent in the Courts of the country, that the old criminal laws antecedent to the Penal Code have not been swept away to the extent to which they appear to us to have been on a perusal of the Statutes above referred to. We regret that we have had no assistance on behalf of the Crown in the investigation of this matter, but, as far as we are able to judge upon the information before us, this conviction appears to be illegal, and we order it to be set aside, and the prisoner discharged.

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Notice was ordered to be given to the Government Pleader and to the prisoner, and the case subsequently came before *Markby, Ainslie, and Mitter, JJ.*, who referred it to a Full Bench with the following remarks:—

"In a case which came before this Court on appeal a short time ago, it was held by us that Act XVII. of 1862 was totally repealed by Acts VIII. of 1868 and X. of 1872, and that therefore no conviction for an offence committed prior to 1862 could be maintained. That case was not argued, and we were therefore only able to express our opinion with reference to such research as we could ourselves make into the matter. Very shortly afterwards the present case was referred to us under Reg. IV. of 1797, s. 3, to confirm a sentence passed by the Sessions Judge of Shahabad, for an offence committed on the 24th May 1861. We accordingly gave notice that we should again consider this question, and the Junior Government Pleader has appeared to argue it. He maintains that, notwithstanding the repeal of Act XVII. of 1862, the prisoner may be still tried and punished because of the proviso in s. 6 of the General Clauses Act (I. of 1868). We find considerable difficulty in coming to a conclusion as to the operation of this section in the present case, and as the question is one of general importance, it should, we think, be heard by a Full Bench."

No counsel appeared on either side before the Full Bench.

The opinion of the Full Bench was delivered by—

GARTH, C.J.—In this case the prisoner has been convicted of culpable homicide not amounting to murder committed on the 24th May 1861, and sentenced to transportation for life. Act XVII. of 1862, under which the prisoner has been tried and convicted for this offence, has been totally repealed by Acts VIII. of 1868 and X. of 1872. It has, however, been contended that, notwithstanding this total repeal of Act XVII. of 1862, the prisoner may still be tried and convicted under that Act by virtue of the provisions of s. 6 of the General Clauses Act (I. of 1868). We have considered this clause, and upon the whole we think that it does not apply to the present case. The conviction, therefore, must be set aside, and the prisoner discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

1877.

Jan. 18.

2 Cal. 273.

THE EMPRESS OF INDIA *v.* JUDOONATH GANGOOLY.¹

Criminal Procedure Code (Act X. of 1872), s. 272—Appeal—Officer appointed to prefer Appeal—Judgment of Acquittal—Conviction on Charge of Murder of Culpable Homicide not amounting to Murder—Acquittal.

On the trial by a jury of a person on a charge of murder, the jury found the accused not guilty of the offence of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he disagreed with the verdict, declined to submit the case to the High Court under s. 263 of the Criminal Procedure Code. The Local Government, thereupon, directed the Legal Remembrancer to appeal under s. 272 of the Code, and in pursuance of this direction an appeal was preferred by the Junior Government Pleader. *Held* that the appeal was duly made. *Held* further that a judgment passed by the Court of Session, following the verdict of a jury acquitting the prisoner, is a judgment of acquittal within the meaning of s. 272. *Held* also that, there being an acquittal on the charge of murder, the appeal lay.

¹ Criminal Appeal, No. 278 of 1876, against an order of *J. O'Kinealy, Esq.*, the Sessions Judge of the 24-Pergunnahs, dated the 8th May 1876.

THE prisoner, Judoonath Gangooly, was tried by a jury for the murder of one Dasseer Raur. The jury acquitted him of the charge of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he remarked that he did not concur with the verdict, declined to submit the case to the High Court under s. 263 of the Criminal Procedure Code. He recorded two separate findings and sentences, stating in the first that the jury had found the prisoner not guilty of murder, and directing his discharge; and in the second, stating that the jury had found the prisoner guilty of culpable homicide not amounting to murder, and sentencing him to 10 years' rigorous imprisonment. The Local Government directed the Legal Remembrancer to prefer an appeal to the High Court under s. 272 of the Code, "against the judgment of the Sessions Judge acquitting the prisoner of the charge of murder." In pursuance of this direction, a petition of appeal was presented and filed by the Junior Government Pleader.

Mr. Ingram (with him the Junior Government Pleader, Baboo Juggadand Mookerjee) for the Crown.

Mr. M. M. Ghose for the prisoner.

Mr. Ghose.—There are three objections to the hearing of this appeal : *First*, it has not been preferred by one of the persons mentioned in s. 272. No public prosecutor has as yet been appointed under s. 57 of the Code, and the Junior Government Pleader has not been generally appointed to prefer appeals of this nature, nor was he specially appointed to prefer this particular appeal. [Mr. Ingram stated that he was instructed by the Legal Remembrancer. Jackson, J.—The appeal must be taken to be an appeal by the Government.] *Secondly*.—The prisoner has been convicted, and not acquitted. Where, upon certain facts found, the jury bring in a verdict of guilty of a particular offence, there is no such acquittal as would give a right of appeal under s. 272; that section, it is submitted, applies only to cases of absolute acquittal. *Thirdly*, s. 272 only gives a right of appeal from judgments of acquittal; it cannot, therefore, apply to cases of trial by jury in which there is no judgment; but only the summing up by the Judge, the verdict by the jury, and the sentence or order of the Court. The Code of Criminal Procedure throughout draws a distinction between a "judgment" and a "sentence" or "order." It is doubtful whether an appeal can be maintained on a question of fact. The section is a novel one, and must be construed with the utmost strictness.

Mr. Ingram for the Government.—The only argument to be drawn from the novelty of the section is that, inasmuch as its wording is general, the Legislature intended to give the Local Government a general and absolute power of appeal. Under the former Code, which was drawn under the influence of English ideas of criminal justice, the verdict of a jury could only be touched under the revision section; but the present Code provides three ways of interfering with such verdict,—*viz.*, under s. 263, where the Court disagrees with the verdict, under s. 272, and under s. 288. The prisoner has been acquitted upon the charge of murder, and an appeal lies from such acquittal. Under s. 263, the jury are bound to return a verdict on all the charges on which the accused is tried; under s. 452, there must be a separate charge for every distinct offence, and each charge must be tried separately, except in the cases by the Code excepted. Then s. 457 provides for an exceptional case; under that section, the accused may be convicted of the offence which he is proved to have committed, although he is charged with a "different" offence; and illustration (b) shows that murder and culpable homicide amounting to murder are different or

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distinct offences: lastly, s. 461 provides that the Court, in passing judgment, shall distinctly specify the offence of which the accused is convicted. The word "judgment" in s. 272 means what falls from the Court after the verdict; it is the conclusion of a syllogism of which the major premiss is, every man who commits a particular offence shall be punished in such and such a way; the minor premiss,—this man has committed that offence, and the conclusion is, judgment according to the law. S. 263 shows that there is a judgment in trials by jury: "if the Court does not think it necessary to dissent from the verdict, it shall give judgment accordingly." S. 271 restricts the right of appeal of an accused person convicted in a trial by jury to matters of law, but there is no such restriction in s. 272. As to the power of appeal under the latter section in trials by jury, see the observations of *Phear, J.*, in *Queen v. Koonjo Leth.*¹

Mr. *Ghose* in reply.

The judgment of the Court was delivered by

JACKSON, J.—During the argument we disposed of the first part of the objection taken by Mr. *Ghose*, who has, at our request, carefully and feelingly advocated the case on behalf of the prisoner. That objection was, that we had not before us an appeal such as is contemplated by s. 272 of the Criminal Procedure Code, inasmuch as the petition of appeal had not been preferred by the Government "prosecutor or other officer specially or generally appointed in this behalf." It appeared, and still appears to us, that, under the authority conveyed by the Secretary's letter to the Legal Remembrancer, the appeal was duly made by one of the Government Pleaders, and has been regularly and properly sustained before us by the counsel instructed by, and appearing on behalf of, the Legal Remembrancer.

Mr. *Ghose* next contended that, in the first place, s. 272 was not meant to apply, and did not apply to cases where the accused person has been tried and acquitted by the verdict of a jury; and in the next place, that an appeal would not lie, inasmuch as there has not been any operative judgment of acquittal, the prisoner not having been set at liberty, but having been convicted of a minor offence arising out of the same set of facts on which he was charged with murder. We observe that one of these points, *viz.*, what is included in a judgment of acquittal, has been adverted to, though not expressly decided by *Phear, J.*, in the case of *Queen v. Koonjo Leth.*¹ But, irrespective of that expression of opinion, we ourselves do not entertain the least doubt upon this subject. It appears abundantly from the various sections of the Code of Criminal Procedure relating to judgments, that the judgment passed by the Court of Session, following the verdict of a jury which acquits, is undoubtedly a judgment of acquittal. The Legislature has allowed an appeal in cases of acquittal by the Local Government, under s. 272, in the widest terms, and without any limitation whatever. Then, as to the contention that there was no acquittal in this case, it appears manifestly from the record that, as regards the particular charge of murder, the prisoner was acquitted, and ordered to be discharged or set at liberty; and that, but for the finding of the jury and the sentence of the Court in respect of the other offence included in the charge, the prisoner would, so far as the charge of murder was concerned, have been set at liberty on his acquittal. He was charged with the offence of murder, which is an offence distinct from the offence of culpable homicide not amounting to murder. The Judge not having thought fit to refer the case under s. 263, the judg-

¹ 11 B. L. R. 14.

ment stood as a judgment of acquittal. The Local Government is charged with the responsibility of considering in such cases whether the public interests require that an appeal should be preferred, and as in the exercise of its judgment it has thought fit to prefer this appeal, we think the appeal lies. It remains to consider what decision we ought to arrive at upon the appeal so preferred, and I confess that I should have greatly desired that the learned Sessions Judge who tried the case in the Court below had thought right to set out in the proceedings the grounds upon which he abstained from doing that which the law enjoins him to do under s. 263, and not imposed upon the Judges of the High Court the onerous and painful duty of passing the proper sentence in the case. (The learned Judge proceeded to consider the evidence, and held that the accused was guilty of murder, and sentenced him to death.)

Appeal allowed.

ORIGINAL CRIMINAL.

Before Mr. Justice White.

IN THE MATTER OF THE EMPRESS OF INDIA ON THE PROSECUTION
OF MALCOLM v. GASPER AND OTHERS.

*High Courts' Criminal Procedure Act (X. of 1875), s. 147—Transfer of case
before Police Magistrate to High Court—Power to issue Mandamus.*

A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and, without disbelieving it, decided it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a *mandamus* to the Magistrate to commit the defendants; it was not a case where the Magistrate had declined jurisdiction; he had exercised his jurisdiction, and heard the case. *Held* also, it was not a case which the Court could transfer under s. 147 of the High Courts' Criminal Procedure Act.

This was an application under s. 147 of the High Courts' Criminal Procedure Act (X. of 1875) for a rule calling on Mr. *Dickens*, one of the Police Magistrates of Calcutta, to show cause why a case should not be transferred to the High Court for hearing and final determination, or for a *mandamus* to compel the Magistrate to commit.

The defendants were charged before the Magistrate, under s. 141 of the Penal Code, with being members of an unlawful assembly, and, in pursuance of the common object of such assembly, with having used criminal force, or show of criminal force, and ejected the prosecutor from the Armenian Church, of which he was in possession. The Magistrate took evidence in the case, and came to the conclusion on that evidence that no offence had been made out. When the application was first made, the Court suggested that it had no power, under the circumstances, to grant it, and asked for an authority to show that, in a similar case, the Court of Queen's Bench or this Court would issue a *mandamus*, or grant a *certiorari*, and gave leave to re-new the application.

Mr. *Phillips* (Mr. *G. Gregory* with him), renewing the application, said that he had been unable to find any case in which the Court of Queen's Bench had issued a *mandamus* ordering the Justices to commit; but there was a reason for that remedy not being given in England, which did not exist here. The Queen's Bench does not grant a *mandamus* until all the other remedies open to the applicant have been exhausted. Now, in England, in such a case as this, the remedy would be to go before a grand jury; therefore a *mandamus* would

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not lie. But in this country the grand jury has been abolished, and, there being no other remedy, a *mandamus* will issue, the Court having the powers, in that respect, of the Court of Queen's Bench. The Magistrate did not disbelieve the evidence, for he stopped the case for the prosecution. He considers that, admitting the facts proved to be true, they do not constitute any offence; he has, in other words, mistaken the law. Where a *prima facie* case is made out, the Magistrate is bound to commit—*Burn's Justice of the Peace*, Vol. I., p. 773. He has no further discretion. [WHITE, J.—Suppose in such a case as this in England you went before a grand jury, they might throw out the bill. You might, indeed, go before a second grand jury; but they also might ignore the bill: would the Queen's Bench compel the grand jury to find a true bill? And, if not, the remedy you mention is very incomplete. I doubt whether the reason why the Queen's Bench won't grant a *mandamus*, is because there is a remedy by going before the grand jury.] It is submitted that it is; and that reason, the grand jury having been abolished, not existing here, this Court has power to issue a *mandamus*. In cases where there is no other remedy the Queen's Bench does grant it. In a case where there is no other remedy, a Magistrate can be ordered to grant a summons; see *The King v. The Justices of Kent*.¹ [WHITE, J.—Here the Magistrate has exercised his jurisdiction, and dismissed the case: that seems to me to be your difficulty.] His action amounts to saying that the law does not give him power to commit, because there is no offence,—that is, he says he has no jurisdiction; in other words, declines jurisdiction. See 9 Geo. IV., cl. 74, s. 2, as to his being bound to commit. A somewhat similar case is the refusal to issue a summons, in which case the Queen's Bench can make an order that the summons be issued; see *The Queen v. Adamson*.² This is a decision on a preliminary point, not a case which the Magistrate has heard and decided. It is a matter of law, as to which he has no discretion. It is similar to a case of refusal of summons, which is only a way of putting a case in train for hearing. [WHITE, J.—The Magistrate appears to me to have exercised his jurisdiction, not to have declined it. It differs from a refusal to issue a summons. He has heard the case.] He has dealt with the case in such a way as amounts to declining jurisdiction. A *prima facie* case was made out for the issue of a summons, and the Magistrate refused to issue it. [WHITE, J.—I have no more power than the Court of Queen's Bench, and you have not shown me any case in which that Court has granted a *mandamus* in a case like this. I think it is only where there is another effective remedy that the Queen's Bench declines to issue a *mandamus*.] Even taking that to be so, it is submitted it would issue here, as there is no other effective remedy.

As to the application under s. 147, the fact that the grand jury has been abolished ought to lead the Court to put as wide a construction on the section as is possible. S. 147 differs from the old law, and is intended to have a wider scope. In 33 Geo. III., cl. 52, s. 153, which was the former law, there is nothing to limit the interference of the High Court to orders for convictions. In this country appeals from acquittals are allowed, and to refuse to interfere, simply because it is a case of acquittal, would be narrowing the law to what it is in England, where appeals from acquittals are not allowed.

As to the facts of this case, constituting an offence under s. 141 of the Penal Code, it is submitted they do. [WHITE, J.—On this branch of your application, one difficulty is, what am I to quash or affirm if I do interfere under the

¹ 14 East 395.² 1 Q. B. D. 201. *Per* Cockburn, C.J., at p. 205.

section?] The order of discharge may be quashed, and this Court may hear and determine the case itself. The order made by this Court must be made on the merits. [WHITE, J.—Does not that show that the proceeding intended by s. 147 was some final proceeding or order of the Criminal Court?] It is submitted that it only shows that there must be some substantial matter to be adjudicated upon after the transfer.

WHITE, J.—I have, in the course of the argument, stated my views so fully that it is unnecessary to do more than recapitulate the reasons for my decision.

Mr. Phillips, on behalf of the prosecution, applies, on affidavit, for one of two orders—either for a rule under s. 147 of the High Courts' Criminal Procedure Act (X. of 1875), calling on the Magistrate to show cause why these proceedings should not be transferred to this Court for hearing and final determination; or for a *mandamus* to compel the Magistrate to commit on a charge of being a member of an unlawful assembly under s. 141 of the Penal Code.

When the case came before me on the first occasion, I was informed that the Police Magistrate, having heard the evidence, did not disbelieve the facts proved, but thought that they did not amount to the offence with which the defendants were charged, and, therefore, declined to commit them for trial. When I heard that such was the nature of the case, I requested Mr. Phillips to refer me to some authority for my granting his application. He has not brought before me, however, any authority which shows that either the Court of Queen's Bench, or this Court, has ever issued a *mandamus*, or granted a *certiorari*, in a case similar to the present one. He has, indeed, referred me to two cases. *The Queen v. Adamson*¹ and *The King v. The Justices of Kent*,² in which the Court of Queen's Bench granted a writ; in the first case, ordering the Justices to hear and determine a case which they had refused to hear; and in the second case, ordering them to issue a summons, which they had refused to issue. But both these cases, when examined, show that the Court of Queen's Bench does not issue a *mandamus* in such cases unless the inferior Court has actually declined jurisdiction, or has acted under circumstances which amount practically to declining jurisdiction. Now, in this case the Magistrate has not declined to exercise jurisdiction. He has heard the evidence in the case, and has come to the conclusion that no offence under the Penal Code has been committed. He has, in fact, exercised his jurisdiction, and decided the case in favour of the defendants. This is sufficient to dispose of the first branch of Mr. Phillips' application. Quite irrespective, however, of this, I may state that a *mandamus* could not issue in the form asked for; if it issued at all, it would go, not to order the Magistrate to commit, but to order him to hear the case again, and upon a sufficient case being made out, then to commit.

As to the second branch of the application, which is to transfer the case to this Court under s. 147 of Act X. of 1875, I think I am equally without power to deal with the case in the way I am asked to do. That section provides that, "whenever it appears to the High Court that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case, and shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only." The present case is not, I think, within the purview of the section. If I transferred it, I should be doing so, not for the purpose of quashing or affirming a conviction or other proceeding, but for the purpose of hearing the case,

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¹ 1 Q. B. D. 201.

² 14 East 395.

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taking the evidence of the witnesses, and myself determining whether a case for committal had been made out or not. I think the section is not wide enough to enable me to do that, and I should be extending the section beyond the intention of the Legislature if I put it in force to transfer such a case as this.

I can well imagine that the refusal of a Magistrate to commit may now and then result in a grievous failure of justice, but if the Legislature intended to provide for such a case, the Court should have been specifically armed with power to deal with such case. I cannot infer such a power in the absence of express words. I am, therefore, unable to grant this application. I have assumed throughout these remarks that an error of law has been committed, but I have made that assumption only for the purposes of the argument. Considering the law bearing on the application to be such as I have stated, I have thought it unnecessary to hear the affidavit. The refusal to commit is not tantamount to an acquittal, and the prosecution can, if they choose, go before the Magistrate again, though I am by no means saying they ought to do so. The application must be refused.¹

Application refused.

Attorney for the applicant—Mr. Leslie.

ORIGINAL CRIMINAL.

Before Mr Justice Macpherson.

1877.
April 19 & 23.

THE CORPORATION OF CALCUTTA v. BHEECUNRAM NAPIT alias BHEECUN NAPIT.

2 Cal. 290. *High Courts' Criminal Procedure Act (X. of 1875), s. 147—Acquittal—Presidency Magistrates' Act (IV. of 1877), s. 181—The Calcutta Municipal Act (Beng. Act IV. of 1876), ss. 75—79.*

The powers of interference given to the High Court by s. 147 of the High Courts' Criminal Procedure Act were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured.²

APPLICATION under s. 147 of the High Courts' Criminal Procedure Act (X. of 1875). The facts in support of the application appeared from the affidavit of *M. R. Shircore*, formerly License Officer to the Justices of the Peace for the Town of Calcutta, and since the passing of Beng. Act IV. of 1876, License Officer to the Corporation established under that Act. He stated that, under s. 78 of the Act, he had received express authority from the Corporation to assess persons exercising within the town of Calcutta any trade, profession, or calling specified in the third schedule of the Act; that, in pursuance of such authority, he assessed the defendant as the keeper of a shop for the sale of majum, an intoxicating drug, under class 3 of the third schedule to the Act for the year 1876, and, on the 21st November 1876, caused to be served on the defendant a notice, informing him that he had been so assessed, and that, unless he took out a license under that class, and paid the sum of Rs. 25 therefor, he would be prosecuted without further notice; that the defendant having failed to take out a license, a summons was issued from the Court of the Honorary Magistrates for the Town of Calcutta, requiring the defendant to answer the charge of having exercised his trade without having taken out a license as provided by ss. 75 and

¹ See *Corporation of Calcutta v. Bheecunram Napit*, post.

² See *Malcolm v. Gasper*, ante, p. 39.

76 and sch. iii. of Beng. A& IV. of 1876, and having thereby committed an offence punishable under s. 77; and that the said summons came on for hearing on the 16th March 1877, before Baboo *Omesh Chunder Dutt*, one of the Honorary Magistrates of Calcutta, who ordered the defendant to be discharged.

At the hearing it was admitted that no license had been taken out; but it was contended that, as Beng. A& IV. of 1876 came into force on the 1st July 1876, and as the defendant had offered to pay Rs. 12-8, being the proportion of the license-fee, he considered himself liable to pay under the A& for the latter half of 1876, he was not further liable. The License Officer, however, refused to accept a less sum than Rs. 25, the fee for the whole year. The Magistrate was of opinion that the defendant's liability only commenced from the 1st of July 1876, the date of the A& coming into force, and that he should have taken out his license for the latter half of 1876; but, inasmuch as he had offered to pay the fee for that period, and as it appeared he was still willing to pay it, the Magistrate held he had incurred no penalty, and ordered his discharge.

The present application was, accordingly, made either for the transfer of the case to the High Court, or for a *mandamus* to compel the Magistrate to commit.

Mr. *J. D. Bell*, in support of the application, contended that the decision of the Magistrate was erroneous in law, inasmuch as, under Beng. A& IV. of 1876, he had no power to revise the assessment made by the officer authorised to assess, but was bound, on its being shown that the defendant had not taken out a license in the class under which he was assessed, to convict him under s. 77. Under Beng. A& IV. of 1876, the officer of the Corporation was the proper person to make the assessment, and that assessment was final, unless an appeal was brought; here no appeal had been preferred. The cases of *Malcolm v. Gasper*¹ and *The Queen v. The Justices of Middlesex*² were referred to.

MACPHERSON, J.—I am of opinion that s. 147 gives me no power to grant this application. The object, in fact, is to appeal against an acquittal. But s. 147 does not provide for such an appeal. It contemplates the transfer of a case before disposal, or interference on behalf of persons aggrieved or injured by an order of the Magistrate. But there was no intention to give power to interfere in order to set aside an acquittal. If it had been intended to give that remedy, it would, no doubt, have been expressly given, as in the Criminal Procedure Code and in the Presidency Magistrates' A& (IV. of 1877). One section of the latter A& (s. 181) really shows that s. 147 was intended to apply only where there has been a conviction, for it makes notice to the Government prosecutor necessary before an application can be made under s. 147.

Even, however, if I had the power to interfere, I would not exercise it in such a case as this.

Application refused.

Attorneys for the Corporation of Calcutta—Messrs. *Sanderson & Co.*

¹ I. L. R., 2 Calc. 278, *ante*, p. 39.

² 12 L. J. M. C. 36.

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OF CALCUTTA
BHEECUNRAM
NAPIT,
2 Cal. 290.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

1876. IN THE MATTER OF THE PETITION OF CHUNDER NATH SEN AND ANOTHER.¹

Dec. 11.

1877.

Feb. 20.

Superintendence of High Court—24 and 25 Vic., c. 104, s. 15—Order under Criminal Procedure Code (Act X. of 1872), s. 518.

2 Cal. 293.

The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code.

The petitioners were the proprietors of an old established hâ. A new hâ was opened by one Hurronath Das in close proximity to the petitioner's hâ, and was held on the same days. The Assistant Magistrate, having regard to the circumstances of the case as they appeared from the evidence of witnesses taken before him, and from police reports, made an order under s. 518 of the Criminal Procedure Code, whereby the petitioners were prohibited from holding their hâ on the days in question. The petitioners, thereupon, applied to the High Court to have the Assistant Magistrate's order quashed, and the case came on for hearing before *Markby* and *Miller*, JJ. The question of the High Court's jurisdiction to entertain such an application, having regard to the provisions of s. 520 of the Code, had been referred to a Full Bench by *Garth*, C.J., and *Birch*, J., in a case which came before them; but as, upon further enquiry, it was ascertained that the question then referred did not arise, it was not decided. In consequence, however, of the opinion expressed by those learned Judges that the question ought to be referred to a Full Bench, *Markby* and *Birch*, JJ., adopted that course in the present case.

Baboo *Kali Mohun Doss* and *Grija Sunker Masoomdar* for the petitioners.

Baboo *Mohini Mohun Roy* and *Doorga Mohun Doss* for Hurronath Doss.

Baboo *Kali Mohun Doss*.—Although orders under s. 518 are non-judicial, and it has been decided that this Court cannot interfere with them under s. 297, and that they are not appealable, it is submitted that this Court can set them aside under s. 15 of the Charter Act. This Court has interfered in cases in which the Magistrate has not taken the initial steps which are directed to be taken under that section, and also when his order ought to have been under s. 521—*Banee Mudhub Ghose v. Wooma Nath Roy Chowdry*,² *Chunder Coomar Roy v. Omesh Chunder Masoomdar*,³ *Sree Nath Dutt v. Unnoda Churn Dutt*.⁴ [MARKBY, J.—Those cases only amount to this. All the proceedings of a Magistrate are *prima facie* judicial; but the Legislature has expressly provided that certain proceedings shall be considered non-judicial. If a proceeding before a Magistrate is to be brought under the latter class, it must be shown that the circumstances exist which bring it within that class. In what respect are the powers of this Court under s. 15 of the Charter Act greater than its powers under Ch. XXII. of the Criminal Procedure Code?] In *Arzanoollah v. Nazir Mullick*,⁵ your Lordship, while holding that this Court could not interfere under the Criminal Procedure Code with orders made under s. 518, intimated that you might interfere with them upon an application under s. 15 of the Charter Act. [MARKBY, J.—I ex-

¹ Criminal Motion, No. 29 of 1875, against an order of Baboo *K. G. Gupta*, Assistant Magistrate of Backergunge, dated the 26th November 1875.

² 21 W. R. Cr. 26.

³ 22 W. R. Cr. 78.

⁴ 23 W. R. Cr. 34.

⁵ 21 W. R. Cr. R. 22.

pressed no such opinion in that case, nor is there even the slightest indication of such an opinion.] In *Tej Ram v. Harsukh*,¹ the Allahabad High Court held that it could not interfere under s. 15 with an order of a subordinate Court, on the ground that it proceeded on an error of law or of fact; but this Court has gone further, and has held that it will interfere with illegal proceedings.

Pleaders for the opposing party were not called upon.

The opinion of the Full Bench was delivered by

GARTH, C. J.—As the Magistrate states that riot or affray was imminent, and that he considered that the direction he gave tended to prevent, and was likely to prevent, a riot or affray, and as the facts stated by the Magistrate show that there were some grounds for the opinion which he expressed, we think that he had power, under s. 518 of the Criminal Procedure Code, to make the order complained of. This Court, therefore, cannot interfere with it under s. 15 of the Statute 24 and 25 Vic., cap. 104; nor can the Court interfere on any other ground, as by s. 520 the order made is declared not to be a judicial proceeding, however much it may infringe upon what are, or may be (irrespective of this section), the undoubted legal rights of the petitioners.

Petition dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS v. CHARU NAYIAH.²

Criminal Trespass—Infringement of exclusive right of fishery in public river—Penal Code, s. 447.

The unlawful infringement of a right of exclusive fishery in a part of a public river is not an offence which can be brought within the definition of criminal trespass in the Indian Penal Code.

This case was referred to the High Court by the Civil and Sessions Judge of Backergunge, under s. 296 of the Criminal Procedure Code.

The accused, Charu Nayiah, together with several other fishermen, were charged with having thrown their nets and fished in a certain river in which the complainant claimed an exclusive right of fishery. The case was tried in the first instance by the Deputy Magistrate, who convicted the prisoner, Charu Nayiah, under s. 447 of the Indian Penal Code, of criminal trespass, and sentenced him to pay a fine of Rs. 50, or in default to suffer simple imprisonment for one month. The Magistrate of the district upheld the order of the Deputy Magistrate.

The Civil and Sessions Judge referred the case to the High Court, on the ground that the offence alleged to have been committed by the prisoner did not fall within the definition of criminal trespass in the Penal Code. The Sessions Judge, in his letter of reference, called the attention of the High Court to the following cases: *Khetter Nath Dutt v. Indro Jalia*,³ *Sristeedhur Paroo v. Indrobhoosun Chuckerbutty*,⁴ *Kashi Chunder Dass v. Hurkishore Dass*,⁵ *Bhudson Parui v. Denonath Banerjee*.⁶

¹ I. L. R., 1 All. 101.

² Criminal Reference, No. 31 of 1877.

³ 16 W. R. Cr. 78.

⁴ 18 W. R. Cr. 25.

⁵ 19 W. R. Cr. 47.

⁶ 20 W. R. Cr. 15.

1877.

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CHUNDER
NATH SEN,
s Cal. 293.

1877.

May 4.

s Cal. 354.

1877.

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NAYIAH,
2 Cal. 354.

The judgment of the Court was delivered by

MARKBY, J.—We agree with the Sessions Judge in thinking that the prisoner was wrongly committed. It was proved that the prisoner fished in a public river at a place where the prosecutor had the exclusive right of fishery. The Deputy Magistrate held that this constituted criminal trespass; but we do not think so. The law provides that whosoever enters into or upon property in the possession of another with a certain intent is guilty of criminal trespass. But though a fishery is property, we do not think that a man who fishes in a public river enters upon property in the possession of another, though he may have no right to fish there. The river upon which the prisoner entered being a public one was not in the exclusive possession of any one, and a right of fishery is not property of such a nature as that a man who unlawfully infringes that right can be said to enter upon property in the possession of another within the meaning of the section.

Conviction quashed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS v. JOY HARI KOR.

1877.

May 3.

2 Cal. 356.

Lunatic—Security—Criminal Procedure Code (Act X. of 1872), ss. 426, 432—Jurisdiction of Criminal Courts.

The authority of the Criminal Courts over an accused, declared under s. 426 of the Criminal Procedure Code to be of unsound mind, ceases after the transmission of such accused to the place of safe custody appointed by the Local Government, and such authority can only be revived under the circumstances mentioned in s. 432.

On the 29th of June 1869, one Joy Hari Kor, a native of Munshigunge, Dacca, was tried before the Deputy Commissioner of Cachar on a charge of an attempt to commit suicide. The Court found him to be of unsound mind and incapable of making a defence, and procured his transfer to the Dacca Lunatic Asylum. Subsequently, an application was made by a brother of the lunatic, under s. 426 of the Criminal Procedure Code, to the Magistrate of Dacca, offering the security required by the Act, and demanding that the lunatic be entrusted to his care. A reference was made to the High Court asking for the transfer of the case of the lunatic, originally tried at Cachar, to the file of the Magistrate of Dacca, in order that such Court might more conveniently deal with the application made under s. 426 of the Criminal Procedure Code.

The judgment of the Court was delivered by

MARKBY, J.—We think that we ought not to make the order asked for, because, even if the case were transferred to the Magistrate of Dacca, we do not think he would have power to release the lunatic upon taking security. The authority of the Magistrate appears to us to cease when the lunatic is handed over to the care of the Local Government, and it does not revive until the prisoner is sent back to the Magistrate under s. 432 on a certificate that he is capable of making his defence. The Deputy Commissioner can, if he thinks proper, bring the matter to the notice of the Government.

Application refused.

APPELLATE CRIMINAL.

*Before Mr. Justice Markby and Mr. Justice Prinsep.*THE EMPRESS v. HALODHUR POROE AND OTHERS.¹*Penal Code, s. 277—Public Spring—Reservoir.*1877.
May 7.

2 Cal. 383.

The words, "public spring or reservoir," used in s. 277 of the Indian Penal Code do not include a public river. The strewing of branches in a river for fishing purposes held, therefore, to be no offence under that section.

THE accused and six other fishermen were tried summarily under s. 227 of the Criminal Procedure Code by the Deputy Magistrate of Jhanedah, in the district of Jessore, for voluntarily corrupting the Nobogunga river by strewing branches therein for fishing purposes. The offence was laid under s. 277 of the Indian Penal Code. The accused were all found guilty and fined respectively.

The defendants thereupon petitioned the High Court.

MARKBY, J.—I think we must hold that this is not a case under s. 277 of the Indian Penal Code. The water which is said to have been fouled was certainly not the water of a reservoir, nor, in my opinion, was it the water of a "public spring." The judgment of the Magistrate shows that it was the water of the river Nobogunga. I do not think by the use of the words "the water of any public spring" the Legislature intended to include the water of a river. On that ground we quash the order, and direct the fine, if paid, to be refunded.

Conviction quashed.

*Before Mr. Justice Ainslie and Mr. Justice McDonell.*THE EMPRESS v. DEDAR SIRCAR.²*Security for good behaviour—Criminal Procedure Code (Act X. of 1872), s. 505.*1877.
June 19.

2 Cal. 384.

On a requisition from the High Court a Magistrate is bound to state the grounds upon which he fixed the amount of security.

A person from whom security for good behaviour is demanded should have a fair chance afforded him to comply with the required conditions of security.

UNDER s. 506 of the Criminal Procedure Code, the Magistrate of Dinagapore required nine persons to furnish "two respectable and sufficient sureties for their good behaviour, each in the sum of Rs. 1,000," and in the case of another person, Dedar, in the sum of Rs. 5,000. The aggrieved parties petitioned the High Court, whereupon *Markby* and *Prinsep*, JJ., called upon the Magistrate to state the grounds or information on which the amount of the respective securities had been fixed. The Magistrate furnished the information required, but took occasion to question the authority upon which he had been called upon to state the grounds upon which he has fixed the various amounts. The case ultimately came before *Ainslie* and *McDonell*, JJ.

Baboo *Indro Nath Banerjee* for the petitioner.

¹ Criminal Motion, No. 68 of 1877, against the order of *W. G. Deare, Esq.*, Deputy Magistrate of Jhanedah, dated the 5th January 1877.

² Criminal Motion, No. 64 of 1877, in the matter of the decision of *E. V. Westmacott, Esq.*, Magistrate of Dinagapore, dated the 20th January 1877.

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EMPRESS

v.

DUDAR

SURGAR,

2 Cal. 284.

The Junior Government Pleader, Baboo Jugadanund Mookerjee, for the Crown.

The judgment of the Court was delivered by

AINSLIE, J.—We think that, under the circumstances stated by the Magistrate, it is not desirable that the Court should interfere in the present case. In the 4th paragraph of his letter the Magistrate expresses a doubt whether the High Court is competent to call upon him to state the grounds upon which he fixed the amount of security. With reference to this, we desire to call his attention to a ruling of the Madras High Court, at p. 450 of Mr. *Prinsep's* edition of the Code of Criminal Procedure,¹ an expression of opinion, in which we entirely concur. It is there said, "The imprisonment is provided as a protection to society against the perpetration of crime by the individual, and not as punishment for a crime committed, and being made conditional in default of finding security, it is only just and reasonable that the individual should be afforded a fair chance at least of complying with the required conditions of security." If the Magistrate declined to furnish a statement of the grounds upon which he fixed the amount of security, this Court would have been unable to say that he had fixed it on just and reasonable grounds, and probably the result would have been that we should have felt bound to modify the order as *prima facie* unreasonable and unsupported by anything before us.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

1877.

Jan. 22.

THE EMPRESS v. DWARKANATH CHOWDHRY AND ANOTHER.²

2 Cal. 899.

Stamp Act (XVIII. of 1869), s. 29, and Sch. II., art. 38.—Instrument of Transfer—Prosecution by Collector—Intention to evade payment of stamp-duty.

The accused was prosecuted under Act XVIII. of 1869, s. 29, for executing a document on insufficiently stamped paper. The document recited that, "whereas A and B have sold to me 2 gundas 3 cowries of land under a kobala, dated the 9th of Jeyt 1283, in lieu of a consideration of Rs. 695, and whereas I have returned to the vendors in all 4 cottas of land worth about Rs. 25, and whereas in lieu of the said land the said vendors have given me 4 cottas of zerait land held by them, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me the purchaser; hence I have executed this chitti by way of conveyance or deed of exchange, which may be of service when required." This document bore a stamp of eight annas, and it was executed only by the accused, and presented by him for registration. *Held*, that the document was an instrument of transfer within the meaning of art. 38, Sch. II., Act XVIII. of 1869. *Held*, also, that a Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed to consider whether a person prosecuted under s. 29, Act XVIII. of 1869, had any intention to defraud by evading payment of stamp-duty.

THE accused, Dwarkanath Chowdhry, employed the accused, Chotay Lall, a mooktear and revenue agent of the Darbhanga Court, to prepare for him a document which was to be registered in the Darbhanga Sub-Registrar's office. Chotay Lall, accordingly, prepared the document, and Dwarkanath executed

¹ 4 Mad. H. C. Rep., App., 44.

² Reference in Criminal Motion, No. 1112 of 1876, by Mr. Justice Ainslie and Mr. Justice Morris, dated the 6th September 1876.

it, and presented it for registration. The document bore a stamp of eight annas. It recited that "whereas Inderman Chowdhry and Mon Chowdhry, sons of Baktwar Chowdhry, residents and shareholders and maliks of mouzah Pauchole Kris, pergunnah Ramchowand, have sold to me 2 gandas 3 cowries, being a quarter share of 11 gandas 2 cowries of the entire 16 annas of a certain estate under a kobala dated 9th Jeyt 1283, F. S., in lieu of a consideration of Rs. 695 ; and whereas out of that share covered by the said deed of sale I have returned to the vendors in all 4 cottas of land worth about Rs. 25 ; and whereas in lieu of the said land the said vendors have given me 4 cottas of zerait land held by them situated in mouzah Pauchole Kris, pergunnah Ramchowand aforesaid, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me the purchaser. Hence I have executed this chitti by way of awazanama, or deed of exchange, which may be of service when required." The document was signed only by Dwarkanath Chowdhry. The document, being found to be insufficiently stamped, was impounded by the Sub-Registrar, and sent by him to Mr. A. P. Macdonell, the Officiating Magistrate, in his capacity of Collector, by whom the accused were prosecuted under s. 29 of the Stamp Act, XVIII. of 1869. The defence of Chotay Lall was, that he merely copied out the document from a draft, and was unaware at the time that the paper was insufficiently stamped, and that he could not be convicted under s. 29. Dwarkanath stated that he did not know what stamp was necessary, and that he had no intention to defraud the Government.

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2 Cal. 399.

The Deputy Magistrate, Baboo Gobind Mohun Ghose, acquitted Chotay Lall on the ground that he could not be legally convicted under the section. As to Dwarkanath, he referred to the Government order, 2857 of 4th December 1875,¹ and held that proof of fraudulent intention was unnecessary, and the offence was complete when the terms of s. 29 were contravened, and it was no defence to say there was no intention to evade the law. Dwarkanath was, accordingly, convicted and sentenced to pay a fine of Rs. 20. The Officiating Magistrate was of opinion that Chotay Lall had been illegally acquitted, and that he ought to have been found guilty of 'making' the document under s. 29 of Act XVIII. of 1859. He, therefore, referred the case to High Court.

The case came before Ainslie and Morris, JJ., who referred it for the orders of the Chief Justice, with the following remarks :—

AINSLIE, J.—The Officiating Magistrate of Darbhanga (who is also the prosecuting Collector) has made a reference to this Court in respect of the acquittal of Chotay Lall, which he holds to have been illegal. As to this it is sufficient to say that, unless the Government sees fit to appeal against the sentence of acquittal under s. 272 of the Code of Criminal Procedure, this Court cannot interfere in any way.

The record has been sent up, and on inspecting it several questions of considerable importance appear to arise; and, as the propriety of the conviction of Dwarkanath depends upon the solution of the first two of these questions, it appears to us necessary to consider them.

In the first place, there is the question whether the instrument on which this prosecution is founded is an instrument of transfer within the meaning of art. 38, Sch. II. of the Stamp Act, or whether that article is not restricted to

¹ 15 B. L. R., Rev. Cir., 59.

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instruments by which a complete transfer binding on all parties thereto is effected. In the present case the instrument is only executed by Dwarkanath Chowdhry and not by Inderman and Mon Chowdhry, the other parties to the alleged exchange, nor are the latter in any way bound by it.

Secondly, there is the question whether a Magistrate is not bound to consider the intention of the persons prosecuted. There is no evidence against Dwarkanath of an intention to defraud the Government, and he states in his answer that he had no such intention, and believed that the instrument was properly stamped as a conveyance of property of less value than Rs. 50 (the value stated in it is Rs. 25). The Deputy Magistrate does not base the conviction on an inference of guilty intention deduced by himself from the facts, but on a ruling contained in an order of the Government of Bengal, No. 2857, dated 4th December 1875,¹ to the effect that the question of fraudulent intention is to be considered and determined by the Collector and not by the Magistrate.

Thirdly, there is a question (which, however, rather arises upon the reference in respect of Chotay Lall, but which it would be well to express an opinion upon) whether a mooktear who writes out a fair copy of an instrument on a stamped paper of insufficient value can be said to 'make' the instrument within the meaning of s. 29 of the Act.

Considering the importance of the questions arising in this case, we think it desirable that it should be considered (as if it were a reference from the Board of Revenue under s. 41) by a Bench of at least three Judges.

Let this be submitted to the Chief Justice for orders, and notice of this order be given to the Government Pleader.

The case came on before a Bench of five Judges.

The Legal Remembrancer (Mr. *H. Bell*) for the Crown.—It is not necessary, to support a conviction under the Stamp Act, that the prosecution should show that the accused had an intention to evade the law. The offence under s. 29 of Act XVIII., 1869, is complete irrespective of intention: see Maxwell on Statutes, p. 80. There are many instances in which a guilty intention is not a necessary ingredient in the offence: offences, for instance, under the Cotton Frauds Act—*Reg. v. Premji Bhagvan*,² or under the English Adulteration Act—*Roberts v. Egerton*,³ and under the Statute for the protection of those entitled to shoot game—*Watkins v. Major*.⁴ For the mitigation of the fine the question of intention can of course be considered, but it is for the accused to show that he had no intention to evade the law.

The opinion of the Court was delivered by

GARTH, C.J.—On the first question raised in this reference, we are of opinion that the instrument on which this prosecution is founded is an instrument of transfer within the meaning of art. 38, Sch. II. of Act XVIII. of 1869.

On the second question we hold that a Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider the question whether a person prosecuted under s. 29 of the Stamp Act had an intention to defraud the Government by using a stamp of less value than that required by law.

¹ 15 B. L. R., Rev. Cir., 59.

² 10 Bom. Rep. 295.

³ L. R., 9 Q. B. 494.

⁴ L. R., 10 C. P. 662.

A Collector has power to prosecute in every case coming within the provisions of s. 24, but he is not to do so unless he shall have reason to think that there has been an intent to evade payment of stamp-duty. If he does prosecute, the Magistrate is bound, under the terms of s. 29, to record a conviction, provided that it is proved that there has been a making, &c., of an unstamped or insufficiently stamped instrument ; but the amount of fine to be imposed is left altogether to the discretion of the Magistrate, a maximum limit only being fixed by the law. It is impossible for the Magistrate to exercise any discretion in fixing the fine, or to say what fine ought in any particular case to be imposed, unless he is at liberty to determine whether the person prosecuted has used no stamp or an insufficient one from a *bond fide* mistake, or from carelessness, or with intent to evade payment of the stamp-duty.

It may be true that the Collector is not bound to offer any evidence of intention, or even to state the reasons which induced him to prosecute ; but the question of intention is, nevertheless, one which the Magistrate is bound to consider, and he must hear the statement of the accused and any evidence which he may offer in reference to it.

A Collector may have formed his conclusion on insufficient grounds, or have ordered a prosecution without due consideration ; and the Magistrate is not bound to be guided, so far as the question of penalty is concerned, by the mere fact of the prosecution having been instituted. The present case shows that a person who enquires as to the proper stamp to be affixed to an instrument may be misled, and so become liable to prosecution even if he makes his enquiry at a place where he may confidently expect correct information : for the registering officer who sent this document to the Collector has himself made a mistake as to the proper stamp to be used. He certified it as liable to a 4-rupee stamp, whereas the stamp prescribed by art. 38, Sch. II., is Rs. 16. Had the accused enquired at the registry office, and used a 4-rupee stamp, he would still have been liable to conviction on prosecution ; but if a Collector were so unreasonable as to prosecute in such a case, a Magistrate would clearly be bound to consider the facts put forward by the defendant, and to give effect to the defence of *bond fides* by discharging the accused with a nominal fine.

A *bond fide* mistake may not be a *complete* defence, even if proved beyond a doubt ; but it cannot be said that it is *no* defence.

As it appears that the judgment of the Deputy Magistrate was arrived at without duly considering the merits of the case before him, so much of that order as imposes a fine must be quashed. The Legal Remembrancer has stated that the Government has determined that the fine realized from Dwarkanath Chowdhry shall be refunded, whatever the merits of this case ; it is, therefore, unnecessary to direct the Deputy Magistrate to reconsider his order.

The sentence passed upon Dwarkanath Chowdhry on the 4th July 1876, by the Deputy Magistrate of Darbhanga, is set aside, and it is ordered that the fine of Rs. 20 imposed on him, if realised, be refunded.

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APPELLATE CRIMINAL.

*Before Mr. Justice Markby and Mr. Justice Prinsep.*THE EMPRESS *v.* DONNELLY.

IN THE MATTER OF THE PETITION OF DONNELLY.

1877.

June 16, 18,
and 21.

2 Cal. 405.

Criminal Procedure Code (Act X. of 1872), s. 215—Discharge of Accused—Revival of Proceedings—Evidence—Magistrate—Competent Witness.

It is illegal and *ultra vires* on the part of a Magistrate to revive before himself criminal proceedings against an accused who has already been discharged under s. 215 of the Criminal Procedure Code where no further evidence is procurable than that which was before the Court on the first occasion. *Per* MARKBY, J.—When the discharge has been improper, the only proper course open to a Magistrate is to report the case to the High Court for orders, and that Court, if of opinion that the accused has been improperly discharged, will order a re-trial.

Per Curiam.—A Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. *Per* MARKBY, J.—Where in such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad. *Per* PRINSEP, J.—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient, if believed, to support the conviction.

This being a proceeding under s. 297 of the Criminal Procedure Code, the Court refused to go into the evidence.

THE facts of this case were as follows: On the 7th of April, Baboo Hem Nath Bose, the post-master of Howrah, preferred a complaint to the Magistrate, that a letter bearing an obliterated or twice-used stamp had been detected among the letters posted in his district. The suspicious letter was handed over to the Magistrate, who on the following day took the evidence of the post-master and some of his subordinates. On the 13th April, Mary Donnelly, the writer of the letter, appeared on a summons, and was examined by the Magistrate. She acknowledged that the letter was in her handwriting, but denied having affixed the stamp; in explanation she stated that she had given a cook named Ismail two pice to purchase a stamp and put upon the letter. Robert Inglis, the step-father of the accused, was also examined. The District Superintendent of Police, under the direction of the Magistrate, made a further investigation, and examined afresh the accused and her step-father; two young brothers of the accused were also examined, as also the cook Ismail, who asserted that the accused has never given him any letter to post. By a letter dated the 28th of April, Mr. *Pellew*, the Magistrate, informed the post-master that, on a consideration of the evidence as taken by him, and also from the facts stated in the police-report, he considered it hopeless to bring home the case to the accused, and he thereupon discharged her. The discharge-order was endorsed at the back of the police-report. On the next day, the post-master, in reply to the Magistrate's letter, called his attention to the fact that the word 'stamped' had been written across the suspicious stamp, and asserted it as his opinion that the woman herself knowingly used the defaced stamp, and concluded by asking the Magistrate to try the case. On receipt of this letter, Mr. *Pellew* issued a warrant for the arrest of the accused, and on the 4th of May began a second proceeding against the accused. So much of the evidence of the post-master as is material was as follows: "I saw clear marks of defacement, not by the stamp of my office. I observed also the word 'stamped' written over the stamp. It appears to be in the same handwriting as the address. I noticed this at the time I first saw the letter. I did not mention this in my deposition, because I was not asked by the Court. I brought

the letter personally to the Magistrate, and did not submit a written report. I mentioned the fact then that the word 'stamped' was written over the stamp." The former witnesses from the post-office were again examined as in the first proceeding. Mr. *Pellew*, the Magistrate, also examined himself as a witness. His deposition was as follows:—

"I recognize this letter: it was given me by the post-master of Howrah on the 6th or 7th April last. He personally showed me the defaced stamp, and spoke to me a few minutes on the subject. I ordered a prosecution, and took up the case myself. I opened the letter, and took evidence as Magistrate. I then referred the matter to the police. Mary Donnelly, the present defendant, was summoned and made defendant after the police-inquiry. Believing that there was no evidence to prove who affixed the defaced stamp, I discharged Mary Donnelly on the 27th of April. The post-master then wrote a letter, No. 142, of the 29th April, pointing out that the word 'stamped' was written over the stamp, and I in consequence took up the case again. The letter has never been out of my custody since the 6th or 7th of April when first made over to me, except to show parties in the course of the trial. It has been always left locked up in my box. I don't recollect the post-master pointing out the word 'stamped' written over the stamp, but he may have done so."

The cook Ismail was also examined, who repeated his previous story. The Magistrate thereupon drew up a charge against the accused under s. 262 of the Indian Penal Code, and, having taken the defence, and examined the witnesses produced on her behalf, found her guilty of the charge, and sentenced her to two months' rigorous imprisonment. The accused appealed to the Sessions Judge of Hooghly, who, however, confirmed the decision and sentence of the Magistrate. On an application by the petitioner to the High Court, under s. 297, the record of the case was sent for from the Court below.

Mr. *Jackson* for the petitioner.—There is no evidence in this case to uphold the conviction. The conviction is also bad on the ground that the Magistrate could not appear as a witness in a case in which he was sole Judge. In *Queen v. Mukta Singh*,¹ *Norman, J.*, has collected the English cases on this point, which are all in favour of this contention. The English law on the point only goes to the extent of permitting a Judge to be a witness in a case where he is not the only Judge trying the case; *Bacon's Abridgment*, Tit. Evidence, p. 206; see also *Hackers' case*.² The Magistrate further had no power to revive the prosecution against the petitioner after she had been discharged. Ss. 142 and 215 of the Criminal Procedure Code may be supposed to confer this power; but ss. 295 and 296 clearly shew that it was the intention of the Legislature to reserve the exercise of this power to the High Court alone. The point has already been decided in *in re Mohesh Mistree*.³ *Jint Sahoo v. Bheekon Roy*⁴ may be referred to as supporting the opposite contention, but there *Couch, C.J.*, points out that the Magistrate had, on the second occasion, some fresh evidence before him, which is not the fact in this case; see also *Kistoram Mohara v. Anis*.⁵

The Legal Remembrancer (Mr. *H. Bell*, with him the Junior Government Pleader, Baboo *Juggadanund Mookerjee*) for the Crown.—In this case there was no necessity for the Magistrate to have made himself a witness. He might have taken judicial cognizance of every fact stated by him as witness. The evidence

¹ 4 B. L. R., A. Cr., 15.

² Kelyng's Rep. 12.

³ 20 W. R. Cr. 47.

⁴ I. L. R., 1 Cal. 282.

⁵ 18 W. R. Cr. 39.

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is immaterial, and there is sufficient on the record independently of the Magistrate's evidence to support the conviction. The action of the Magistrate cannot, therefore, be a ground for reversing the orders of the lower Courts; see s. 167 of the Evidence Act. *Hurpurshad v. Sheo Dyal*¹ and *Kishore Singh v. Gonesh Mookerjee*² are cases in favour of the power of a Judge to examine himself as a witness. An American case, *Ross v. Buhler*,³ referred to by Taylor in his work on Evidence, p. 1173, seems to decide that a sole Judge cannot depose as a witness, but the author does not approve of that case; see also Best on Evidence, 3rd ed., 260. [MARKBY, J.—Mr. Best is there referring to trial by jury, and not to cases where a Judge tries the facts.] In England and America there would be no appeal from the facts. In this country appeals are permitted; and therefore the same objection does not apply. Under s. 118 of the Evidence Act, a Judge is not precluded from giving evidence—*Queen v. Tarapersaud Bhuttacharjee*.⁴ [MARKBY, J.—There is no reason at all given for that decision.] The decision of *Norman, J.*, in *Queen v. Mukta Singh*,⁵ distinctly holds that a Judge is a competent witness, and can give evidence in a case tried before himself. *Queen v. Bholanath Sen*⁶ does not apply, because there it was held that the Magistrate had a personal interest in the case tried. No authority has been shewn making it imperative that the Magistrate should have fresh evidence before him before he can try a case a second time. The Magistrate was competent, under s. 464, to withdraw the order of discharge. The evidence on the second proceeding was given much more in detail; there was, therefore, fresh evidence sufficient to bring the case within *Hari Singh v. Danish Mahomed*.⁷ Fresh evidence was not absolutely necessary—*In re Ramjoy Mozoomdar*.⁸ *In re Mohesh Mistree*⁹ does not apply; all the Court there ruled was that a Magistrate cannot order a subordinate Magistrate to proceed with a case under s. 142; see also *Queen v. Tilkoo Goala*,¹⁰ *Jint Sahoo v. Bheekon Roy*,¹¹ *Kistoram Mohara v. Anis*,¹² *Sidya bin Satya*.¹³ The record shows that the alleged first and second proceedings of the Magistrate were in fact one proceeding—the second proceeding was only a continuation of the first.

Mr. Jackson in reply.

Cur. adv. vult.

The following judgments were delivered:—

MARKBY, J. (after shortly stating the proceedings before the Magistrate continued):—The petitioner appealed to the Sessions Judge of Hooghly, who on the 28th of May affirmed the conviction and sentence. The petitioner then applied to this Court to set aside the conviction as illegal: first, because the Magistrate had no power to revive the prosecution against the petitioner after she had been discharged; and, secondly, because the Magistrate could not

¹ L. R., 3 Ind. App. 259, 286.

² 9 W. R. 252.

³ 2 Martin, N. S., 312.

⁴ N. A. Rep., 1857, Pt. II., p. 83.

⁵ 4 B. L. R., A. Cr., 15.

⁶ I. L. R., 2 Cal. 23, *supra*, p. 23.

⁷ 20 W. R. Cr. 46.

⁸ 14 W. R. Cr. 65.

⁹ I. L. R., 1 Cal. 282.

¹⁰ 8 W. R. Cr. 61.

¹¹ 18 W. R. Cr. 39.

¹² 20 W. R. Cr. 47.

¹³ Unreported, see Prinsep's Cr. Pro. Code, 5th ed., 163.

appear as a witness in a case in which he was the sole Judge. On the argument of the case, it was also contended that there was no evidence which would support a conviction.

As regards the last point, we intimated, at the close of the argument for the petitioner, that there was some evidence. Of course, we express no opinion whatever as to the sufficiency or otherwise of that evidence; that is a matter into which this Court does not enter upon an application of this kind, nor is it desirable to comment upon this evidence; but I may say, with reference to an argument used by Mr. *Jackson*, that, in my opinion, that evidence does not consist solely of the comparison of handwriting made by the Magistrate.

I proceed now to examine the grounds of law taken in the petition.

With regard to the power of the Magistrate to revive proceedings against an accused person who has been discharged under s. 215, the law provides by that section that a discharge under it is not equivalent to an acquittal, and does not bar the revival of the prosecution for the same offence. By s. 142, also, any Magistrate duly empowered in any case which he is competent to try or commit for trial may, without any complaint, take cognizance of any offence which he suspects to have been committed, and may issue process to compel the suspected persons to appear. These two sections appear, no doubt, to leave the Magistrate, if properly qualified, free to revive any case he likes, whether the discharge be illegal, whether it be improper upon the evidence, whether it appears to the Magistrate that another offence has been committed than that charged, or whether fresh evidence which was not previously forthcoming has come to his knowledge. And the Magistrate could, under the sections, revive not only any case heard by himself, but any case heard by another Magistrate subordinate to himself; and, having revived it, he could, under s. 44, send it back to the Magistrate who ordered the discharge for enquiry or trial. And this is precisely the same where there is a discharge under s. 195 upon an enquiry by a Magistrate with a view to commitment to the Sessions or to the High Court. For all cases of discharge, therefore, the Magistrate would, under the section, appear to have the most absolute and uncontrolled power of reviving the proceedings against the accused.

That this, however, was not the intention of the Legislature is obvious from the provisions of ss. 295 and 296. A special proceeding is provided by s. 295 for the case in which an order (which, in my opinion, includes an order of discharge) is found to be illegal. All that the Magistrate can then do is to report the proceeding for the orders of the High Court. So by s. 296, if it appears to the Magistrate that some other offence has been committed than that of which the accused person has been discharged, he may direct the subordinate Magistrate to enquire into that offence; but this he can only do in a case which, when before that Magistrate, was a sessions case. If the Magistrate at the same time possessed the unlimited power of reviving proceedings in all cases of discharge, and sending them down to his subordinates for further enquiry, which ss. 44, 142, 195, and 215 at first sight appear to give him, these provisions would be wholly meaningless.

It is this difficulty of reconciling the provisions of ss. 295 and 296 with the extensive powers conferred by the earlier sections that seems to me to render it necessary to put some restriction upon the literal meaning of those earlier sections; and, taking the whole Act, the only conclusion I can come to is, that the Legislature did not intend that the Magistrate should, as a general rule, have any power at all of revision over the proceedings of subordinate Magis-

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trates in cases of discharge. S. 296 gives that power in one special case only. If a Magistrate, therefore, thinks a discharge illegal or improper, it must be brought before the High Court; in the first case, by a report of the Magistrate under s. 295; in the second case, by an application under s. 297; when the High Court will, if the discharge was improper, order the accused to be tried or committed for trial. On the other hand, if there is any fresh evidence forthcoming, which was not before the Court when the first enquiry was held, then there is no necessity to revive the previous proceedings at all, and the Magistrate can proceed without any reference to the High Court. This seems to me to be a reasonable construction of the Act, and it is the only way in which I can reconcile all its provisions. That distinction was, I believe, first suggested in a reference by the Officiating Sessions Judge of Sylhet in the case *Hari Singh v. Danish Mahomed*.¹ The learned Judges of this Court do not there say whether they approve of that distinction, but they affirm the order of the Magistrate who had remanded the case for a fresh enquiry upon the ground of there being "further evidence procurable which was not before the Court when the order of discharge was given," and not as the Sessions Judge points out on the ground of there being a "failure of justice." But in a subsequent case² three Judges of this Court held that a Magistrate could not, of his own motion, revive a case where the accused had been discharged without examining all the witnesses for the prosecution. I was a party to this judgment, and of course it was not our intention to overrule the decision of the late Chief Justice and Mr. Justice *Glover* in 20 Weekly Reporter. We could not do so; and it seems to me that these decisions are reconcilable in the way I have mentioned. I, therefore, hold that a Magistrate cannot, by his own order, revive proceedings where no further evidence is procurable which was not before the Court on the first occasion.

The only question, therefore, is, whether in this case there was, on the second occasion, any such further evidence. I think there was not. Indeed, I confess I have great difficulty in understanding what the first evidence is said to be. The petitioner was charged with using a defaced stamp; the envelope of the letter upon which the stamp was, was before the Court on the first occasion, and it is not denied that the stamp was also before the Court on that occasion; but it is said that a certain word, which was at that time written partly upon the stamp and partly upon the letter, was not before the Court as evidence. How that is possible I really cannot understand. I agree with the Sessions Judge entirely that this evidence was before the Magistrate on the first occasion, but its effect had been overlooked.

As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this. Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence?

It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been found, and no authority of any Judge or text-writer has been cited in support of such a proposition. The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment

¹ 20 W. R. 46.² I. L. R., 1 Cal. 282, *supra*, p. 13.

of other persons, exercising similar judicial functions, sitting with him at the same time (per *Norman, J.*, in *Queen v. Mukta Singh*).¹ No case in England is cited in which even under these circumstances a Judge has been called as witness in a trial on which he was sitting later than the trial of Lord Stafford.

Two cases are cited as having occurred in this country—one the case of *Queen v. Tarapersaud Bhuttacharjee*,² and the other the case before Mr. Justice *Norman* above referred to. That learned Judge went into the matter on that occasion very fully; and, having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down as the result of the English cases. He is very careful to point out that, in the case before the late Nizamut Adawlut, the trial took place with the assistance of a Muhammadan Law Officer, who might have given a futwa acquitting the prisoner, and that if he had done so the Judge who gave that evidence could not have convicted him, but could only have referred the matter to the Nizamut Adawlut. Then he says at p. 19: "Prior to the enactment of the Code of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Muhammadan Law Officer, it would seem from the case cited, and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trial with assessors, a different species of check was introduced. The assessors give their opinions, which the Judge is bound to record. The Judge must transmit an abstract of a trial to the High Court, and on perusal of such abstract the Court may call for the record."

The learned Judge seems, therefore, to think that the presence of the assessors brings the case within the rule which he had derived from the English cases. Whether this is quite correct is, I think, open to some question; and it is not quite consistent with what the learned Judge had himself asserted in an earlier part of his judgment. But that appears to me to have been the view at which the learned Judge ultimately arrived.

In the absence, therefore, of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hands. He has no one to restrain, correct, or check him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding; no one dare venture to defend it. The Judge would therefore give his evidence without the usual safeguards against false testimony—a position which has been over and over again repudiated.

It was contended by Mr. *Bell* that the appeal to a higher Court was a check upon the Judge. To some extent it may be so, but not a sufficient one. The Appeal Court would deal with the evidence including that of the Judge. But in my opinion the evidence of the Judge being practically incapable of challenge or contradiction ought not to be even taken. Moreover, a Court of Appeal is

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¹ 4 B. L. R., A. Cr., 15.² N. A. Rep., 1857, Pt. II., p. 83.

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not a check in the same way that Judges sitting together are a check upon each other. I am, therefore, of opinion that a Judge who is a sole Judge of law and fact cannot give his own evidence, and then proceed to a decision of the case in which that evidence is given, and that, upon this ground, also, the conviction is bad ; but as Mr. Justice *Prinsep* has some doubts about quashing the conviction on this ground, it is better that our judgment should proceed upon the first ground only.

The conviction and sentence are set aside. No application has, however, been made to us to order further proceedings, and we do not consider it necessary, of our own motion, to direct any further proceedings against the accused.

PRINSEP, J.—It is unnecessary to repeat the facts connected with the case now before us, as they have been already fully stated.

It is sought to set aside the conviction passed by the Magistrate on three grounds : first, because the evidence is not sufficient in law ; secondly, because the Magistrate, being a witness for the prosecution, is not competent to try it as the sole Judge of law and fact ; thirdly, because, having discharged the accused under s. 215 of the Code of Criminal Procedure, the Magistrate was not competent to revive the proceedings and try the accused.

On the first point, I entirely agree with my learned colleague that there is evidence which, if believed, is sufficient for the conviction of the petitioner. That evidence, as pointed out by Mr. Justice *Markby*, does not consist solely of a comparison of handwriting, and I am not prepared also to assent to the proposition contended for by Mr. *Jackson*, that to establish an inference from a comparison of handwriting the evidence of an expert is absolutely necessary. Of course, it is most desirable, but to lay this down as an absolute rule would, in nearly every case in this country, exclude such evidence, because experts are not procurable. The powers given to Appellate Revisional Courts are sufficient to correct any misapplication of such evidence.

But, before leaving this part of the case, I desire to state emphatically that I express no opinion on the value of that evidence or on the guilt or innocence of the petitioner.

On the second point, I consider that the authorities quoted in the judgment of Mr. Justice *Norman* in *Queen v. Mukta Singh*¹ are conclusive, that one who is sitting as a sole Judge is not competent also to be a witness. No case has been quoted in which this has ever occurred, and the inexpediency of such a rule, as well as its possible evil results, are too obvious to call for explanation. The case cited by Mr. *Bell* does not establish this rule, or go further than to state that a Judge is not competent to state in the judgment or to consider facts which can only come from the mouth of a witness.

But in the present case I am not inclined to set aside the proceedings on this ground, because it seems to me that Mr. *Pellew's* evidence was immaterial, and that, if it be put out of consideration, there is evidence which, if believed, would be sufficient for the conviction of the petitioner.

On the last point as to the competency of a Magistrate to revive a case after he has passed an order of discharge under s. 215, I find that several decisions of this Court restrict this power to cases in which there may be some fresh evidence forthcoming. Had this point been before us for the first time, I should not be disposed to question a Magistrate's competency, provided that he is in-

¹ 4 B. L. R., A. Cr., 15.

vested with the power described in s. 142 ; but I do not feel justified in the present case in adhering to that opinion, which is opposed to that of so many Judges of matured experience.

That there is no evidence which can properly be called fresh evidence is to my mind clear. The Magistrate considers that, on the definition of 'evidence' and 'document' in the Evidence Act, he is entitled to consider the word 'stamped' written across the obliterated stamp to be fresh evidence, because his attention was not directed to it ; but I find it impossible to disconnect the word 'stamped' from the actual stamp which admittedly was in evidence, or to hold that, anything which a Magistrate or Judge may accidentally overlook, and which it is difficult to understand how he could not have seen, can be deemed to be *fresh* evidence when his attention is especially directed to what is practically a part of it. In this case, also, the Magistrate's own statement as a witness leaves it in doubt whether his attention was not drawn by the post-master to the word 'stamped.'

Then the statement of the cook, recorded only after the order of discharge, is, it is contended, fresh evidence. But even if it was not previously recorded, it is clear that the nature of that statement was known to the Magistrate from the police-report on which he discharged the accused. He alludes to that statement in his letter to the post-master, reporting the result of the case, and he did not think it necessary to examine that witness, who had been bound over by the police to appear before him.

Under these circumstances, I concur in quashing the conviction and proceedings taken subsequent to the order of the Magistrate discharging the accused, holding that, under the rulings of this Court, the Magistrate was not competent to revive the case ; and I further am of opinion that we should not, on our own motion, direct the proceedings to be revived.

The order will render it unnecessary to consider the propriety of the sentence passed.

Conviction quashed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

EMPRESS ON THE PROSECUTION OF JODOONATH GHOSE *v.*
BROJONATH DEY.¹

Beng. Act III. of 1864, ss. 2, 10, 11, 13, 15, 16, 57, and 58—Public Highways—Municipal Commissioners, power of, to close, or divert a public highway—Calcutta Municipal Act (Beng. Act VI. of 1863), ss. 109, 110.

Beng. Act III. of 1864, which vests public highways in Municipal Commissioners for the purposes of the Act, does not, by so vesting them, give power to the Municipal Commissioners, nor *à fortiori* to the Vice-Chairman alone, to stop up or divert such public highways.

THE facts of this case were as follows :—Within the jurisdiction of the Municipal Commissioners of the town of Serampore there was formerly a lane, called the Shudgoppara Lane, leading to the River Hooghly. This lane ran through the garden of one Brojonath Dey, the defendant in this proceeding. In the year 1869 this lane was stopped by persons acting on behalf of the defendant ; these

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¹ Revisional Proceedings from an order of *H. Haggard, Esq.*, Magistrate of Serampore, under s. 521 of the Code of Criminal Procedure.

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persons were convicted under the Indian Penal Code of obstructing a public highway. Proceedings were subsequently taken by the defendant in the Civil Courts with a view of establishing that the road was not a public highway, but these proceedings were unsuccessful; and in the present case it was admitted that the lane in question was a public highway. The litigation in the Civil Courts ended in 1871. In August 1874, the present defendant presented a petition to the Municipal Commissioners of Serampore, which again sought to open the question whether the lane was a public highway, and also prayed for permission to close it under such conditions as the Municipal Commissioners might consider reasonable. On the back of the petition was written the following order, dated the 31st of December 1874:—

“Application granted on condition that the applicant make, at his own expense, a road ten feet wide, round the south and west side of his garden, so as to form a thorough communication between Distillery and Napitpara Lane.”

This order was signed by J. E. B. Jeffery. It was admitted that Mr. Jeffery was at that time Vice-Chairman of the Municipality, and it was not contended that this order was not made by him in that capacity. Prior to January 1876, the said road was completely stopped up, and another road to the south and west of the defendant's garden was made. There was some doubt, however, whether this new road was really a new road, or whether it existed before, and was only widened. Applications, respectively made to the Municipal Commissioners and to the Chairman of the Municipality, who was also the Magistrate of the district, against the order of Mr. Jeffery, the Vice-Chairman, were refused on the ground that neither the Chairman nor the Municipal Commissioners had any power to interfere with the order of the Vice-Chairman. The matter was then, under s. 521 of the Code of Criminal Procedure, taken before the Joint-Magistrate of Serampore, who, in October 1876, called upon the defendant to show cause why the obstruction to the Shudgoppara Lane should not be removed. The Joint-Magistrate ultimately held that the order of Mr. Jeffery was not illegal, and he refused to interfere further. The case then came before the High Court under s. 297 of the Code of Criminal Procedure, the question of law raised being whether the Joint-Magistrate was right in holding the order of Mr. Jeffery to be legal.

The Municipal Commissioners were unrepresented.

Baboo *Troilokynath Mitra* for the complainant.—Under Beng. Aft III. of 1864, the Vice-Chairman of the Municipality had no authority to sell, divert, or close a public road. S. 13 only gave power to the Commissioners to sell land required for the purposes of the Aft, and, therefore, did not apply to this case. Although the Commissioners had powers reserved to them under s. 58 of the Aft to make alterations in fences, pavements, or posts of a highway, they could not obstruct, or sanction an obstruction of, the public roadway. The 10th section of the District Municipal Aft (Beng. Aft III. of 1864), vesting the streets in the Commissioners, is in words precisely similar to s. 109 of the Calcutta Municipal Act (VI. of 1863). S. 110 of the Calcutta Act, however, gives the Commissioners express power to divert and close up streets; it may, therefore, be assumed that the Legislature considered that, without such express permission, the Commissioners had no such power conferred on them by the words of s. 109. The District Municipal Act of 1864 does not contain such express permission as is found in s. 110 of the Calcutta Act of 1863. This omission was, no doubt, designedly made, and shows an intention to withhold such powers from District Municipal Commissioners. The same distinction is preserved in the Calcutta Municipal Consolidation Act (Beng. Act IV. of 1876) and the

Bengal Municipal Act (Beng. Act V. of 1876). The Commissioners could not, therefore, be supposed to have the power to close a road altogether without such express permission. Ss. 12 and 15 of Beng. Act III. of 1864 give no power to the Commissioners to substitute one public road for another. Under s. 213 of the Bengal Municipal Act of 1876, the Commissioners have power to close a road temporarily for certain purposes. The following cases were cited in the course of the argument: *Rex v. Justices of Worcestershire*,¹ *Rex v. Justices of Surrey*,² *Rex v. Horner*,³ *Reg. v. United Kingdom Electric Telegraph Company*,⁴ *Reg. v. Train*,⁵ *Rex v. Winter*,⁶ *Reg. v. Justices of Calcutta*,⁷ and *Fowler v. Sanders*.⁸

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Baboo Taraknath Dutt for the defendant, Brojonath Dey.—S. 10 of Beng. Act III. of 1864 vested public roads in the Commissioners, and, therefore, gave them a right to close or divert such roads.

Baboo Troilokynath Mittra in reply.

MARKBY, J. (after stating the facts of the case):—The question turns on the construction of Beng. Act III. of 1864, which was in force when the order of Mr. Jeffery was made. The powers and duties of the Municipal Commissioners are defined in ss. 6 to 23. No power to stop up or divert public highways is anywhere in express terms given by the Act; but public highways not being the property of Government or private property are, by s. 10, vested in the Municipal Commissioners. By s. 9 the Municipal Commissioners are enabled to sue and be sued in their corporate name, to hold properties, moveable and immoveable, and to convey the same, and to enter into all necessary contracts for the purposes of the Act. By s. 12, the Municipal Commissioners are required to apply all property vested in them for the purposes of the Act.

The argument is, that Shudgoppara Lane was a public highway vested in the Municipal Commissioners, and that, under the Act, the Municipal Commissioners may dispose of their property in any way they please, provided they do so for the purposes of the Act, which purposes, it is further said, are defined in the preamble, namely, the "conservancy, improvement, and watching" the district where they have jurisdiction. The Commissioners, therefore, it is argued, had a right to stop up this road, if their doing so was for the improvement of the town, of which they are the sole Judges. I am of opinion, however, that it was not the intention of the Legislature to give, by implication, these very wide powers to the Municipal Commissioners. I read the provisions of those sections of the Act which define the powers and duties of the Commissioners quite differently. I think the general words of ss. 9, 10, and 12, are controlled by the specific provisions of ss. 13, 14, 15, and 16. In regard to highways, which are the property of the Municipal Commissioners, I think that the only powers which Municipal Commissioners have over them is to make, repair, and keep properly cleansed such highways, and to do such things upon them as are necessary for conservancy (s. 15). If any more extensive works are necessary, then the consent of the Lieutenant-Governor must be taken (s. 16), and even with the consent of the Lieutenant-Governor there is no power to stop up a road. It seems to me that, if the mere fact of property being vested in the Municipal Commissioners for the purposes of the Act gave them the extensive

¹ 2 B & Ald. 228.

² 7 D & Row. 857.

³ 2 B & Ad. 150.

⁴ 9 Cox, Cr. Ca., 137.

⁵ 9 Cox, Cr. Ca., 180.

⁶ 8 B. & C. 785.

⁷ 2 Ind. Jur., N. S., 182.

⁸ Cro. Jac. 446.

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powers contended for, those sections which define the powers of the Municipal Commissioners over their property would be meaningless.

This construction of the Act appears to me to be most in accordance with what is reasonable and proper. By s. 20, the Chairman or Vice-Chairman may make any order authorized by the Act unless it be expressly required to be made at a public meeting, and, therefore, if by the Act the Municipal Commissioners are authorized to make an order for the stopping up of a public highway, it would be very difficult to say that that order might not be made by the Chairman or Vice-Chairman acting alone, and the order in the present case was in fact made by the Vice-Chairman upon his sole responsibility. It is most improbable that the Legislature intended to confer such extraordinary powers upon a single individual.

The construction which I have put upon Beng. Act III. of 1864 is further confirmed by a comparison of its provisions with those of Beng. Act VI. of 1863, relating to the town of Calcutta, upon which the Act of 1864 was obviously modelled; s. 109 of Act VI. of 1863 vests the streets of Calcutta in the Justices almost in the same words as s. 10 of Act III. of 1864 vests public highways in the Municipal Commissioners. But by s. 110 of the former Act express power is given to the Justices, with the sanction of the Bengal Government, "to turn, direct, discontinue, or stop up any public street." This, I think, shows that merely vesting highways in a Municipality does not *ipso facto* empower the Municipal Body to stop them up, if they happen to consider that to do so is advantageous for the town. I may also observe that to hold that the Municipal Commissioners derive a power to stop up highways from the circumstances that certain highways of the town are vested in them would lead to this, that highways not vested in them could not be stopped up. This distinction would be reasonable enough as regards highways vested in Government, but quite unreasonable as regards highways which are the property of private individuals.

I, therefore, consider that this order of Mr. Jeffery, permitting Baboo Brojonath Dey, upon certain conditions, to stop up this lane was an order which neither he as Vice-Chairman, nor the Municipal Commissioners, had power to make; and that the order of the Joint-Magistrate of 21st December 1876, holding Mr. Jeffery's order to be legal, was wrong in law, and ought to be set aside. The record of the proceedings against Brojonath Dey, under s. 521, will be returned to the Joint-Magistrate, and he will finally dispose of those proceedings by such order as he thinks proper, treating Mr. Jeffery's order for the purpose of those proceedings as a nullity.

I am very glad to have arrived at a result which will probably have the effect of restoring to the inhabitants of the neighbourhood the use of the road of which they appear to me to have been very improperly deprived. I quite agree with the condemnation passed by the Magistrate and present Joint-Magistrate upon Mr. Jeffery's order, by which the interests of the public seem to have been sacrificed to those of a single individual.

PRINSEP, J.—I concur in holding that Mr. Jeffery, as Vice-Chairman of the Serampore Municipality, was not competent, under Beng. Act III. of 1864, to close the Shudgoppara Lane; that his order must be considered to be a nullity; and that the proceedings taken under s. 521 of the Code of Criminal Procedure, by the present Joint-Magistrate of Serampore, should proceed.

Order set aside.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, and Mr. Justice Ainslie.

THE EMPRESS *v.* JYADULLA.¹

Criminal Procedure Code (Act X. of 1872), s. 272—Appeal—Acquittal—Limitation—Act IX. of 1871, s. 5, cl. b, and Sch. II., art. 153—Act XI. of 1874, s. 23.

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March 26.
2 Cal. 436.

An appeal by the Local Government under s. 272, Criminal Procedure Code, is within time if presented within six months from the date of acquittal. The sixty days' rule does not apply.

THE following case was referred to the Full Bench by Macpherson and Birch, JJ. :—

In this case the Local Government has appealed (under s. 272, Criminal Procedure Code) from a judgment of acquittal.

The acquittal was on the 29th of August 1876, and the appeal therefrom was not presented until the 6th of February 1877, *i. e.*, after a lapse of about five months and seven days.

The Court (*Markby and Miller, JJ.*) admitted the appeal, "subject, however, to the consideration of the question whether the appeal has not been presented after the time allowed by law. . . . If the period of sixty days is the time allowed for an appeal by the Crown, as well as for an appeal by the prisoner, in that case we think the Crown ought to be held strictly to sixty days, because no ground has been shown to us for enlarging the time under s. 5, cl. b, of Act IX. of 1871."

We think the question is of so much importance that it ought to be set at rest at once by an authoritative decision of a Full Bench, especially as in a variety of cases in which the point was not raised, appeals by Government against acquittals, presented after sixty days, have been admitted without hesitation.

The question arises in the following manner :—

The Limitation Act, IX. of 1871, Sch. II., art. 153, says that the period of limitation for appeals to the High Court under the Code of Criminal Procedure is sixty days, and that the date of the sentence or order appealed against is the time when the period of sixty days begins to run. By s. 6 of the same Act it is provided that, when by any law thereafter to be in force in British India, a period of limitation differing from that prescribed by the Limitation Act is specially prescribed for any appeals, nothing in Act IX. of 1871 shall affect such law.

Thereafter, by Act X. of 1872 (Criminal Procedure Code), s. 272, an appeal was given to the Local Government from a judgment of acquittal: and it was declared, "The rules of limitation shall not apply to appeals presented under this section." By Act XI. of 1874, s. 23, this clause is repealed, and for it is substituted the following clause: "No appeal shall be presented under this section after six months from the date of the judgment complained of." So that, as the law now stands, by s. 272 modified by s. 23 of Act XI. of 1874, the Government may appeal from a judgment of acquittal, but no such appeal shall be presented after six months from the date of the judgment complained of.

¹ Criminal Motion, No. 27 of 1877.

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On the one hand, it is contended that the ordinary sixty days' limitation applies to appeals by Government from judgments of acquittal, and that the six months are mentioned in s. 23 of Act XI. of 1874, not as giving a right of appeal at any time within six months, but as providing that such an appeal must, under all circumstances, be presented within six months, after which time no excuse whatever can be received under the Limitation Act, 1871, s. 5, cl. b, as sufficient cause for not having appealed within the sixty days.

On the other hand, it is contended that Act IX. of 1871 does not apply to these appeals at all, and that there is no limitation of the right of appeal save s. 23 of Act XI. of 1874, which says the appeal must be presented 'within six months.

The question referred is, whether an appeal by the Local Government under s. 272 from a judgment of acquittal is within time if presented within six months from the date of the acquittal, although presented more than sixty days from that date.

The Advocate-General, Offg. (Mr. Paul), for the Crown.

The following was the opinion of the Full Bench :—

GARTH, C.J.—We are of opinion that an appeal from an order of acquittal is within time if presented within six months from the date of the order of acquittal. The sixty days' rule does not apply.¹

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

1877.

July 15.

2 Cal. 466.

IN THE MATTER OF THE PETITION OF JANOKEY NATH ROY.

Appeal—Presidency Magistrates' Act (IV. of 1877, s. 41)—Prosecution—Sanction of Judge—Jurisdiction of High Court.

No appeal lies from the order of a Judge directing a prosecution under s. 41 of the Presidency Magistrates' Act.

IN the suit of one *Bhoobun Mohun Neogy v. Janokey Nath Roy* an application had been made to Mr. *Sconce*, one of the Judges of the Calcutta Small Cause Court, to direct the prosecution of the defendant (the present appellant) for perjury and forgery. Mr. *Sconce* refused to direct such prosecution; and the plaintiff applied *ex parte*, under s. 41 of Act IV. of 1877, to Mr. Justice *Kennedy*, sitting on the Original Side of the High Court, for an order that he might be at liberty to prosecute the defendant, which was granted. Against this order the defendant presented a petition of appeal, on the grounds that the learned Judge had no jurisdiction to make the order; that, under the circumstances of the case, the order ought not to have been made; and that the appellant ought to have been allowed an opportunity of being heard against the order being made.

Mr. *Branson* (with him Mr. *Bonnerjee*) moved to admit the appeal.

Mr. *Branson*.—It is true that neither under the Criminal Procedure Code, nor the general law, has the Court any right to interfere with the discretion of a Judge, but the order amounts to a judgment. The word 'judgment' in cl. 15 of the Letters Patent of 1865 has been held to mean a decision, whether

¹ *Ed. Note.* In "*Reg. v. Dorabji Balabhai*" (11 Bom. Rep., p. 117) it was held that s. 272 of Act X. of 1872 must be read by itself.

final or preliminary, or interlocutory. This order is one creating jurisdiction, and is to that extent final; and so far there is a right of appeal. The learned Counsel referred to *The Justices of the Peace for Calcutta v. The Oriental Gas Company*,¹ *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*,² *Mowla Buksh v. Kishen Pertab Sahi*,³ and to *Barkat-ul-lah Khan v. Rennie*.⁴

The judgment of the Court was delivered by

GARTH, C.J.—We are clearly of opinion that no appeal lies in this case, and that we ought not to grant leave to admit the appeal. Leave granted by a Judge to institute proceedings is not a 'judgment' within the meaning of cl. 15 of the Charter. If authority were wanted, the case of *The Justices of the Peace of Calcutta v. The Oriental Gas Company*¹ would be ample authority for our judgment. But, apart from that, this leave, given by the Court, is the creation of a late Statute. It is a power which did not exist when the Charter was passed. It is a power of a peculiar kind. The object is to check rash proceedings in criminal matters being taken. It gives power to take proceedings, which could not have been taken without leave. As the Legislature has not thought fit to give an appeal from such an order, we think that this appeal should not be admitted.

Application refused.

Attorneys for the appellant—Messrs. *Pittar and Wheeler*.

¹ 8 B. L. R. 433.

² 13 B. L. R. 91.

³ I. L. R., 1 Cal. 102.

⁴ I. L. R., 1 All. 17.

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FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, Mr. Justice Pontifex, and Mr. Justice Ainslie.

THE EMPRESS v. BURAH AND BOOK SINGH.¹

IN THE MATTER OF THE PETITION OF BURAH AND BOOK SINGH.

1877.
March 26.

3 Cal. 63.

Jurisdiction of High Court—A& VI. of 1835—A& XXII. of 1869, s. 9—24 and 25 Vic., c. 67, s. 22; c. 104, ss. 9, 11, and 13—3 and 4 Will. IV., c. 85—16 and 17 Vic., c. 95—17 and 18 Vic., c. 77—Delegation, Power of.

By A& XXII. of 1869, certain districts were removed from the jurisdiction of the High Court, and by s. 5 the administration of civil and criminal justice was vested in such officers as the Lieutenant-Governor of Bengal should appoint. By s. 9 the Lieutenant-Governor was empowered to extend all or any of the provisions of the A& to the Cossyah and Jynteeah Hills. By a notification in the *Calcutta Gazette* of 4th October 1871, the Lieutenant-Governor extended the provisions of the A& to the Cossyah and Jynteeah Hills, and directed that the Commissioner of Assam should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of that district. The two prisoners were tried for murder in April, 1876, and were, on conviction, sentenced by the Chief Commissioner of Assam to transportation for life. On appeal by the prisoners to the High Court, *held*, by the majority of a Full Bench (GARTH, C.J., MACPHERSON and PONTIFEX, JJ., dissenting), that the High Court had jurisdiction to entertain the appeal, and such jurisdiction was not taken away by A& XXII. of 1869.

Per Curiam.—The Governor-General in Council had power by legislation to remove the districts from the jurisdiction of the High Court.

Per JACKSON, AINSLIE, and MARKBY, JJ. (KEMP, J., concurring).—The Governor-General in Council had no power to delegate his legislative functions to the Lieutenant-Governor of Bengal in the way he had done in A& XXII. of 1869. The power of delegation cannot be considered as validated by any long course of practice, nor as sanctioned by the tacit recognition of Parliament: A& XXII. of 1869 is therefore so far invalid.

Per MACPHERSON, J. (PONTIFEX, J., concurring).—Such delegation is nowhere expressly prohibited, and does not bring the A& under any of the restrictive provisions of the Indian Council's A&.

Per GARTH, C.J., and MACPHERSON, J. (PONTIFEX, J., concurring).—The power of delegation now questioned had been exercised in many cases for a series of years previous to the passing of the Indian Council's A&, and that A& (the framers of which must have been cognizant of such course of practice) must be taken as impliedly approving of and sanctioning such practice, which it would otherwise have declared illegal.

Per GARTH, C.J., JACKSON, MARKBY, and AINSLIE, JJ. (KEMP, J., concurring).—The High Court has power to question the validity of the legislative acts of the Governor-General in Council.

Per MACPHERSON, J. (PONTIFEX, J., concurring).—The High Court has no such power if satisfied that the act is not within any of the prohibitions of the Indian Council's A&.

Two prisoners, Burah and Book Singh, were convicted of murder by the Deputy Commissioner of the Cossyah and Jynteeah Hills, and were sentenced to death. On the 23rd of April 1876, the sentence was commuted to transportation for life by the Chief Commissioner of Assam. On the 9th of July 1876,

¹ Criminal Appeal, No. 482 of 1876, against an order of Col. Bivar, Deputy Commissioner of Shillong, dated the 24th of April 1876.

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the officer in charge of the Kamrup jail forwarded to the High Court a petition of appeal from the prisoners. The appeal came on for hearing before *Markby* and *Ainslie*, JJ., who referred to a Full Bench the question whether the High Court had any power to entertain these applications.

On the 12th of September 1874, the reference came on for hearing, and was argued by the Legal Remembrancer (Mr. *H. Bell*) on behalf of the Bengal Government, before *Sir R. Garth*, C.J., *Kemp*, *Macpherson*, *Markby*, and *Ainslie*, JJ.

On the 2nd of February, at the instance of the Government of India and before the judgment was delivered, the point was re-argued.

The Advocate-General, Officiating (Mr. *Paul*), the Standing Counsel (Mr. *Kennedy*), and the Legal Remembrancer (Mr. *H. Bell*), for the Crown.

Mr. *Phillips* for the prisoners.

The Advocate-General.—The validity of s. 9, Act XXII. of 1869, is first questioned. There is a further question as to whether the Governor-General in Council can affect the jurisdiction of the High Court. The latter point is concluded by *Queen v. Meares*.¹ [GARTH, C.J.—Confine yourself to the invalidity of s. 9. Mr. *Phillips*.—*Queen v. Meares*¹ does not cover the point raised here. That case only decides as to the power to subject British subjects to another Court. MARKBY, J.—It does not go so far as to say that the Governor-General in Council may entirely abolish the jurisdiction of the High Court.] 3 and 4 Will. IV., c. 85, s. 43, gives full power to legislate concerning anything except certain matters specified; s. 51 enacts that nothing in the Act shall affect the right of Parliament to legislate for India, and expressly reserves to Parliament control over the acts and proceedings of the Governor-General in Council, and the better to enable that body to exercise the powers reserved, requires that all laws and regulations made by the Governor-General in Council shall be laid before Parliament. There, therefore, exists a complete check over improper legislation. The administrative power to establish Courts has existed unquestioned with the exception of a dictum thrown out by *Sir L. Peel* in the case of *Biddle v. Tarney Churn Banerjee*,² the broad proposition of which is open to question. Many Acts have been passed which it is provided should come into operation on the notification of some person to whom discretion is given to bring the Acts into force. [MACPHERSON, J.—That is a different point.] If it be admitted that the Governor-General in Council has power to depute authority to the Lieutenant-Governor to declare when certain Acts shall come into force, then the High Court has no jurisdiction to entertain this appeal. The Governor-General in Council can say that an Act shall come into force on the happening of a certain contingency, say the death of a person. [JACKSON, J.—Suppose it be when the province shall have arrived at a certain stage of civilization?] Then the word of the Lieutenant-Governor can be taken. If there be no objection to the principle that an Act shall come into force on a date to be named by the Lieutenant-Governor, then s. 9 would have validity with reference to s. 4. By Act VIII. of 1859, the Local Government had power assigned to it to extend the provisions of that Act to any place. The intention of the Government is, that laws and regulations applicable in certain places, being inapplicable in other districts, shall not there have any force until those districts are prepared to receive them. This has actually been done with respect to the Garo Hills. [GARTH, C.J.—I do not agree with you. The

¹ 14 B. L. R. 106.

² 1 Tay & Bell 391; see p. 404.

Governor-General in Council had not come to any conclusion as to the Jynteeah Hills, and had delegated his authority to the Lieutenant-Governor to come to a decision.] The argument now is as to the intention of the legislature. The Governor-General in Council has the power to say that an Act shall come into operation when the Local Government shall direct; see Act VIII. of 1859, ss. 387, 388. The High Court has not the power to try whether or not that power has been rightly exercised; see Sedgwick on Statutory and Constitutional Law, p. 137. The American books refer to legislature with far more limited power than that of the Indian legislature. In the *Bhownuggur* case, *Damodar Gordhan v. Deoram Kanji*,¹ their Lordships of the Privy Council would not allow the political matters (the policy of a measure) to be argued. The High Court has no concern with political questions. The question whether or not a Court has been rightly reconstructed cannot arise before the High Court. The jurisdiction, having been once taken away, ceases to exist. By 16 and 17 Vic., c. 95, ss. 19 and 29, and 24 and 25 Vic., c. 67, s. 22, two things are provided—*viz.*, the power to legislate, and that the laws should be made in Council. [GARTH, C.J.—If the power given is to make laws in Council only, where would be the use of that restriction if the Governor-General is at liberty to say that any one in Bengal may have the same power?] The Governor-General in Council could do so. But the question does not arise, as it is not to any one to whom he delegates the authority. Although there is a restriction placed on the subject of legislation, there is no restriction as to the mode of making the legislation operative. If Parliament considers it convenient to delegate authority to administrative officers to carry out measures, why may not the Governor-General in Council do so? There is the same authority with respect to unexcepted subjects as there is in Parliament. [GARTH, C.J.—His power being derivative, the Governor-General in Council has not as much power as Parliament.] Discretion is given to the Lord Lieutenant of Ireland. Is it a bad law to say that a person of competent capacity shall decide a certain point? Is it a bad law to appoint a law-officer of the Crown an arbitrator, when there are Common Law Courts and the House of Lords to which the suitor could go? [MARKBY, J.—Power deputed to the Lord Lieutenant might be said to be unconstitutional delegation, but no Court of law could question it. The more precise question would arise, whether the delegation was *ultra vires*? The difference is that which exists between a sovereign legislature and a derivative legislature.] The question might be as to the subject, not as to the mode of legislation. [GARTH, C.J.—But can the powers given to the Governor-General in Council alone be transferred?] The powers are not transferred; all that there is done is that provision is made how those powers can be brought into force. [GARTH, C.J.—If the Lieutenant-Governor were not to notify any date, there would be no law, criminal or civil.] The word 'may' here does not leave option to the Lieutenant-Governor. By the wording, the Lieutenant-Governor is bound to extend the Act, but within an unspecified time. Having provided law on a certain subject, the Act gave power to the Lieutenant-Governor to say when it was to come into force. There is no limitation as to ministerial duties. The time when a tax shall be imposed is not defined in an Act, nor the mode of operation, nor what kind of a horse, or what kind of a cart, shall be taxed. So long as Governor-General in Council keeps within the subjects concerning which he is allowed to legislate, there can be a valid delegation of authority. A sub-agent can bind the principal; *Story on Agency*, 14, *Rossiter v. Trafalgar Life Assurance Association*,² *Quebec and Rich-*

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¹ 1 L. R., 1 Bom. 367; S. C., L. R., 3 I. A. 102.² 27 Beav. 377.

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There are a number of Acts passed since 1848 under which there has been a delegation of authority. Among them are the following: Acts XXII. of 1855; XIII. of 1859; XXV. of 1861; VI., XIV., and XIX. of 1863; XXII. of 1864; XIV. of 1865; XX. of 1866; XXIII. of 1867. See Maxwell on Statutes, p. 166.

The Standing Counsel.—Act XIV. of 1874 repeals Act XXII. of 1869. [MACPHERSON, J.—That Act is of no effect, see s. 3. Mr. Phillips.—If the Act is repealed, there is no further necessity to argue.] 24 and 25 Vic., c. 67 (the Indian Councils' Act), conferred powers on the entirely new legislatures of Madras and Bombay. When this Act was passed, former restrictions were got rid of. 16 and 17 Vic., c. 95, then in force, conferred on the legislature, after making provision for the appointment of certain additional members, powers of making laws and regulations. 24 and 25 Vic., c. 67, shows a desire to extend the powers of the legislature. That which it can, and that which it cannot do, are strictly defined. The fact that powers given are expressly limited shows that they would otherwise be unlimited. When Parliament passed this Act, a long series of Acts passed by the Governor-General was in existence. The long list of enactments bears very strongly on the construction of this Act. Parliament did not appear to take away the power which had been, rightly or wrongly, professedly exercised. The presumption is, that Parliament was cognizant of all concerning which it legislated. There is then that which amounts to legislative sanction. The Governor-General in Council may not have power to give away legislative powers, but it has power to make a law. The law is to make the Lieutenant-Governor do a certain act. He is by statute an executive officer, and can be compelled so to act. [GARTH, C.J.—Then what becomes of the discretion of the Lieutenant-Governor?] If there is an outbreak, say on the Punjáb frontier, the Governor-General has power to suspend all laws and leave districts at the will of a General. True that would be in a case of emergency, but can a Court of law examine into motive? Unless a construction can bear the strain both ways, it is not the true one. Parliament, in the regular course of its legislation, confers the duty on others to make bye-laws, or to fix a time at which a particular Act shall come into force. Parliament has never passed a single word of censure on the Indian legislature for having adopted the same practice. By 32 and 33 Vic., c. 115, the Home Secretary in England was entrusted with the power to license hackney-carriages, and to fix a scale of fares, a power which it has been decided was validly conferred: *Bocking v. Jones*.³ The legislature is not to contemplate the remote contingency that power may be conferred on an incapable person, but must assume that public officers will do their duty. Take a municipality as an illustration: there are certain acts which would be accounted offences if committed within the boundaries, but not so if without the boundaries. If a general municipal law were passed, and it was provided it should only apply to certain places mentioned in a schedule to that Act, could not a provision be made that the Act be afterwards extended to other places as they became ready for it? Acts of this kind were passed during the mutiny while Sir B. Peacock was Legal Member of Council: see Acts VIII. of 1857 and XIV. of 1857. [JACKSON, J.—The mutiny was an emergency.] No Act is passed unless there is a necessity for it, and these were passed very shortly before the passing of the Indian Councils' Act; see Acts XXVIII. of 1857; VI. and XX. of 1858;

¹ 12 Moore's P. C. 232.

² 1 Smith's L. C. 41, 7th ed.

³ L. R., 6 C. P. 29, at p. 35.

XX. of 1859; 19 and 20 Vic., c. 36. The Peace Preservation (Ireland) Aft contained certain sections of 11 and 12 Vic., c. 2, giving power to the Lord Lieutenant to proclaim certain districts. The Aft continued in force until 1870, when another Aft was passed. The matter was frequently agitated, and the points well known to the legislature. If there is injustice done under an Aft of the legislature, indemnity might be afforded. Necessity or emergency for a measure cannot come into question. It is a question of state to be determined by the Legislative Council alone. If the High Court can question the policy of an Aft of the legislature, then it can be questioned by any Munsif's Court.

The High Court sits under a power conferred on Her Majesty by Parliament to establish it; there is a delegation of power when Courts of any description change or modify the practice of pleading. Under what authority are the rules issued? There is no authority contained in the Charter authorizing Judges to issue rules. [GARTH, C.J.—There must be power given to Judges to make rules to carry on work and for new Courts.] But a new Court must follow the common law in its procedure. In Equity Courts in England it is considered necessary to give statutory power. [GARTH, C.J.—The old system of pleading had become the law of the land.] The practice of this Court as of the Queen's Bench is a law of the Court. When the legislature has once commanded, the question of emergency cannot be questioned: *Phillips v. Eyre*.¹ When war is imminent, the Government is charged by the very necessities of the case to take measures. The executive is charged with extended powers. No responsibility is taken away if a minister act in a manner which, under ordinary circumstances, would be illegal; he at once becomes responsible to the tribunal of the country. The authority given to the Lieutenant-Governor was not delegated authority, but derivative. By Aft XXXVII. of 1855, "the Sonthal Pergunnah's Aft," the jurisdiction of the Sudder Court was taken away. The following case and Afts were also quoted: *Leverson v. Queen*; ² and Afts XIV., XXII., and XXIII. of 1836; XVI. and XXVI. of 1837, as to the course of practice.

Mr. *Phillips* for the prisoners.—The questions to be argued are: (1) Has the power been validly deputed to the Lieutenant-Governor, *i.e.*, is the Lieutenant-Governor validly authorized? (2) Has the Governor-General in Council the power which he here delegates? Unless the Lieutenant-Governor has been authorized by the Imperial legislature, he has not been validly authorized. Parliament has shown, by giving express powers, not only that the power of the Governor-General in Council is strictly limited by the Afts, but that the power of delegation claimed had not been given; see 24 and 25 Vic., c. 67; s. 6 (3 and 4 Will. IV., c. 85, s. 70) 8, 17, 18, 23; 24 and 25 Vic., c. 104, s. 18; 28 Vic., c. 15, s. 5. Parliament has not created a legislature like itself; it has only given certain persons a certain limited power of making laws. Even a Colonial legislature like itself has not all its powers as incident, and in fact has only the powers conferred: *Doyle v. Falconer*; ³ *Fenton v. Hampton*.⁴ [GARTH, C.J.—The cases decide that inherent privileges were not vested, but assume supreme legislative power.] True, but of a limited kind. It is not contended that within limits it has not supreme power. It lies on the Crown to show what power is vested in the legislative assembly. The contention on the part of the Crown is, that since the English Parliament delegates authority, the Governor-

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General in Council has the same power; then the Lieutenant-Governor also will have power to delegate the authority given to him to another. S. 6, Indian Councils' Act, gives certain powers; it shows that the Council had not those powers, and that a section giving them was thought to be necessary, and this expressly excepts the making of laws and regulations. The power in a legislature with affirmative powers is not beyond that which is expressly given; as an incident, the power to the Lieutenant-Governor to extend an Act is not included. A power derived from Imperial Parliament is limited by the Act giving power. Therefore, unless some authority be shown, the Legislative Council has not the power claimed by it. The Lieutenant-Governor has not the power to call a dead Act into life. The Lieutenant-Governor is deputed to exercise legislative discretion to the extent of seeing whether or not this law, or which portion of it, should be applied. The wisdom or propriety of a measure is not questioned, but the authority of the Governor-General in Council: The English Parliament itself was not at one time supreme: Sedgwick on Statutory and Constitutional Law, p. 123. It is the Governor-General in Council who has authority to make laws and regulations, but here it is not the Governor-General in Council who has been legislating. It is the Lieutenant-Governor who has exercised legislative functions. Ministerial functions can be distinguished from legislative functions, which consist in the legislative consideration of what is necessary. The Governor-General in Council has deprived himself of this power, and has conferred it on the Lieutenant-Governor. Jurisdiction existed in the Supreme Court which was transferred to the High Court. Then by an order of the Lieutenant-Governor the whole jurisdiction of this Court may be withdrawn leaving the learned Judges drawing their salaries but as nonentities. There are consequences as serious in holding this to be a valid Act as there may be in holding it to be invalid. [PONTIFEX, J.—Jurisdiction was given by the High Court Charter; the Governor-General could not take away that jurisdiction.] The greater his power, the more necessary to secure the exercise of it by himself. The High Court, which was created by the same power, and which may determine whether he has validly abolished all law, cannot be abolished by him. Absence of express condemnation cannot be construed as sanction by Parliament of an illegal cause. The Parliament is presumed to have before it only their own statutes in *pari materia*—Maxwell on Statutes, pp. 27 and 28; but not all the Indian Acts which show an excess of power. No case goes as far as is required. As to *Leverson v. Queen*,¹ see the report, p. 404. This would give greater force to the user than to a preamble: *Market Harboro Trustees v. The Kettering Highway Board*,² *Wilson v. Knubley*.³ This Act, XXII. of 1869, cannot be upheld at all, unless the whole is valid. The Civil Procedure Code was hastened as to its operation with respect to provisions which were to have come into force. The general municipal enactment would merely bring more persons into the community, the law existing all the while.

The Standing Counsel in reply.—The Governor-General in Council can take away the jurisdiction of the High Court, and can create a jurisdiction identical to that taken away. [MARKBY, J.—Then the High Court of Madras might have conferred on it jurisdiction over the Jynteah and Cossyah Hills.] It is prohibited by the provisions of an Act which it cannot touch by express provision; see 24 and 25 Vic., c. 67, s. 23. [GARTH, C.J.—Some members of the legislature might think it necessary to constitute new Courts more subordinate to the legislature than they are now.] No great or high power can be conferred without opportunity of abuse, but the check would be rapid enough to

¹ L. R., 4 Q. B. 394.² L. R., 8 Q. B. 308.³ 7 East 135.

stop injury. If the legislature of a colony, being a supreme legislature, thought fit to pass a law enabling to commit for contempt, it could do so. *Mr. Evans as amicus curiæ* referred to *Rutter v. Chapman*,¹ and *Grant on Corporations*, p. 80.]

Cur. adv. vult.

The following judgments were delivered by the Full Bench :—

MARKBY, J.—Two persons, Burah and Book Singh, have been convicted on a charge of murder by the Deputy Commissioner of the Cossyah and Jynteeah Hills, and sentenced to death. The sentence was commuted to transportation for life by the Chief Commissioner of Assam on the 23rd April 1876.

On the 9th July 1876, the officer in charge of the Kamrup Jail forwarded to this Court petitions of appeal from these prisoners, unaccompanied by copies of the judgment.

The first question which arises in the case is, whether the High Court has any power to entertain these applications; and this question is one of so much importance that it has been referred to a Full Bench, and has been on two occasions very fully argued.

The Cossyah and Jynteeah Hills comprise a considerable tract of country on the eastern frontier of Bengal, and they contain a population which, in 1862, was estimated at 120,000. The Jynteeah Hills were formerly under the independent Rajah of Jynteeah. The Cossyah Hills were divided into a number of smaller districts under different rulers. Of the twenty-five Cossyah states, five used commonly to be called "semi-independent," and the remaining twenty "dependent." It is not very clear how this division was arrived at, and it probably has never been accurately ascertained what part of the Cossyah Hills is, and what is not, British territory. But by far the greater portion has long been subject to our Government, and is therefore (21 and 22 Vic., c. 106, s. 1) included in British India.

Prior to 1854, there was a Political Agent of the Cossyah Hills, who exercised the usual powers of a Political Agent with regard to so much of the territory as was under chiefs who were treated as independent; but he also held general powers for the administration of justice in those portions of the territory which had ceased to be independent. Probably, in practice, the difference was of no very great importance, the chiefs being all too insignificant to assert any independent authority. This officer was in command of the Sylhet Light Infantry, and he acted also as the Political Agent in respect of Jynteeah, which, up to the period of the Burmese War in 1824, was independent. During that war the Jynteeah territory was taken under the protection of the British, and the Rajah acknowledged his allegiance. In 1835 the reigning Rajah was deposed for an act of cruelty, and his territory was annexed. From the date of this annexation the Political Agent of the Cossyah Hills seems to have exercised the same functions with regard to Jynteeah, as he had hitherto exercised in respect of the annexed portions of the Cossyah Hills. But he still continued to bear the somewhat inappropriate designation of Political Agent of the Cossyah Hills.

In the year 1835, an Act was passed (Act VI. of 1835), by which the functionaries in political charge of the "Cossyah Hills" were placed under the control and superintendence, in criminal matters, of the Court of Nizamut Adawlut. From the records of this Court it appears that, on the 16th June

¹ 8 M. & W. 1.

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1835, the Court informed the Government of Bengal that the Political Agent of the Cossyah Hills had submitted returns of criminal business for Jynteeah also. The Government replied that the Jynteeah territory was taken possession of on the 15th of March, whilst the Act was passed on the 13th, and that, if the Court thought that this did not constitute any objection to their doing so, the Government saw no objection to the Court exercising jurisdiction in Jynteeah, which was accordingly authorized. The Court replied accepting the jurisdiction in Jynteeah from the date of the Act. The arrangement of the duties of the Political Agent of the Cossyah Hills remained, as above stated, until 1854, when an order was issued by the Governor of Bengal (1st March 1854) to the Commissioner of Assam, communicating his determination to separate the civil functions of the Political Agent in the Cossyah Hills from the command of the Sylhet Light Infantry, and to vest the former in an Assistant Commissioner, subordinate to the Commissioner of Assam, "precisely on the same footing as the other principal assistants in the Province of Assam." The order also intimates that the officer to be appointed would be called "Principal Assistant in charge of the Cossyah and Jynteeah Hills." From that time the Cossyah and Jynteeah Hills, though never formally annexed to the district of Assam, seem to have been treated as part of Assam. All the criminal appeals which in Regulation Provinces would go to the Sessions Judge went to the Deputy Commissioner of Assam, and were apparently disposed of by him in the same manner as any other criminal appeals in Assam.

In the year 1861, the jurisdiction which had been exercised by the Nizamut Adawlut was transferred to the High Court upon its creation by Her Majesty's Letters Patent. The Code of Criminal Procedure was extended to Assam by a notification of the Lieutenant-Governor of Bengal published in the *Gazette* of 16th November 1862, and though never expressly extended (as far as I have discovered) to the Cossyah and Jynteeah Hills, it was considered to be in force in that district without any further notification; and this it would be, if the view that this district was made a part of Assam were correct.

In the year 1866, the Assistant Commissioner convicted a prisoner, named U. Don Dolloi, of an offence under s. 504 of the Indian Penal Code, and bound him over to keep the peace for one year after his release. On appeal to the Deputy Commissioner of the Cossyah and Jynteeah Hills, that officer confirmed the order; but this Court, upon a petition presented by the accused, altered the period for which the party was bound over.

In the year 1869, the Deputy Commissioner of the Cossyah and Jynteeah Hills referred a sentence of death for confirmation by this Court under s. 380 of the Code of Criminal Procedure. The sentence was confirmed, and the prisoner was hanged.

Under these circumstances, there can be no doubt that this Court had at one time jurisdiction in the Cossyah and Jynteeah Hills. The only question therefore is, whether this jurisdiction has been taken away, and this renders it necessary to consider the recent legislation with regard to these districts.

By s. 4 of Act XXII. of 1869 (which is called the "Garó Hills Act") the Garó Hills are removed "from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue constituted by the regulations of the Bengal Code, and the Acts passed by the legislature now or heretofore established in British India, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid;"

and it is provided that "no Act hereafter passed by the Council of the Governor-General for making Laws and Regulations shall be deemed to extend to any part of the said territory unless the same be specially named therein." By s. 5 "the administration of civil and criminal justice, and the superintendence of the settlement and realization of the public revenue, and of all matters relating to rent within the said territory, are vested in such officers as the said Lieutenant-Governor may, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint;" and the officers so appointed are, in the administration of justice, to "be subject to the direction and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue."

By s. 9 the Lieutenant-Governor is empowered to extend all or any of the provisions of this Act to the Cossyah and Jynteeah Hills.

By a notification in the *Calcutta Gazette* of 14th October 1871, the Lieutenant-Governor did extend the provisions of this Act to the Cossyah and Jynteeah Hills; and he also directed that the Commissioner of Assam should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of that district. On the 30th July 1872, rules were issued by the Lieutenant-Governor, under ss. 5 and 9 of Act XXII. of 1869, for the administration of justice and police in the Cossyah and Jynteeah Hills, in which no allusion is made to the High Court.

Shortly after this, another power, which had been conferred by Parliament upon the Governor-General in Council, was called into action with reference to these districts. By proclamation of the 6th February 1874 (see *Gazette of India* of 7th February), in exercise of the powers conferred by s. 3 of Statute 17 & 18 Vic., c. 77, the Governor-General in Council took some districts (now forming 'Assam,' and including the Cossyah and Jynteeah Hills) under his immediate authority and management, which districts were till then under the Lieutenant-Governor of Bengal. On the same day, by another proclamation, the Governor-General in Council constituted Assam a Chief Commissionership.

By Act VIII. of 1874, after a recital that the Cossyah and Jynteeah Hills had been taken under the direct management of the Governor-General in Council, and had been made part of the Chief Commissionership of Assam, all the powers then vested in the Lieutenant-Governor of Bengal were (s. 1) transferred to the Governor-General in Council, and the Governor-General in Council was empowered (s. 2) to delegate to the Chief Commissioner all or any of the said powers, or to withdraw the said powers.

By Act XIV. of 1874, in which the Cossyah and Jynteeah Hills are specially named, Act XXII. of 1869 is repealed, and the Local Government is empowered (s. 6) to appoint officers to administer criminal and civil justice and to regulate the procedure of officers so appointed, but not so as to restrict the operation of any enactment for the time being in force in any of the said districts. And it is also declared (s. 7) that all rules theretofore prescribed for the guidance of officers "for all or any of the purposes mentioned in s. 6, and in force at the time of the passing of this Act, shall continue to be in force unless and until otherwise directed." This Act, however, has not yet come into force in those hills, because as yet no notification under s. 3 has been published.

By notification of the 16th April 1874 (see *Gazette of India*, April 18th), the Governor-General in Council, under s. 5 of Act XXII. of 1869, made cer-

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tain alterations in the rules for the Cossyah and Jynteeah Hills published under the notification of July 30th, 1872, by the Lieutenant-Governor of Bengal, and republished the rules. In these rules no mention is made of the High Court.

It thus appears that the jurisdiction of the High Court was certainly in existence until the passing of Act XXII. of 1869. The question then is, has this jurisdiction ceased by reason of that Act, or by reason of anything done by any person under that Act? For the prisoners it is contended (1) that the jurisdiction of the High Court as established by Parliament cannot be wholly abolished by any authority in this country whatsoever; (2) that if there be any authority which can abolish the jurisdiction of the High Court, it is only the Governor-General in Council exercising legislative powers at a meeting for the purpose of making laws and regulations who can do this; and that in this case the assumed abolition was not by this authority, but by the Lieutenant-Governor of Bengal acting under the powers given to him by Act XXII. of 1869, which powers, it is contended, were not validly conferred.

With regard to the first question, the jurisdiction of this Court in the Cossyah and Jynteeah Hills was a jurisdiction vested in the Nizamut Adawlut at the time of its abolition, and it thus falls within the 2nd clause of s. 9 of the 24 and 25 Vic., c. 104. It is, therefore, in my opinion, expressly made subject by that clause to the legislative powers of the Governor-General of India in Council, or (to use a phrase which is more convenient) to the Legislative Council of India.

I have given fully my reasons for this construction of the High Courts' Act in *In the matter of the Petition of Syed Feda Hossein*,¹ to which reasons I still adhere, and in which I understand the other members of the Full Bench substantially concur.

It is necessary, therefore, to consider the second objection taken on behalf of the prisoner. This objection is met by the Crown in three different ways:—First, it is said that the Act of 1869 does itself actually take away the jurisdiction of this Court. Secondly, that even if it does not do so, it evinces a final determination of the legislative authority that this jurisdiction shall be taken away, and that it only leaves it to the Lieutenant-Governor to fix the exact date of the Act coming into operation; no discretion being vested in him as to whether the Act shall come into operation or not. Thirdly, that even if the Lieutenant-Governor be vested with a discretion to determine whether or no the jurisdiction of this Court shall be taken away, still there is nothing which renders such a delegation of authority illegal.

The first and second of the three propositions put forward on the part of the Crown depend upon what is the true construction of Act XXII. of 1869. The Act is a very peculiar one. It recites that "it is expedient to remove the Garo Hills from the jurisdiction of the Civil, Criminal, and Revenue Courts and offices established under the general Regulations and Acts, and to provide for the administration of justice and the collection of revenue in the said territory." The Act is to be called "The Garo Hills Act, 1869," and it is to come into operation "on such day as the Lieutenant-Governor of Bengal shall by notification in the *Calcutta Gazette* direct." Then by s. 3, "on and after such day," that is to say, when the Act comes into operation in the Garo Hills, Act VI. 1835, so far as it relates to the Cossyah Hills, is to be repealed. Then ss. 4 to

¹ I. L. R., 1 Cal. 431.

8 deal exclusively with the Garo Hills, and s. 9 gives the power already adverted to, to extend all or any of the provisions of the Act to the Jynteeah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British India. It is contended that s. 3, which relates to the repeal of Act VI. of 1835, came into operation, so far as regards the Cossyah Hills, when the Lieutenant-Governor brought the Act into operation in the Garo Hills; that there was no discretion left as to bringing the Act into operation in the Garo Hills, and that by the repeal of Act VI. of 1835 the jurisdiction of this Court, as created by that Act, was destroyed. Assuming, for the present, the correctness of the other parts of this argument, still, in my opinion, the last proposition is incorrect. When Act XXII. of 1869 was passed, the jurisdiction of this Court in the Cossyah Hills in no wise depended upon Act VI. of 1835. It depended upon the 24 and 25 Vic., c. 104, s. 9. Act VI. of 1835, in so far as it conferred jurisdiction upon this Court, was wholly obsolete. Moreover, as already shown, the jurisdiction of the Nizamut Adawlut was, after some discussion, extended to both the Cossyah and Jynteeah Hills, and the jurisdiction of the High Court, which is co-extensive, has been exercised in both tracts accordingly. But s. 3 of Act XXII. of 1869 is expressly confined to the Cossyah Hills. The result, therefore, of this construction of Act XXII. of 1869 would be that, whilst it takes away our jurisdiction in the Cossyah Hills, it leaves it in the Jynteeah Hills. This is very improbable. Ever since the year 1835 both these tracts have been under one administration forming the district of one Deputy Commissioner. The reason why the legislature was desirous to get rid of the Act of 1835, at all events, is not perhaps at first sight quite obvious. But it was, I believe, as follows:—As to that large portion of the Cossyah Hills which lies within British territory, the Act was, as I have said before, obsolete. As to any small portion of the Cossyah Hills, if there should be any, which might be considered as not within British territory, the Act, though in terms applicable thereto, could not be enforced. It was, therefore, an Act which it was proper to repeal so far as the Cossyah Hills were concerned, whether our jurisdiction remained or not. I am, therefore, clearly of opinion, notwithstanding the reference to the Cossyah Hills in s. 3 and the repeal of Act VI. of 1835, that the Act of 1869 does not itself take away the jurisdiction of the High Court either in the Cossyah or in the Jynteeah Hills.

Nor do I think that the Act, taken as a whole, evinces a final determination on the part of the legislature that the jurisdiction of the High Court shall be taken away. I will assume that, if it did so, there would be then nothing to prevent the operation of the Act. I will assume that the operation of an Act complete in all its parts may be suspended by the legislature until something is done by an officer of Government. This might be considered merely as a method of promulgation, and not as any delegation of authority at all. It would be the same as if the Act had been directed to come into operation on its being printed at length in the *Calcutta Gazette*. If, therefore, this be the true construction of the Act, I am not prepared, as at present advised, to say that it could not operate. As regards the Garo Hills, the Act (always excepting s. 8, which presents special difficulties of its own which I need not now consider) may, I think, bear this construction. But as regards the Cossyah and Jynteeah Hills, the Act cannot, I think, be so construed. The frame of the Act as to the Garo Hills and as to the Cossyah and Jynteeah Hills is entirely different. If the legislature had had the same final intentions as to removing the Cossyah and Jynteeah Hills from the jurisdiction of the ordinary Courts as it may, I think, notwithstanding s. 2, be considered to have had in respect of the Garo Hills,

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the preamble of the Act would not have been limited to declaring the expediency of removing the Garo Hills only from the jurisdiction of those Courts. It would have declared the expediency of removing the Cossyah and Jynteeah Hills also. It is true that the preamble of an Act cannot limit the express words. But here the express words are in accordance with the preamble. The power to bring the Act into operation generally is conferred by s. 2. The power to extend the Act to the Cossyah and Jynteeah Hills is given quite separately and in different language by s. 9; and it is not a power to extend the Act simply, but to extend "all or any" of the provisions of the Act. The Lieutenant-Governor might, for example, have applied ss. 6 and 7 to the Cossyah and Jynteeah Hills, but not s. 4, in which case our jurisdiction would have remained as before. It cannot, I think, be said that a power of extension so conferred makes the Lieutenant-Governor the mere ministerial officer who is to promulgate the Act. It vests in the Lieutenant-Governor a double discretion: first, whether the Act shall come into operation in the Cossyah and Jynteeah Hills at all; and secondly, if so, what portion of it shall there operate. I do not mean to say that this is all the discretion vested by the Act in the Lieutenant-Governor. He may by s. 8 apply or not apply to these territories all or any portion of any law applicable to other parts of Bengal. But this portion of the Act is not now immediately before us. I am at present only considering s. 9, and what discretion that section leaves to the Lieutenant-Governor as to the application to the Cossyah and Jynteeah Hills of s. 4. Reading s. 9 by itself, the discretion appears to me to be absolute. Reading the whole Act, I can find no words which can carry any further inference than this—that the Legislative Council, when it determined it to be expedient to remove the Garo Hills from the jurisdiction of the ordinary Courts, at the same time contemplated the possibility of its being expedient to remove the Cossyah and Jynteeah Hills from this jurisdiction also. But this they left an entirely open question to be decided by the Lieutenant-Governor of Bengal.

It is not, of course, in any way necessary now to establish that there is no legislative discretion left to the Lieutenant-Governor as to the application of this Act to the Garo Hills. But it is, I think, desirable to show that the discretion (if any) under s. 2, and the discretion under s. 9, are wholly different both in kind and degree. For this purpose we may consider the matter in this way. It is just possible to conceive that the Lieutenant-Governor of Bengal might not choose to issue the notification under s. 2, and that the Governor-General in Council might not choose to compel him to do so. The legislature would then have been helpless; the Act would never have come into operation at all; it would have wholly miscarried; and the intention of the legislature would have been defeated. But would the intention of the legislature have been defeated if the Lieutenant-Governor had given the notification under s. 2, and had not extended s. 4 of the Act to the Cossyah and Jynteeah Hills? I think not. In the one case the legislature counted on the action of the Lieutenant-Governor as a certainty; in the other case, they left him to act or not as he pleased. Then again, the moment the Act came into operation by the issuing of the notification under s. 2, the jurisdiction of the ordinary Courts in the Garo Hills was destroyed by the imperative words of s. 4. But even when the Act had been thus brought into operation, there is still not a single imperative word applicable to the Cossyah and Jynteeah Hills at all. Even then it is only said that the Lieutenant-Governor "may from time to time extend" to certain districts "all or any of the provisions of the Act." What ground is there for saying that the intention of the legislature would have been defeated if the Lieutenant-Governor had declined to exercise any portion of these powers?

Another way of looking at s. 9 was suggested in the course of the argument. It was said that s. 9 might be looked at merely as dealing with a question of boundaries; that all the districts mentioned in the Act, the Garo Hills, the Cossyah and Jynteeah Hills, and the Naga Hills, were conterminous, and that in such wild and barbarous districts as these it would be impossible for the legislature to fix the exact limits of the application of the Act. I think this suggestion does not accord with either the geographical or the historical facts. Although the Garo Hills, and the Cossyah and Jynteeah Hills, and the Naga Hills, are contiguous, they are three entirely separate districts. The Garo Hills belong to the Commissionership of Cooch Behar, the Cossyah and Jynteeah Hills and the Naga Hills to the Commissionership of Assam. The boundary between the Garo Hills, the Cossyah and Jynteeah Hills, and the Naga Hills, is generally well defined. In point of size the three districts are about equal, the Cossyah and Jynteeah Hills being rather the largest. The policy of the Government has always been to keep the Garo Hills out of the jurisdiction of the regular Courts, and these Courts have never established their jurisdiction in that district. On the other hand, the policy as to the Cossyah and Jynteeah Hills was to bring them under the ordinary jurisdiction of the Courts; and this jurisdiction was fully established and in action without inconvenience from 1835 up to 1871. The Garos are said to be wild and barbarous tribes, whom the Government in 1869 were still endeavouring to reclaim to the habits of civilized life. No such assertion, as far I am aware, could be made with regard to the inhabitants of the Cossyah and Jynteeah Hills. The district is a peaceable one; the inhabitants of it carry on peaceful pursuits. There are within it two considerable European stations, one of which is the seat of the Local Government of Assam. There are also many Europeans living in the Cossyah and Jynteeah Hills, most of them in the service of Government, but some are settlers. The determination, therefore, to exclude the ordinary Courts of law from the Garo Hills would depend upon considerations having no application whatever, or at least only a very modified application, to the Cossyah and Jynteeah Hills. Moreover, there was a special cause which led to the legislation of 1869 as regards the Garo Hills. There had been a decision of this Court, which in effect decided that the Government had been wrong in treating certain portions of the Garo Hills as not within the jurisdiction of the ordinary Courts of justice. It was to counteract the result of this decision that the Act of 1869 was passed. It was in fact an Act passed to legalize the *status quo*. But the same Act, when introduced into the Cossyah and Jynteeah Hills, instead of continuing a state of things already in existence, entirely revolutionized the long established administration of the district. It threw back people who had been living for thirty-five years under a regular and settled administration according to established laws into a condition which every one would acknowledge to be only suitable to a people just emerging from barbarism—that is to say, a condition in which all the powers of Government were centred in the hands of a single individual. This may have been necessary. I do not presume to say that it was not so. But there is nothing in the frame of the Act of 1869, or the circumstances of the case, which would lead me to suppose that simply because this was done in the Garo Hills, it was necessarily intended to be done in the Cossyah and Jynteeah Hills also.

I think, therefore, that the legislature did not decide by Act XXII. of 1869 that in the Cossyah and Jynteeah Hills the jurisdiction of the ordinary Courts should be excluded; that it did not express any opinion whatsoever upon that question, but that it left the decision of it to the absolute and uncontrolled discretion of the Lieutenant-Governor.

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This being the view that I take of Act XXII. of 1869, it becomes necessary to consider whether it falls within the legislative powers of the Governor-General of India in Council to delegate to the Lieutenant-Governor of Bengal the power of determining whether or no a particular district of British India shall remain subject to the jurisdiction of the High Court.

Now, in order to ascertain this, we must go back to that which is the root of the whole matter, the 24 and 25 Vic., c. 104, s. 9. which (as we are all agreed) alone makes the High Court subject to any legislative control in this country; and the question comes to this. When Parliament made the High Court subject to this legislative control, did it thereby intend to enable the Indian Legislative Council to transfer that control to another person, or did Parliament intend that that control should be exercised by the Legislative Council of India itself?

The argument, that such a transfer of authority may take place, has been put by at least one of the learned Counsel who argued this case for the Crown on very high grounds. It is said that the legislative powers of the Governor-General of India in Council mentioned in s. 9 of the 24 & 25 Vic., c. 104, are those legislative powers which are conferred by the Councils' Act (24 & 25 Vic., c. 67); that, except as regards the seven heads specifically mentioned in s. 22 of the latter Act, the Indian legislature has a power co-equal with that of Parliament; that there is no restriction as to the mode of legislation; that the power of the Indian legislature to delegate its authority is no more to be questioned than the power of Parliament to do the same; and that every possible and imaginable power of Parliament not specially excepted in the Councils' Act is conferred. Stress was also laid on s. 45 of 3 and 4 of Will. IV., c. 85, which provides that laws made by the Indian legislature shall have the same force as an Act of Parliament.

This question, although not, as I shall hereafter show, devoid of authority, has never been discussed at length, as far as I am aware, by any English Judges. The task of laying down the principles upon which such a high and important question is to be determined is an extremely difficult one, and I approach it with the greatest diffidence. But it is, nevertheless, one which in the present case I am bound to attempt.

Before proceeding to consider the general question, I will consider an argument which was addressed to us, in order to show that the Courts of law have no jurisdiction to enter upon a consideration of this question at all. It was said that, if there be any limits to the legislative powers of the Governor-General in Council, they are political limits, and not legal ones, and that the question I am about to consider is a political one, upon which Courts of law are not empowered to enter. All doubt upon this part of the case may, I think, be cleared up by a consideration of the difference between a sovereign or supreme and a subordinate or restricted legislature. No one would contend that the Indian legislature is itself sovereign. It exercises sovereign powers, but by delegation only, and is subordinate to Parliament. This is made clear by the 3 and 4 Will. IV., c. 85, s. 51, which is applicable to the present Legislative Council (see 24 & 25 Vic., c. 67, s. 2), and which reserves to Parliament the full power still to legislate for India, and to "control, supervise, and prevent all proceedings and Acts whatsoever of the Governor-General in Council." And it is well known that Parliament does exercise a control as regards the affairs of India which it does not exercise in any other dependency of the British Crown. The Indian budget is annually laid before Parliament. Indian questions are frequently there debated on; and inquiries are constantly being

there made by committees and otherwise into the conduct of affairs by the Government of this country. Now, the reasons why Courts of law cannot examine the validity of Acts passed by a sovereign or supreme legislature have no application whatsoever to the Acts of a subordinate or restricted legislature. Of course, within its competency, the Acts of a subordinate or restricted legislature are, to use the expression of Chancellor Kent, "as absolute and uncontrollable as laws flowing from the sovereign power,"¹ and I may remark in passing that this explains how it is that the Acts of the Indian legislature, if duly authorized, come to be equivalent to Acts of Parliament. But the question whether the Act is or is not within the competency of the legislature must, as the same learned author points out, of necessity fall within the province of Courts of law to determine. The same principle was laid down by the Supreme Court of the United States in a case quoted by Chancellor Kent at p. 453.² There the Chief Justice points out that the powers of the legislature are in America (as they are in India) defined and limited by a written constitution; "but," he proceeds to say, "to what purpose is that limitation, if those limits may at any time be passed? The distinction between a Government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if Acts prohibited and Acts allowed are of equal obligation. . . . The theory of every Government with a written constitution forming the fundamental and paramount law of the nation must be that an Act of the legislature repugnant to the constitution is void. If void, it cannot bind the Courts, and oblige them to give it effect; for this would be to overthrow in fact what was established in theory, and to make that operative in law which was not law. . . . If the constitution be superior to an Act of the legislature, the Courts must decide between these conflicting rules; and how can they close their eyes on the constitution and see only the law." In order properly to understand these observations, and to apply them to the present case, it must be borne in mind that the words 'constitution' and 'constitutional,' as here used, do not mean precisely the same thing as with us, and the distinction is most important, as upon its due observance depend the exact limits of the competency of Courts of law to inquire into the validity of the Act of a subordinate legislature. The Parliament of England, although absolutely sovereign and supreme, is restricted by limits which are called constitutional, and we speak of certain principles of the English constitution as being inviolable. But Parliament, being in the eye of the law absolute, can do that which a subordinate legislature cannot do. It can, in the eye of the law, by its own ordinary proceedings, alter the constitution. The proceedings, therefore, of Parliament can never be questioned upon constitutional grounds by Courts of law. The constitutional restriction has, *ex hypothesi*, been already cut away by paramount authority before the question arises. But not so where there is a written constitution issuing from an authority superior to that of the legislature whose functions it defines. There the constitutional restrictions always operate until the superior authority has removed them, and the Courts of law are bound to give effect to them. Moreover—which is most important, as showing that the question to be decided is, in the strict sense of the word, a legal and not a political one—the restrictions here, as in America, exist in a written form, so that the only question the Court has to determine is the ordinary one—what was the intention of the sovereign power when it created the subordinate legislature?

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I desire it to be fully and clearly understood that I treat this as an ordinary question of construction of an Act or Acts of Parliament, and I do not intend to enter into any political considerations whatsoever.

I also desire to say that I in no way countenance the doctrine which has been put forward by some eminent authorities, but which I believe to be now exploded, that Courts of law can question the validity of Acts of the legislature upon general considerations of religion, morality, natural justice, the so-called social contract, or other similar grounds. I have repudiated this doctrine already in the case of the *Queen v. Ameer Khan*,¹ and I do so again. Where an Act has once been passed by a legislature which is supreme, I consider it to be absolutely binding upon Courts of law. Where it is passed by a legislature, the powers of which are limited, it is not the less binding, provided it be not in excess of the powers conferred upon the limited legislature. I may seem to some persons to be here repeating mere truisms, but I know by experience how much one is liable to be misunderstood when speaking upon such subjects as these.

Being, therefore, of opinion that it is not only within our power, but that it is our duty, to say whether the authority given to the Lieutenant-Governor to take away the jurisdiction of this Court was validly conferred, I proceed to consider the general and important question whether the Councils' Act enables the Legislative Council of India to transfer to others the powers which Parliament has conferred upon itself.

Now, what is the broad principle generally applicable to all cases where an authority is given to one person to do acts on behalf of another, which authority involves personal trust and confidence in the agent, and is to be exercised by him in a particular manner? It will, I think, be admitted that the agent is bound himself to perform the acts for which he is authorized according to the manner indicated; and that he cannot transfer to others the confidence reposed in himself. No doubt, this principle has been generally laid down with reference to dealings between private individuals, but it appears to me to be equally applicable to the case of public functionaries. Parliament has said that the Governor-General of India, together with certain other specified persons whose qualifications are mentioned, may make, at meetings duly constituted, laws for the people of India. To that extent it has delegated its own sovereign authority to the Indian legislature. But, undoubtedly, this delegation of authority was made in view of the special qualifications of the persons in whom this power is reposed, and of the safeguards which arise from the publicity and deliberation of the proceedings of a legislative body which can only transact business at meetings duly convened and constituted. Did Parliament intend to be itself the sole judge of what persons were thus qualified, and what safeguards were necessary for that purpose; or did it intend to leave to the legislature here the power to substitute any persons whom they might consider sufficiently well qualified and any safeguards which they might consider sufficiently effectual? That is the question we have to decide.

The only ground upon which, as it appears to me, it can be maintained that the Indian Legislative Council may transfer to others the powers entrusted to itself is the broad and general ground upon which it was placed by the learned Standing Counsel, Mr. *Kennedy*, who argued with great force and ability that the power to do this is involved in the power to make laws. It was pointed out that there is a difference between a general power to make laws

¹ 6 B. L. R. 482.

and a particular power, for example, to grant a lease or to execute a deed. If I give a man a power to execute a deed, and he transfers that power to some one else, he has done something clearly not authorized by the power which was restricted to the single act of executing a deed. But where Parliament has conferred upon a legislature the general power to make laws, the only question can be, is the disputed Act a law? If it is, then it is valid, unless it falls within some prohibition. I think that this argument is sound, and that it must be met if the validity of Act XXII. of 1869 is denied.

Now, first, as to this Act being a law, I am clearly of opinion that it is not a law in the proper sense of the word. I am at present only speaking of the Act so far as the Cossyah and Jynteah Hills are concerned. As to those hills in the view that I take of it, this Act commands no one to do or to forbear from doing anything. It is simply a signification that a particular person may in those hills either do or not do certain things as he likes. That is not a law in the ordinary acceptance of the word. I will not take the definition of 'law' as given by so accurate and precise a writer as Austin, since it may perhaps be objected that his views cannot be applied to British Acts of Parliament. But no one will make this objection as regards Blackstone, and how do we find that Blackstone defines a law? He says, a law "is that rule of action which is prescribed by some superior, and which the inferior is bound to obey."¹ Tried by this test, Act XXII. of 1869 is not a law. I need not here advert to the distinction between substantive and adjective law, the ultimate object of both being the same; nor do I say that amongst the multitudinous varieties of meaning which have been attributed to the term 'law' a mere permission to legislate could never be called a law. Any authoritative expression of intention might, by some persons under some circumstances, be called a law. But when a Legislative Council was constituted in India distinct from the Executive Council with power to make laws at meetings held for the purpose, I think it was clearly intended to restrict the Legislative Council to the exercise of functions which are properly legislative—that is, to the making of laws which (to use Blackstone's expression) are rules of action prescribed by a superior to an inferior, or of laws made in furtherance of these rules. The English Parliament is not so restricted. It is not only a legislative but a paramount sovereign body, and many of its Acts are not laws according to Blackstone's definition, though as being authoritative expressions of intention they might be sometimes so called. The Indian Legislative Council cannot, in my opinion, do all that Parliament can do, even where there is no express prohibition. The powers concentrated in Parliament are in India divided between the Executive and the Legislative Council. The Executive Council alone has the superintendence, direction, and control of the whole civil and military government of the territories and revenue of India (3 and 4 Will. IV., c. 85, s. 39). The Legislative Council has the power of making laws only. In England also, no doubt, as in India, the executive functions of Government are generally exercised by a body distinct from Parliament, by what (in a special sense) is called "the Government;" but there is no *legal* impediment to Parliament taking upon itself executive functions, and the executive authorities are all responsible to Parliament for the way in which they exercise their executive powers. Indeed, to some extent, Parliament does exercise purely executive functions, as, for example, when it fixes the amount of the naval and military forces, or appropriates the public revenues. The difference in India is this. That the Executive Council and the Legislative Council are two co-ordinate and independent bodies, each having its

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own separate functions with which the other cannot legally interfere. For these reasons, I think that the Legislative Council, when it merely grants permission to another person to legislate, does not make a law within the meaning of the Aft from which it derives its authority.

I have discussed this question with reference only to the word 'laws.' The Aft of Parliament uses the expression "laws and regulations." No reliance was placed in the argument on the use of the additional word, and I think myself that it is merely redundant.

But I quite admit that, in order fully to appreciate the powers of the Indian legislature, we must not fasten our attention solely upon the meaning of a single word. We must look to the whole Aft, and gather from it what were the intentions of Parliament in this respect. Indeed, we must look further. In order properly to understand the frame and intention of the Councils' Aft, we must consider the whole action of Parliament with regard to legislation in India from the year 1833 down to the present time. In the year 1833, by the 3rd and 4th Will. IV., c. 85, s. 43, the Governor-General in Council was empowered to make laws and regulations. Under this Aft there was but one authority in India, "the Governor-General of India in Council." There was not, as now, a separate Council for making laws and regulations. But by s. 48 all laws and regulations were to be made at some meeting of the Council at which the Governor-General and at least three of the ordinary members of Council were assembled; and at which alone the legal member of Council (as he was called) was entitled to vote. By s. 70, the Governor-General in Council was expressly permitted to authorize the Governor-General alone to exercise all the powers which might be exercised by the Governor-General in Council, except the power of making laws and regulations.

From this time nothing occurred, as far as I am aware, to affect the constitution of the legislative authority in India, until the year 1853, when, by the 16th and 17th Vic., c. 95, the constitution of the Legislative Council was entirely altered by the addition of members who did not belong to the Executive Council. A distinction between the legislative and executive functions of Government is observable in the Aft of William the Fourth, but this Aft puts the distinction upon much clearer ground. It puts those functions into the hands of two separate bodies. Owing to the power which the Executive Government has over the appointment of members, and for other reasons, its influence in the Legislative Council is still supreme. But the change in the constitution of the Legislative Council introduced by this Aft is, nevertheless, of importance as emphasizing the distinction between legislative and executive functions. There is also no doubt that henceforth a conflict of opinion between the Executive and Legislative Councils was theoretically, at any rate, no longer impossible.

In the next year, Parliament, by the 17th and 18th Vic., c. 77, granted to the Executive Council power to take any district under its own immediate authority, and to give all necessary directions respecting the administration of such districts or otherwise to provide for the administration thereof: provided always that no law or regulation should be altered except by laws made by the Legislative Council. This power to issue orders and directions is, no doubt, to some extent a legislative power, and the Aft shows how very cautiously provision was made by Parliament for a change in the legislative machinery in India. It is to be observed also that this very limited power is conferred, not upon the Legislative Council, but upon the Executive—a peculiarity which, as we shall see, is preserved through all the Afts of Parliament relating to this subject.

The next Aft is the Councils' Aft. That Aft re-confers the general power of making laws and regulations for the whole of India upon a Legislative Council somewhat differently constituted from what it had been previously, but still one quite distinct from the Executive Council. The Aft provides how the members of the Legislative Council are to be appointed; how they are to resign their offices; and, for the validity of acts, notwithstanding certain defects in the constitution of the Council, it declares that the power of making laws shall be exercised by the Council only at meetings duly constituted in the manner directed by the Aft; it provides how meetings of the Council are to be convened and adjourned, and how rules for the conduct of business are to be made, and one important rule for the conduct of business is, by s. 19, laid down by Parliament itself. It is also remarkable that the Indian legislature does not exercise absolute control over the rules for the conduct of its own business, nor any control over its own adjournments; the first is partly, and the second entirely, under the control of the Executive Government. The Aft also confers a somewhat more restricted, but still, as far as it goes, general, legislative authority upon Local Councils in Madras and Bombay. Then, dealing with the subject of a change in the legislative machinery, the Aft empowers the Governor-General in Council, that is the Executive Council, by proclamation to establish local Legislative Councils in other parts of India, each of which would possess, in regard to its own particular district, a general power to make laws similar to that possessed by the Local Councils established by the Aft. Thus we find provision in the Aft for the establishment and constitution of, and the conduct of business by, three Legislative Councils. We also find power to create new Local Councils given to the Executive; and it is also provided how these Local Councils are to be constituted, and how they are to conduct their business. As to any other changes in the legislative machinery, the Aft is wholly silent.

The next Aft is the 33 Vic., c. 3, expressly passed to make better provision for ordinary laws in certain parts of India. It was found, no doubt, that the machinery of even a local legislature was too cumbrous for certain outlying districts, and this Aft, accordingly, enables the Executive Government, under certain special restrictions, to make regulations (the word 'laws' is not used) in a particular manner without any resort to the Legislative Council. But this can only be done in those parts of India as to which the Secretary of State in Council shall declare the provisions of the Aft applicable. In short, the Aft provides a very special and guarded method of doing that which it is now said that the Indian legislature may do without limit or restriction.

We see, therefore, that these Acts of Parliament nowhere confer any express power upon the Indian legislature to change the machinery of legislation in India, but they do confer that power subject to important restrictions upon the Executive Government. Now, Parliament, in conferring this power upon the Executive Government, necessarily proceeded upon one of two views. Either it considered that the Indian legislature had power to change the machinery of legislation in India, or it considered that it had no such power. In other words, Parliament, when these Afts were passed, either considered that it was making the sole and only provisions which existed for changing the legislative machinery in India, or it considered that it was conferring powers which need only be resorted to when the Executive Government could not obtain the powers which it required from the Legislative Council. I have come to the conclusion, upon reading these Acts of Parliament, that Parliament considered itself to be making the only provisions which existed for changing the

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machinery of legislation otherwise than by an Act passed by itself. In the first place, whatever theoretical difficulty might be imagined as arising out of a conflict between the Executive and Legislative Councils, I do not think that any one ever seriously contemplated that any such difficulty could occur. The existence of the Legislative Council secures publicity and deliberation in regard to the legislative action of Government. But the actual power of Government still remains for all practical purposes with the Executive. I do not think, for example, that Parliament passed such an Act as the 33 Vic., c. 3, merely in view of such a contingency as a conflict between the Executive and Legislative Council. In the next place, though it is not impossible, I think it unlikely, that powers to make fundamental changes in the constitution would have been placed by Parliament simultaneously in the hands of two co-ordinate and independent bodies. In case of these two bodies working harmoniously, such a double power would be useless. In case of their working inharmoniously, such a double power would, as it seems to me, be objectionable. The very fact, therefore, that Parliament bestowed this power on the Executive Government of India seems to me to show that it did not already exist in the legislature. But, after all, what is most important, I cannot reconcile the language of these Acts of Parliament with the existence of the power now claimed for the Legislative Council of India. We must consider what the nature of the claim really is. It is nothing less than this, that the constitution of India, as created by Parliament in these Statutes, is a merely provisional one; that all the directions as to the mode of exercising legislative authority are only to remain in force and effect so long as the legislature may choose that they should do so. That the separation which these Statutes make between the exercise of legislative and executive functions may be nullified, and all the powers now held by the legislature may be re-transferred to any executive officer it may select, whenever it pleases to do so. The legislature may, indeed, still continue to exist, but it may abrogate all its functions by transferring them to some one else. I do not so read these Acts of Parliament. I think that Parliament intended the provisions which it made for the exercise of legislative power in India to be permanent until altered by itself, and that it did not intend to give the Indian legislature power to repeal them. It may be that there is not much in India to which the term 'constitution' can be properly applied. But there is something. The laws must now be made publicly and with deliberation. I do not think this provision either worthless or unimportant, and its worth and importance is greatly increased by the fact that it is the only protection which exists in this country against hasty and arbitrary legislation. The Council for the Crown argue that this protection may be swept away by the Indian legislature, and its powers of legislation placed in the hands of a single individual. I do not think so. I think this protection was provided by Parliament for the people of India, and that it is only under the express authority of Parliament itself that they can be deprived of it.

Moreover, if we consider at one view the Acts of Parliament which have been passed during the last forty years, we cannot help seeing that there has been a considerable conflict of principles in dealing with Indian legislation. At one time there was an attempt to place the legislative authority for the whole of India in a single Council. This authority has been in part decentralized by the establishment of Local Councils; and from time to time, in respect of certain districts, the legislative authority, after having been once separated from the executive, has been, under the express authority of Parliament, again confounded with it, and all powers without distinction have been again placed in the hands of the Executive Government, where they originally resided. I

believe that there is no doubt what the origin of this conflict and of these changes was. Whilst it was considered desirable to secure for the people of India that the functions of legislation should be separated from the other functions of Government, and should be performed with publicity and deliberation, it was found impossible that this should be done by a single Council, or even entirely so by a general Council with the assistance of several local Councils. Parliament has, therefore, from time to time, relieved these bodies from the pressure of an extreme difficulty. We even know that to avoid the slow and tedious method of regular legislation, the executive authorities did, in former times, assume the power to legislate otherwise than in the regular manner for certain districts of India. This was done to a large extent in the Non-Regulation Provinces. But in the whole course of the controversy which has thus arisen, and the pressure thus felt, I have never seen the claim distinctly put forward, that the right to change the legislative machinery in India was included within the general power to make laws, and was one which Parliament had entrusted to the discretion of Indian Legislative Councils. As far as I am aware, this easy and simple solution of the difficulty, namely, that these bodies have the general power to transfer their legislative authority to others, has never been before asserted; and no direct attempt to change the machinery of legislation in India by any Indian Legislative Council has ever yet been made.

Upon the whole, therefore, it seems to me that the fair and reasonable conclusion is this—that Parliament has provided for the exercise of the legislative authority of India by certain Councils, at meetings duly constituted; further, that, if any change in the legislative machinery is necessary, Parliament has provided how and by whom that change is to be made; that the power to make this change is vested by Parliament in the Executive Government alone, no such power being vested in any of the Legislative Councils. These arrangements for the exercise of legislative authority and for the changes in legislative machinery depend upon five Acts of Parliament; the 3 & 4 Will. IV., c. 85; the 16 & 17 Vic., c. 95; the 17 & 18 Vic., c. 77; the 24 & 25 Vic., c. 67; and the 33 Vic., c. 3. The Indian legislature is expressly forbidden to make any law which shall repeal or in any way affect the provisions of any one of these five Acts. Four of these Acts are expressly named in the prohibitions—one in the first head of prohibition, and three in the second. The remaining one is included in the general prohibition contained in the sixth head. In the view that I take, the Indian legislature cannot change the legislative machinery in India without affecting the provisions of these Acts of Parliament which created that machinery, and if it does in any way affect them, then, *ex consensu omnium*, its Acts are void.

On both grounds, therefore, both because Act XXII. of 1869 is, as regards the Cossyah and Jynteah Hills, not a law, and because, if it is a law, it is one which the Legislative Council of India is expressly prohibited from making, I should hold that it is so far void.

I have dealt with this case upon the broad grounds upon which Mr. Kennedy put it. He boldly claimed for the Indian Legislative Council of India the power to transfer its legislative functions to the Lieutenant-Governor of Bengal. Index, as I understood him, the only restriction he would admit was that the Legislative Council could not destroy its own power to legislate, though I see no reason why he should stop there. The Advocate-General did not, I think, go quite so far. But in my opinion there is no narrower question which can be substituted for the broad and general question which the

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learned Counsel put, and which I have considered. There are no words in the Acts of Parliament upon which legislative authority could be made transferable in one class of cases and not in others. Of course, I do not for a moment suggest that every time discretion is entrusted to others there is a transfer of legislative authority. Every Act of the legislature abounds with examples of discretion entrusted to the judicial and executive officers of Government, the legality of which no one would think of questioning. And there may be particular cases in which it would be a matter of considerable difficulty to say whether or no the discretion conferred was of the legislative kind. When the difficulty arises, we must deal with it. But in the present case we have not to cope with this difficulty. By the express words of 24 & 25 Vic., c. 104, s. 9, it is only by legislation that the jurisdiction of this Court can be taken away. Whoever, therefore, takes away the jurisdiction of this Court must exercise legislative authority for the purpose. I have stated my reasons in an earlier part of this judgment for holding that it was wholly by the Lieutenant-Governor, and not in any sense or to any extent by the Indian Legislative Council, that the jurisdiction of the High Court was assumed to be taken away. The broad and general question seems to me, therefore, necessarily to arise—can the legislature confer upon the Lieutenant-Governor this legislative power?

I now come to a decision which, as it appears to me, strongly fortifies the conclusion I have come to as to the powers of the Indian legislature. Indeed, it is a decision which I rely upon far more than my own reasoning, and which we must overrule if we are to adopt the construction of the Councils' Act contended for by the Crown. In the year 1850 a suit was brought in the late Supreme Court against a servant of the Commissioners for the Improvement of the Town of Calcutta for the illegal seizure of a buggy. The defendant justified the seizure under Act XVI. of 1847, and certain rules which the Commissioners had made under that Act, alleging that the plaintiff had not paid the carriage-tax assessed upon him by the Commissioners. The plaintiff demurred to the plea, raising a question as to the legality of these rules. The first judgment was delivered by the Chief Justice, Sir *Lawrence Peel*, as the judgment of himself and Sir *James Colvile*. On that occasion the Court intimated a strong opinion that, if these rules varied the law, they were void, notwithstanding that they were made under the express authority of an Act of the legislature. When, after an amendment of the pleadings, the same question again arose, Sir *Lawrence Peel* gave the joint-judgment of himself, Sir *James Colvile*, and Sir *Arthur Buller*. I have referred to the Registrar's book, and this shows (which the report in *Taylor and Bell* does not) how the Court was constituted on the two occasions on which the case was before it. The important passage is the first paragraph in the second judgment, and is to be found at page 479 of the Report in *Taylor and Bell*. The learned Judges, though they express great doubts whether the rules in that particular case were legal and binding, do not finally decide that point. But they do clearly and unmistakably lay down as a general principle of law applicable to India, that any substantial delegation of legislative authority by the legislature of this country is void. The actual order made was a second permission to the defendant to amend his plea upon payment of costs. The second amendment was made, but I cannot find that the case went any further, and probably it was compromised. The Act itself was shortly afterwards repealed.

The case was very fully argued on two occasions, the defendant being represented by the Advocate-General and the Standing Counsel, and it is in all respects an authority which seems entitled to the very greatest weight.

I am also disposed to think that, if the American reports were available to us, we should find some authority there on this part of the case. There are several decisions of the American Courts referred to in a note to *Kent's Commentaries*, p. 504. One cannot be quite sure, without seeing the reports *in extenso*, how far these decisions go, but they seem to me to support the view that Aft XXII. of 1869 is, as regards the Cossyah and Jynteeah Hills, not a law.

It was asked in the course of the argument what was to be done in the case of emergency, and whether the legislature might not do that which was necessary to meet an emergency? And assuming the answer to this question to be that the legislature might do what was necessary, it was then argued that the Court could not enquire whether the emergency existed or not, for of this the legislature was the sole judge. In fact, whilst asking us to dismiss all political considerations, the learned Counsel ask us to decide this case on the ground of political necessity. But we have nothing to do with any such question at all. Upon an emergency in which danger to life and property is involved, the law, as it stands, and without any alteration, gives increased and exceptional powers to the executive. In extreme cases the executive may suspend the operation of all laws. But I am not aware that such emergencies in any way affect the powers of the legislature; certainly not unless the legislature were actually overawed.

Lastly, it was said that, whether the Indian Legislative Council can or cannot lawfully delegate the power to make laws, it had done so for a long series of years, and a long list of Acts passed between 1845 and 1868 has been handed in to us, all of which, it is said, must be treated as instances of delegation of legislative authority, if Aft XXII. of 1869 be so treated. It was then argued that Parliament must have known what the legislature of this country had been doing, and, had it not approved what was done, would have used language which would have placed the illegality of these proceedings beyond all possible doubt. I have some difficulty in dealing with an argument based upon an assumption of fact in a matter of this kind. I imagine that Parliament, when legislating for India, is dependent mainly upon such information as may be imparted to it by the Secretary of State, or by individual members who have a special acquaintance with this country. The position is, in fact, substantially the same in this as in all other cases where the subject of legislation is not one of every-day experience. If the information thus obtained were not found to be sufficient, special inquiries would then be directed. Whether in the particular case under consideration Parliament did really arrive at a knowledge of the particular provisions in these Acts which are now relied on, I am at a loss how to determine. I cannot, however, think that we need enter upon this inquiry. For, even if we presume knowledge, still to infer ratification from silence would lead to consequences which seem to me inadmissible. Upon one particular point Parliament expressly refers to the practice here, and no doubt, therefore, was so far acquainted with it. In s. 25 of the Councils' Aft it is recited that doubts have arisen as to the power to make laws for the Non-Regulation Provinces, otherwise than at regular meetings of the Legislative Council in conformity with the 3 & 4 Wm. IV., c. 85. The section then goes on to give validity to laws that had not been so made. But it has never been contended that this recital and this ratification have legalized the previous practice. On the contrary, the accepted view has, I believe, always been that the previous practice was put an end to by this very Aft. Speaking of this very practice in a Minute recorded in 1868, Sir *Henry Maine* says:

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"This system, of which the legality had long been doubted, was destroyed by the Indian Councils' Act. No legislative authority now exists in India which is not derived from this Statute." But if the argument of tacit recognition which I am now considering be correct, how is it possible to escape the conclusion that all the vague powers, half legislative, half executive, previously exercised in the Non-Regulation Provinces, are valid and subsisting powers? The argument seems here to stand on its strongest ground.

Nor do the Acts contained in the list which was handed in appear to me to afford (as was asserted) so many clear and undisputed instances of a transfer of legislative authority. I must guard myself against being drawn into a final expression of opinion as to the construction of Acts which are not properly before us. I must also observe that the argument only extends to Acts passed prior to the Councils' Act. It is not, and could not be, contended that the Indian legislature can have increased its own powers by any recent usurpation. This gets rid of the two Acts most relied on,—namely, Act XXIII. of 1861, s. 39, and Act XXV. of 1861, s. 445. Neither of these Acts had been passed when the Councils' Act received the Royal assent, though, probably, they were passed before the Councils' Act came into operation. I may also observe that these sections only confer powers on the Executive Government to extend the Acts to Non-Regulation Provinces. But we know that as to these districts certain exceptional notions were at that time held which are now exploded. As to those Acts which were passed prior to the Councils' Act becoming law, Act VIII. of 1859, s. 385, and Act XIV. of 1859, s. 24, also relate only to Non-Regulation Provinces. Act VII. of 1845 only empowers the Local Government to make rules respecting the levying of water-rates and so forth for canals which have been constructed at the expense of Government. Act XXXV. of 1850 and Act XXXVI. of 1857 give to the Local Government powers which are not legislative, but may be judicial. Act XVIII. of 1853 seems to me merely to give power to fix the limits of cantonments. Act XVII. of 1854 reserves to the Governor-General in Council powers which he would have had without this reservation. Act XXII. of 1855, Act XX. of 1856, Act XXIV. of 1859, and Act V. of 1861, are more difficult to construe. It would certainly have been safer to treat them as what are called General Clauses Acts, and for the legislature in each case to have sanctioned their extension. But I may observe generally as to the provisions which these and many other Acts contain for the making of rules by the Executive Government in conformity with the Act, that we have the very high authority of the Judges who decided the case of *Biddle v. Tariney Churn Banerjee*,¹ that the power to make such rules may be largely conferred without any delegation of legislative authority. Act XXIX. of 1857 does not seem to me to confer any legislative powers at all. Act XXIX. of 1858 was passed to meet a pressing emergency during the mutiny, and ought not, I think, to be taken as a precedent. Act XIII. of 1859, s. 5, and Act IX. of 1860, s. 9, are, in my opinion, of very doubtful validity. I am not sure that they have ever been acted upon. It is by no means easy to ascertain this, for it is one of the peculiar results of this method of legislation that there is no information upon the subject contained in the Statute book. But this I know that I have often heard the validity of these provisions questioned. Upon the whole, the list of Acts prior to the passing of the Councils' Act does not seem to me to show any clear practice of transferring legislative authority which Parliament can be said to have known and recognized.

¹ 1 Tay. and Bell 390; see p. 404.

Before leaving this list I must observe that it contains a number of Acts which were evidently inserted under an entire misconception as to the nature of the difficulty which the Crown has to meet in establishing a claim now put forward on behalf of the Indian legislature. It has never been doubted that the legislature may confer discretion of the most extensive kind upon the executive officers of Government. I have already adverted to this, and, but for the misconception which this list discloses, I should not have thought it necessary to advert to it again. But it cannot be too clearly understood that no one denies that the Indian legislature may entrust to the executive officers of Government power, for example, to regulate public processions and to keep order in places of public resort. And the insertion of this provision (Act XIII. of 1856, s. 77) in the list handed up only shows how entirely the question before us may be misunderstood. No one would think of challenging such a provision as this, as being beyond the powers of the Indian legislature. If my view of the law threw any doubt upon the power of the Indian legislature to pass such an Act as this, I should abandon it at once. But surely it is not necessary to insist at length upon the difference between the delegation of a power to keep order in the public streets, and the delegation of a power to abolish all the existing Courts of justice in a large district, and to substitute such new ones as the *delegatus* may deem advisable. All that can be said is, that there may be a difficulty in some cases in saying whether the Act amounts to a transfer of legislative power. There would be precisely the same difficulty in drawing an exact line between the functions of the legislative and the functions of the executive Council—between the powers which Judges possess to make rules of procedure, and the power which they do not possess to make rules of substantive law. But this does not prove that these distinctions do not exist, or that they are not to be observed. We are, as I have already pointed out, not now called upon to deal with difficulties of this kind. If we are ever called upon to do so, I do not doubt that the utmost endeavour will be made to avoid impeding the useful action of the legislature. I say with confidence that this Court (the only one of which I have a right to speak) has always shown the greatest care and circumspection in questioning the validity of Acts passed by the Indian legislature. On the present occasion it has been pressed very strongly that the view of the law which I take would lead to the most disastrous consequences. Nothing has been adduced in support of this statement, which appears to me quite unfounded. I would gladly have refrained from expressing any opinion upon these Acts at all, but, not being able to do so, I am compelled to admit that there are some provisions in some of the Acts passed by the Legislative Council, the legality of which, upon the view of the law to which I adhere, may be doubtful. But I say distinctly that there is no ground whatever for the sweeping assertion which has been made that, on this view of the law, a very large proportion of these Acts must be at once pronounced to be illegal. No such consequences followed from the decision of *Biddle v. Tariney Churn Banerjee*,¹ and my decision goes no further. The only proposition of law which I lay down is, that the Legislative Council of India cannot confer any power to legislate upon the Lieutenant-Governor of Bengal.

In my opinion, our jurisdiction in the Cossyah and Jynteeah Hills is now the same as it was before the notification was issued by the Lieutenant-Governor, and we ought, therefore, to send for the record of this case, in order to see whether the appeal should be admitted.

KEMP, J.—I concur in the judgment of Mr. Justice *Markby*.

¹ 1 Tay. and Bell 390.

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AINSLIE, J.—By 3 and 4 Will. IV., c. 85, s. 43, the Governor-General in Council had power to make laws and regulations for repealing, amending, or altering any laws or regulations whatever then in force or thereafter to be in force in the Indian territories of His Majesty or any part thereof, and to make laws and regulations for all persons and all Courts of justice and the jurisdiction thereof, and for all places and things whatsoever throughout the whole and every part of the said territories, with certain reservations; and by s. 45 all laws made as aforesaid were to have the force and effect of Acts of Parliament.

By 16 and 17 Vic., c. 95, s. 22, provision was made for the better exercise of the powers of making laws and regulations by the addition to the Council of the Governor-General of certain persons as legislative councillors; and by s. 23 it was enacted that the powers of making laws or regulations vested in the Governor-General in Council should be exercised only at meetings of the said Council at which a certain number of members, and certain particular members, should be present.

By 24 and 25 Vic., c. 67, s. 2, the 43rd section of the Act of Will. IV., and the 22nd and 23rd sections of the Act of 16 and 17 Vic., are repealed, but the 45th section of the former is maintained in force, save so far as the same may be altered by or be repugnant to this Act. Ss. 9 and 10 provide for the constitution of a Legislative Council, and s. 15 restricts the power of making laws and regulations to meetings of the Council at which a certain proportion of members is present; by s. 6 the Governor-General alone is authorized in certain cases to exercise all the powers of the Governor-General in Council, except the power of making laws and regulations. S. 22 re-enacts the provisions of s. 43 of the Act of Will. IV., with the addition that the power is capable of being exercised at meetings of Council for the purpose of making laws and regulations, at which, by s. 19, no other business can be transacted, and except at which, by s. 15, no laws or regulations can be made. S. 25 validates certain laws and regulations theretofore made otherwise than at meetings of a Legislative Council in respect of the Non-Regulation Provinces. By s. 23, the Governor-General, in cases of emergency, may make ordinances for the peace and good government of the Indian territories of Her Majesty or any part thereof, to have effect for six months only, and subject to be controlled or superseded by a law made at a meeting of the Legislative Council. Ss. 34 and 45 restrict the power of making laws and regulations conferred on subordinate legislatures, so that, as in the case of the Council of the Governor-General, it can only be exercised at a meeting for the purpose of making laws and regulations, and in no case can they modify Acts of the Imperial Parliament.

The 1st section of 33 Vic., c. 3, provides that, in respect of any part of the territories under the government or administration of any Governor, Lieutenant-Governor, or Chief Commissioner, to which the Secretary of State shall, from time to time, by Resolution, declare the provisions of the section to be applicable, the Governor, Lieutenant-Governor, or Chief Commissioner, as the case may be, may propose drafts of regulations for the peace and good government of such parts to the Governor-General in Council, which, on receiving his assent, and being duly published, shall have the force of laws made at a meeting of the Legislative Council.

There is further a provision in 17 and 18 Vic., c. 77, s. 3, by which the Governor-General in Council (with the sanction of the Court of Directors of the East India Company) could, by proclamation, take, under the immediate authority and management of the Governor-General in Council, any part of the territories under the Government of the East India Company, and thereupon could

give all necessary orders and directions respecting the administration of such part, or otherwise provide for the administration of the same; but this is coupled with a proviso that no law in force at the time in such part should be altered or repealed except by a law made by the Governor-General in Council.

The Imperial Parliament has thus carefully declared the mode in which legislation by the Government of India is to be carried on. Ordinarily it is to be by laws made at meetings of the Legislative Council of the Governor-General; under emergencies and for the limited term of six months, by the Governor-General alone; and in respect of particular places, to be defined by the Secretary of State, by the Governor-General in (Executive) Council on the proposal of the Local Government.

When Act XXII. of 1869 was passed, the last provisions had not come into existence. This Act was passed by the Governor-General in Council under the general powers conferred by s. 22 of the Indian Councils' Act, subject to the limitations specified in that section.

The question is, whether the supreme Indian legislature did itself, directly or by necessary implication, exclude the Cossyah and Jynteeah Hills from the territorial jurisdiction of the High Court. I confine myself to this one matter, which is all that we need consider for the purposes of the appeal before us at the present stage of the proceedings. I understand we are all agreed that such exclusion is within the powers of the legislature.

I think it did not do so, but that it left the question of such exclusion unsettled. The preamble and title of the Act speak only of the Garo Hills; the Cossyah Hills are not mentioned until s. 9 is reached, except that in s. 3 it is said that, from the date of the notification provided for in s. 2, Act VI. of 1835 (so far as it relates to the Cossyah Hills) shall be repealed. With this exception, the first eight sections refer exclusively to the Garo Hills. Then comes the 9th section, which empowers the Lieutenant-Governor from time to time, by notification in the *Calcutta Gazette*, to extend all or any of the provisions of the other sections to the Jynteeah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British territory.

This provision for a separate notification makes it clear that no part of the territory mentioned in s. 9 is affected by the Act in consequence of the notification provided for in s. 2; and that, if the Act has any operation there, it is simply as the result of the will of the Lieutenant-Governor. The repeal of so much of Act VI. of 1835 as affects the Cossyah Hills from the date when the Act came into force in the Garo Hills (namely, the first March 1870) is of no practical importance; this much of the Act was wholly obsolete. The Courts of Sudder Dewany and Nizamut Adawlut, to which powers of superintendence had been given by the Act, had ceased to exist; and by the 9th section of the High Courts' Act (24 and 25 Vic., c. 104) this Court had been vested with the same powers that the former Courts had. That the Government of India in Legislative Council should take the opportunity of repealing this obsolete Act at the same time that it was dealing with the law applicable to the Garo Hills, is not, to my mind, sufficient ground for saying that the legislature in September 1869 made a declaration in respect of the Jynteeah, the Naga, or the Cossyah Hills similar to that which it had made in respect of the Garo Hills. As to these last, certain provisions were absolutely enacted, and all that was referred to the Lieutenant-Governor was to fix a day from which they should take effect.

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The preamble declares the expediency of dealing with the Garo Hills, but says not a word about the others. The notification necessary to start the operation of the Aft in respect of the Garo Hills has no effect in the Cossyah and other hills. Whether or not the Aft shall ever come into operation at all in the latter, and, if so, the extent to which effect shall be given to it, is left entirely to the discretion of the Lieutenant-Governor. The 2nd and 9th sections are not framed in the same form. The first directs that the Aft shall come into operation, and that the Lieutenant-Governor shall fix a date of commencement, and merely leaves the particular date to be determined by the Lieutenant-Governor as is commonly done when the introduction of a new law requires some adjustment of the administrative machinery.

The fixing of such date is a ministerial, not a legislative act; but the determination whether the law shall be applied at all is not a ministerial, but a legislative act. As this determination was not arrived at by the Supreme Legislature, but was remitted to the discretion of the Lieutenant-Governor, it cannot be said that the legislature excluded the Cossyah and Jynteeah Hills from the jurisdiction of the High Court; it went no farther than to say that if at any time the Lieutenant-Governor shall think fit to exclude them he may do so. In fact, the Lieutenant-Governor did not avail himself of the power for two years after the passing of the Aft, whereas he issued the notification under s. 2 within five months from that time, and it rested entirely with him to determine whether he ever would avail himself of it, and if so, in what district and to what extent. He might possibly have determined only to apply the provisions of s. 5, relating to the public revenue and rent, and of s. 7, as to cesses in one tract, while he applied the whole law in another. The Supreme Legislature could have no knowledge beforehand of what would be the results of the passing of the Aft. It certainly cannot be said that the four bill-tracts named in the Act were all in the same condition at the date of the passing of the Aft of 1869, so that what was good law for one was necessarily applicable to the others; if this had been so, the frame of the Aft would have been different from what it is. If then it was uncertain whether the jurisdiction of this Court in the Cossyah Hills would ever be taken away at all, it cannot be held that it was actually taken away by the Supreme Legislature in the Aft of 1869, and that all that was left to the Lieutenant-Governor was to make arrangements accordingly, and to fix a date for the commencement of the operation of the Aft.

It is consequently necessary to ascertain whether the delegation of power to the Lieutenant-Governor to remove the Cossyah and Jynteeah Hills from the jurisdiction of this Court by a legislative declaration was within the powers of the Legislative Council. On this point, the language of s. 22 of the Councils' Aft appears to me to leave no doubt.

Power is given to the Governor-General in Council at meetings for the purpose of making laws and regulations to alter any laws and make laws for all persons, places, and Courts of justice in the Indian territories of Her Majesty: provided, *inter alia*, that such laws shall not in any way affect any of the provisions of the Councils' Aft.

The law under consideration is a law made undoubtedly at a meeting of the Legislative Council of the Governor-General, and so far a good law; and, if it does not fall within one of the seven exceptions specified in s. 22, it has, by the 45th section of 3 and 4 Will. IV., c. 85, all the force and effect of an Aft of Parliament; but, if it does fall within one of these exceptions, this last mentioned enactment gives it no force at all. S. 22 of the Councils' Aft having

been substituted for the earlier provisions on the same subject (3 and 4 Will. IV., c. 85, s. 43, as modified by 16 and 17 Vic. c. 95, s. 23), the words of s. 45—"all laws and regulations made as aforesaid"—only apply to laws properly made under s. 22 of the Councils' Act, and not within one of the exceptions.

The Act of Parliament requires that ordinarily all laws shall be made only at a meeting of the Council of the Governor-General held for the sole purpose of making laws and regulations, and at which certain persons are present. When laws are to be made otherwise, there is a specific provision according to the nature of the case, but these exceptional provisions are made by Parliament itself, and not left to the discretion of the Indian legislature; and it is, and has long been, an established rule (s. 70, 3 and 4 Will. IV., c. 85, and s. 6, 24 and 25 Vic., c. 67) that the Governor-General himself shall not by himself, except when specially authorized by Parliament, exercise the power of making laws and regulations. It would not be possible for the Legislative Council validly to divest itself of its own functions, and transfer them to the Governor-General alone. A law to such effect, made by the Council, would violate the provisions of both s. 6 and s. 15, whether that law purported to vest the Governor-General with legislative powers generally or specially, and would, therefore, under the express words of s. 22, be *ultra vires*. But if this is so as to the Governor-General, surely it must be so as to the Lieutenant-Governor of Bengal. The same reasons which apply in the one case for restraining the highest officer of the Crown in India from exercising legislative powers alone, and for entrusting those powers only to a Council to be exercised at a meeting at which not less than a certain number of members shall be present, must apply with more force to a subordinate officer; and s. 15 is as much violated in one case as in the other.

Therefore, in my opinion, the conferring on the Lieutenant-Governor power to remove the Cossyah Hills from the jurisdiction of this Court was *ultra vires*.

If it was *ultra vires*, this Court is bound to take notice of the fact. The power formerly exercised by the Nizamut Adawlut in this tract of country was given to this Court by Act of Parliament (s. 9, 24 & 25 Vic., c. 104), and, unless it has been validly taken away, we are bound to exercise it.

No doubt, the Governor-General in Council, whatever construction be put on the section referred to, has power to put an end to this Court's jurisdiction in this tract of country, but no other authority in India can do so. But if the Governor-General in Council wishes to do it, he must proceed by the exercise of his legislative powers as created or declared by the Councils' Act, and in no other way. The High Courts' Act provides no new mode of legislation, but makes the jurisdiction of the High Courts subject to the legislative powers of the Governor-General in Council, which must be looked for elsewhere. If he shall proceed in any other way, this Court is constrained by the Act of Parliament to continue the exercise of its jurisdiction.

But it is said that this view of the provisions of s. 22 of the Councils' Act is at variance with that taken through a long course of years, as shown by a series of enactments in which a somewhat similar mode of supplementing the action of the Legislative Council has been adopted.

I think it unnecessary now to express any opinion as to the validity of the Acts referred to. Assuming them to have been validly enacted, their existence does not support the argument that the mode of legislation adopted in Act XXII. of 1869 is only that which has been constantly adopted without objection;

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and that, as it cannot be assumed that this mode of legislation has escaped the observation of the Imperial Parliament, it has the warrant of a tacit approval.

It appears to me that a distinction must be drawn between provisions by which the carrying out of the declared decisions of the Supreme Legislature is furthered, and provisions which give a power to act independently of the discretion of the Council of the Governor-General. As an example of the one, I may take s. 385 of Aft VIII. of 1859, or s. 445, Aft XXV. of 1861. These are laws intended to be eventually of universal application in British India (the latter, re-enacted in Act X. of 1872, is now, with very few exceptions, the only law on the subject); the actual introduction of these enactments was in certain tracts of country postponed, and made to depend on the discretion of the Local Government. The Supreme Legislature had considered these laws, and adopted them as laws to be eventually in force everywhere; but, instead of declaring that they were to take effect everywhere at once, it was content to declare the ultimate law, and leave the Local Governments to advance up to this standard as fast as they conveniently could. When a Local Government declared such a law to be in force, it was merely parting with a power of delay conferred upon it; it did not make any law; the law introduced was the law made by the Governor-General in Council with the express intention that it should become the law of the particular tract of country in due time. But Aft XXII. of 1869 does not stand on precisely the same footing. There was no expression of a determination by, or desire of, the Legislative Council that eventually the Jynteah Hills, the Naga Hills, and the Cossyah Hills, should be reduced to the same condition as the Garo Hills; at the most it can only be said that there was an expectation that such a measure might become necessary. But an attempt to provide beforehand for the contingency of such a state of things arising in the former as then warranted the introduction of the measure into the Garo Hills, does not amount to a determination that this was the law which it was desirable to put into force in all these hill tracts; had this been the intention of the legislature, I should have expected it to have been expressed in plain language.

The provisions of s. 39, Aft XXIII. of 1861, do not affect my view of this matter. This section allows a Local Government, with the previous sanction of the Governor-General in Council, to annex any restriction, limitation, or proviso it may think proper when extending the Code of Civil Procedure to any territory not subject to the general regulations; but this is merely another form of delaying the full extension of the Code. So far as the Code obtains operation, it is still, because the extension is, *pro tanto*, a carrying out of the intention of the superior legislature that this shall be sooner or later the law in the particular tract of country. As I read the section, no power is given to amend the law itself; it is only a power to keep some portion in abeyance, or to make its operation contingent on something external to it, which again is only another form of postponing its full operation.

A very large number of the Afts referred to in the schedule submitted to us of Afts containing delegation of powers is of the same character. The subject of many is limited, but the mode of legislation is substantially the same. The general law on each subject is propounded by the legislature; the gradual application of it is entrusted to some authority named in the Aft. In form, it may be that the law is made for one or more named members of a class with power to extend it to others; but, in effect, this is making a law for the class with a power granted to the Local Government to introduce it more or less rapidly as may seem fit. The distinctive feature in my opinion is, that in each

of these cases the law is constructive by addition to, or remodelling of, the Statute law then existing as to each class of subjects under the directly exercised discretion of a legislative body, whereas Act XXII. of 1869, as far as we are now concerned with it, is destructive, and operates merely to terminate the operation of established laws.

There is another class of Acts in which there is apparently a clear delegation of legislative power. I refer to Acts which contain a provision giving power to make rules or bye-laws, and to impose taxes or fix fees and charges; but these are clearly distinguishable from such an Act as Act XXII. of 1869, so far as we are concerned with it now, which is only so far as it gives power to the Lieutenant-Governor to repeal s. 9 of 24 & 25 Vic., c. 104. Whether the powers conferred in these Acts to make rules and bye-laws can in all cases be defended, is a matter I need not discuss. All legislation of this class is subordinate to, and in furtherance of, the defined object of each particular Act.

The case of *Biddle v. Tariney Churn Banerjee*¹ at p. 409, and again at p. 479 of the report, is authority for holding that, while the validity of rules which can be brought within the definition of ministerial acts is undoubted, the validity of other rules such as therein mentioned—namely, rules imposing a penalty directly, or granting power of compelling discovery—is open to grave doubt, if indeed the case does not go so far as to rule that they are absolutely invalid. It is foreign to my present purpose to discuss that case; it is enough to show that the delegation relied on does not stand unquestioned, but that there is very high authority for doubting its validity. As I have referred to this case, I take the opportunity of observing that it seems to me strongly to support the earlier part of my judgment. At p. 406 the learned Chief Justice, Sir *Lawrence Peel*, observes: "The legislature of India, though it possesses large legislative powers, is still a limited legislature, and exercises a delegated authority of making laws. Independently of the territorial limits assigned to its power of making laws, there are other limits imposed which the legislature must not exceed; and it is the province of the Courts of Justice of the country to decide on the legality of Acts of the legislature, if a suit be instituted to decide whether the legislature has or has not exceeded the limits within which it may legislate." Again, at p. 479, as I understand the judgment, he assumes as undoubted that delegation of legislative authority by the Indian legislature is beyond its powers, the question being in each case whether there has or has not been such delegation.

The Acts which are most analogous to the Act under consideration, so far as we have now to deal with it, are few in number; they have been termed de-regulationizing Acts.

Act XXI. of 1845 was passed while the 3 and 4 Will. IV., c. 85, was in force; the power of legislation was then vested in the Governor-General in Council. This Act does not make any transfer of that power, but simply declares that the same authority in which the legislative power rested, *viz.*, the Governor-General in Council may, by order in Council, do certain things. The same remarks apply to Acts VI. and XI. of 1846.

After the passing of 16 and 17 Vic., c. 95, we come to the Sonthal Districts' Act XXXVII. of 1855. This differs in form from Act XXII. of 1869, and is distinctly a legislative declaration by the Governor-General in Council. The Lieutenant-Governor has, by s. 6, to give effect to it by proclamation; but this obviously is a merely administrative action. The power to allow an

¹ 1 Tay. and Bell 390.

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appeal in cl. 1, s. 4, notwithstanding the declaration in that section that all decisions and sentences passed according to the provisions of the Act are final, is a power to relax the stringency of the Act in the direction of the general law.

The Chittagong Hill Tracts' Act XXII. of 1860 approaches, in some respects, more nearly to the form of the Act under consideration. Whether any of its provisions are open to question is beyond the scope of my present enquiry. So far as the abolition of the jurisdiction of the Courts of civil and criminal judicature is concerned, the direct and undoubted authority of the Governor-General in Council has been exercised. In the Rohilkhund Act XIV. of 1861, there is a slight change of form. While the Supreme Legislature makes a direct declaration in respect of certain tracts specified in the schedule, it gives power to the Lieutenant-Governor, North-Western Provinces, to define the portions of Pergunnas Juspoor and Kashipore in the District of Moradabad, which are to be subject to the Act; but it does not give him power to include these pergunnas or not at his pleasure and at such time as he may think fit. There is no provision for more than one proclamation giving effect to the Act. This Act approaches to, but does not reach, the form of Act XXII. of 1869.

Act XXIV. of 1864 is wholly different; it validates rules previously made. As far as it empowers the Local Government to extend any Regulation or Act then in force, it may be said to give legislative power; but this is not such a power as is now in question, and whether such powers have been rightly or wrongly given is a matter on which I express no opinion.

On the whole, then, I am of opinion that the jurisdiction of this Court in the Cossyah and Jynteah Hills has not been validly taken away, and that we are bound to entertain the appeal.

MACPHERSON, J.—In my opinion, the Governor-General in Council has power, by legislation, to remove from the jurisdiction of this Court a district over which the Court was declared by the Letters Patent to have jurisdiction. That power seems to me to be expressly conferred by s. 9 of 24 and 25 Vic., c. 104—without which section legislation on the subject would be wholly prohibited by the proviso in 24 and 25 Vic., c. 67, s. 22, that the Governor-General in Council shall not have the power of making any law which shall repeal or in any way affect any of the provisions of that Act or of any Act passed in the same session, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories or the inhabitants thereof.

These two Statutes, 24 and 25 Vic., c. 67 and c. 104, were passed within a few days of each other (one on the 1st of August, and the other on the 6th); and I think it clear that it was intended by ss. 9, 11, and 13 of the later Act to preserve to the Governor-General in Council certain legislative powers which otherwise, by reason of the proviso in s. 22 of c. 67, the Governor-General in Council would not have had. A consideration of the terms of the High Courts' Act will show that the matters covered by the three ss. 9, 11, and 13—in which alone the legislative powers of the Governor-General in Council are saved—are the only matters relating to the High Court in respect of which the Governor-General in Council was intended to have legislative powers. And the express saving of these powers in ss. 11 and 13 was necessary, because those sections relate to matters not included or dealt with in s. 9. The Governor-General in Council has no legislative power in relation to the High Court save what is reserved to him by 24 and 25 Vic., c. 104; and the Letters Patent could give no such power not already given by that Statute.

Although I do not doubt that the conclusion arrived at in *Meares's case*¹ was correct, I do not concur in the construction there put upon these two Statutes. I dissent wholly from the theory, which seems to be the basis of the late Chief Justice's decision in *Meares's case*,¹ that a declaration of jurisdiction contained in the Letters Patent can be affected by legislation by the Governor-General in Council, because the declaration in the Letters Patent is not a "provision of the Act" within the meaning of s. 22. In my opinion, it is a provision of the Act within the meaning of s. 22, and as such the legislative powers of the Governor-General in Council would be wholly barred in respect of it were those powers not given or reserved to the Governor-General in Council by s. 9 of the High Courts' Act. It is only so far as legislative powers are expressly given or reserved by 24 and 25 Vic., c. 104, that the Governor-General in Council has any legislative authority over the jurisdiction, &c., of the High Court. S. 9, however, does seem to me to give the Governor-General in Council plenary powers of legislation as regards the jurisdiction. For I read that section as declaring that the Court shall have and exercise all such civil and other jurisdiction, original and appellate, and all such powers in relation to the administration of justice in the Presidency, as the Letters Patent shall direct; and, save as by the Letters Patent otherwise directed, and subject and without prejudice to the legislative powers of the Governor-General in Council in relation to the matters aforesaid (*i. e.*, all the matters mentioned in s. 9, with which the Crown is authorized to deal in the Letters Patent), the Court shall have and exercise all jurisdiction and every power, &c., in any manner vested in the abolished Courts (Supreme and Sudder) of the same Presidency. The section, in short, vested in the new Court all the jurisdictions and all the powers of every description of the two abolished Courts, except so far as those jurisdictions and powers might be altered or taken away by the Letters Patent or by subsequent legislation by the Governor-General in Council.

This construction of the Statute, no doubt, leads to the conclusion that the Governor-General in Council has power to alter wholly, and to take away the jurisdiction of the High Court—and, further, that the Governor-General in Council is the only authority in India by which the jurisdiction or powers of this Court can be altered or in any way affected. Nevertheless, it appears to me to be the right construction; and it is the construction which, as a matter of fact, was invariably put upon the law up to the time of *Meares's case*.¹ If it be the right construction, it cannot be questioned that the Governor-General in Council could legally remove the Cossyah and Jynteah Hills from our jurisdiction.

But it is argued that, if the Governor-General in Council had this power, it has not been legally exercised, inasmuch as the Governor-General in Council did not attempt or profess to remove the Cossyah and Jynteah Hills from the jurisdiction of the High Court, but merely passed an Act authorizing the Lieutenant-Governor to remove them if he at any time should think fit to do so. And it is contended that a removal by an order based on the authority thus given to the Lieutenant-Governor of Bengal is not legal.

It is an undeniable fact that the Governor-General in Council did by Act XXII. of 1869 empower the Lieutenant-Governor of Bengal at his pleasure to extend the provisions of the Act to the districts in question, and that, by virtue of the power so conferred on the Lieutenant-Governor, those provisions have since been extended in the manner contemplated.

¹ 14 B. L. R. 106.

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The first question which here arises is, whether, the Governor-General in Council having passed such an Act, this Court can decline to recognize or be bound by it, on the ground that it was *ultra vires* of the Governor-General in Council to legislate in such a fashion—*i.e.*, to delegate to the Lieutenant-Governor of Bengal functions which were expressly vested in the Governor-General in Council. In considering this matter, it is necessary to go back a little, and see what the legislative powers of the Governor-General in Council really are.

The Stat. 3 and 4 Will. IV., c. 85, s. 43, gave the Governor-General in Council power to make laws for repealing or altering any laws or regulations whatever then in force or thereafter to be in force (in British India, &c.), and for all persons of whatever nationality—and for all Courts of justice, whether established by Royal Charter or otherwise, and the jurisdiction thereof—*save and except* that the Governor-General in Council was not to have power by legislation to repeal or alter any of the provisions of that Act (3 and 4 Will. IV., c. 85), or of any Act to be thereafter passed affecting the East India Company or the said territories, or the inhabitants thereof, &c. This power of legislation was (s. 44) subject to the right of the Court of Directors to disallow any law which might have been passed, which was thereupon (*i.e.*, if disallowed) to be repealed. By s. 45 it was enacted—and this section stands unrepealed to the present day—that all laws made as aforesaid (*i.e.*, by the Governor-General in Council under the powers given by that Act) “shall be of the same force and effect within and throughout the said territories as any Act of Parliament would or ought to be within the same territories, and shall be taken notice of by all Courts of justice whatsoever within the same territories in the same manner as any public Act of Parliament would and ought to be taken notice of; and it shall not be necessary to register or publish in any Court of justice any laws or regulations made by the said Governor-General in Council.”

By the Stat. 16 & 17 Vic., c. 95, the Council of the Governor-General for legislative purposes received a new constitution; but the legislative powers of the Council and the effect to be given to its Acts remained as they were under Stat. 3 & 4 Wm. IV., c. 85.

The Stat. 17 & 18 Vic., c. 77, s. 3, empowers the Governor-General in Council, with the consent of the Home Authorities, from time to time, by proclamation, to take any district under the immediate management of the Governor-General of India in Council, and thereupon to give all necessary orders respecting the administration of such district, or otherwise to provide for the administration thereof. But it is expressly provided that no law or regulation in force in any such district at the time it is so taken under the immediate management of the Governor-General of India in Council shall be altered or repealed except by law or regulation made by the Governor-General of India in Council.

Then came the Indian Councils' Act, 24 & 25 Vic., c. 67, which again gave a fresh constitution to the Council of the Governor-General for making laws and regulations. This Act, however, to describe it generally, left the legislative powers of the Governor-General in Council unaltered, save that local legislatures were re-established, and certain matters appertaining more peculiarly to the executive were declared (s. 19) not to be cognizable without the previous sanction of the Governor-General. The legislative power, which was taken away from the Presidencies of Madras and Bombay by 3 and 4 Will. IV., c. 8, was, in a modified degree, restored to them; and the establishment of a local legislature for Bengal was authorized. The legislative powers conferred on the Governor-General in Council by 3 & 4 Will. IV., c. 85, were left unimpaired,

but under the new Act, 24 & 25 Vic., c. 67, were to be exercised for the most part in matters of more general administration and such as affected the interests of the Indian Empire at large. In the preamble of the Councils' Act, it is merely recited that it is expedient that the provisions of former Acts of Parliament respecting the constitution and functions of the Governor-General in Council should be consolidated, and in certain respects amended. The second section repeals ss. 40, 43, 44, 50, and certain other sections of 3 & 4 Will. IV., c. 85; and it is declared that all other enactments then in force with relation to the Council of the Governor-General of India or to the Councils of the other Presidencies shall continue in force, "save so far as the same are altered by or are repugnant to this Act." S. 22 declares the powers of the Governor-General in Council as regards the subjects of legislation. It is, in truth, a mere re-enactment of the repealed s. 43 of 3 & 4 Will. IV., c. 85, altered formally and with reference to the changes which were being made in the constitution of the Council. It gives the Governor-General in Council power to repeal or alter any existing law of whatever kind, save that it expressly provides that the Governor-General in Council shall not have the power of making laws or regulations which shall repeal or in any way affect any of the provisions of the Act (24 & 25 Vic., c. 67) itself or any of the then unrepealed sections of 3 & 4 Will. IV., c. 85, and 17 & 18 Vic., c. 77, and certain other Statutes named—and save also that the Governor-General in Council shall not have power to make laws which repeal or affect any provisions of any Act passed in the then present Session of Parliament, or thereafter to be passed in anywise affecting Her Majesty's Indian territories or the inhabitants thereof.

The 3 & 4 Will. IV., c. 85, remains in force, except so far as it is expressly repealed or is repugnant to the Councils' Act. S. 45 is still unrepealed, though the Councils' Act repeals the two sections immediately preceding and s. 50 which follows it. And there is nothing in s. 45 repugnant to the Councils' Act. Therefore it is clear that s. 45 is still in force, and applies to all laws made by the Governor-General in Council under the Councils' Act. Of course, an Act passed by the Governor-General in Council in contravention of s. 22 of 24 & 25 Vic., c. 67, would not be an Act duly passed, the legislative powers of the Governor-General in Council being by that section expressly barred in such cases. But an Act passed by the Governor-General in Council under the Councils' Act, and not falling within any of the prohibitions therein contained, seems, under s. 45 of 3 & 4 Will. IV., c. 85, to have the same effect here as an Act of Parliament would or ought to have; and it must be taken notice of by us in the same manner as any public Act of Parliament. If this be so, this Court has no power to question the authority of the Governor-General in Council, if once satisfied that the Act is not within any of the prohibitions of the Councils' Act. For there is no doubt that, had a public Act of Parliament been passed in the same terms as Act XXII. of 1869, we should have been bound to accept it without question.

But, if it be open to me to question the authority of the Governor-General in Council to pass a law which does not fall within any of the restrictive provisions of 24 and 25 Vic., c. 67, I am unable to say that the Cossyah and Jynteah Hills have not been legally removed from the jurisdiction of the High Court. By s. 4 of the Act, the Governor-General in Council did expressly remove the Garo Hills from our jurisdiction, leaving it, however, to the Lieutenant-Governor of Bengal to fix the date from which the removal was to have effect. Then (ss. 5—8) the Governor-General in Council practically left it to the Lieutenant-Governor to provide, as he should think fit, for the administration, in all respects, of the district, and gave authority to the Lieutenant-Gover-

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nor to extend to the Garo Hills any law, or any portion of any law, then in force in the other territories subject to the Lieutenant-Governor, or which might thereafter be enacted by the Council of the Governor-General, or of the Lieutenant-Governor, for making Laws and Regulations.

As regards the Cossyah and Jynteeah Hills, after, in s. 3, repealing Act VI. of 1835 (which repeal, it may be noted, did not of itself in any way affect the jurisdiction of the High Court over those Hills), the Governor-General in Council by s. 9 empowered the Lieutenant-Governor from time to time to extend, *mutatis mutandis*, all or any of the provisions contained in the other sections of the Act to the Cossyah and Jynteeah Hills. It is left to the Lieutenant-Governor to say whether these districts shall be removed from the Court's jurisdiction or not—and also, if removed, what law shall be administered in them. No doubt, the whole future position of the Cossyah and Jynteeah Hills is left absolutely to the discretion of the Lieutenant-Governor. For all that is really decided by the Governor-General in Council is, that it is fit and proper that the Cossyah and Jynteeah Hills shall be removed from the jurisdiction of the High Court if the Lieutenant-Governor shall think it right at any time that they shall be so removed. No other matter is actually decided by the Governor-General in Council than that it is right that these districts shall be made over wholly to the Lieutenant-Governor's control, if and when he chooses to take them over. It is impossible to deny that this is practically an entire delegation to the Lieutenant-Governor by the Governor-General in Council of the legislative powers of the Council. But on what precise grounds can I say that such delegation is illegal? The Act does not fall within any of the restrictive provisions of the Stat. 24 and 25 Vic., c. 67; and there is no positive law which prohibits such delegation. The question is really one of intention—what powers did the Supreme Legislature intend to confer on the subordinate legislature, the Council of the Governor-General of India for the purpose of making Laws and Regulations?

Reading the Councils' Act with the High Courts' Act, 24 and 25 Vic., c. 104, it is sufficiently clear that the intention of the Supreme Legislature was, that the jurisdiction of the High Court should remain as defined in the Statute, c. 104, except so far as otherwise declared by the Letters Patent or by the legislative enactments of the Governor-General in Council. And it is fairly argued that, if the Statutes gave no power of legislation in such matters to any authority in India save the Governor-General in Council, it could not have been the intention that the Governor-General in Council should, by legislation, confer on the Lieutenant-Governor those powers which it was clearly intended should be exercised by the Governor-General in Council alone. But, although I do not doubt that the Governor-General in Council is the only authority in India who can, by legislation, affect the jurisdiction of this Court, I am not prepared to say that, if the Legislative Council of the Governor-General passes an Act declaring that such rules affecting the jurisdiction as the Lieutenant-Governor may make shall have the effect of law, and if rules affecting the jurisdiction are thereupon made by the Lieutenant-Governor, the alteration of the jurisdiction would be otherwise than by the Governor-General in Council in exercise of his legislative powers. For if we hold that the Governor-General in Council must, if the object is to affect the jurisdiction of this Court, do it by the direct act of the Council assembled for the purpose of making laws and regulations, and cannot do it through authority given by that Council to the Lieutenant-Governor or any other functionary, we are, in fact, legislating and imposing a restriction on the legislative powers of the Governor-General in Council which is not imposed by the Statute.

There are, as I have said, grounds for arguing that the intention was that legislation to affect this Court's jurisdiction should be by the Governor-General in Council directly, and not by delegation. On the other hand, the Statute does not expressly say so; and it might have been expected to say so if such had really been the intention, inasmuch as for years prior to the passing of the Statutes of 24 and 25 Vic., powers of legislation had been delegated repeatedly by the Governor-General in Council to the Lieutenant-Governor and other executive officers, and it may be presumed that in framing these Statutes provision would have been made against a repetition of the evil, had it been deemed in fact to be an evil.

Aft XXII. of 1869 is certainly an exceedingly strong instance of legislation by the Governor-General in Council in a manner amounting to a delegation to the Lieutenant-Governor of Bengal of the legislative powers of the Council. Still, powers of a similar nature (though usually not so extensive) have constantly for years past been given by the Governor-General in Council by legislation to various executive authorities. It is very difficult, for example, to distinguish in principle the present case from that of the Civil Procedure Code (Aft VIII. of 1859), which, by s. 385, took effect in any part of the territories not subject to the general regulations only when extended thereto by the Governor-General in (Executive) Council or by the Local Government to which the particular territory happened to be subordinate. In like manner, the first Criminal Procedure Code (XXV. of 1861) took effect in Non-Regulation Districts only when extended to them by the Governor-General in (Executive) Council or by the Local Government to which the territory was subordinate. It is substantially neither more nor less than a delegation of legislative authority to say to the Lieutenant-Governor or any other officer: "Here is a new Code; but it is left wholly to your discretion to decide whether—and, if at all, when—it is to be applied to such and such territories now under your government." The principle in these and other such cases is really the same as in the case now before us. Yet such delegations are frequent.

Altogether, I do not think that the passing of Aft XXII. of 1869 was absolutely *ultra vires* of the Governor-General in Council. And after the course of practice which undoubtedly has been followed in this matter for very many years, I should certainly decline to declare such an Aft to be beyond the powers of the Governor-General in Council, unless I considered it clear beyond all question that it was so.

I think, therefore, that we have no jurisdiction to entertain this appeal.

Various important points which I have not touched upon have been discussed in the course of the argument. But in the view which I take of the position of the Legislative Council of the Governor-General with reference to this Court, it seems to me unnecessary to go further into them.

PONTIFEX, J.—I concur in the judgment of Mr. Justice *Macpherson*.

JACKSON, J.—Assenting, as I do, to the decision in *Feda Hossein's case*,¹ and being therefore of opinion that the jurisdiction of the High Courts can be affected by legislative action of the Governor-General of India in Council, and by no other authority in this country, I have only to consider whether our jurisdiction has been validly taken away, and whether, if we should think otherwise, we are competent to give effect to our opinions.

It is contended on behalf of the Crown that the jurisdiction of this Court over the Cossyah and Jynteah Hills was put an end to by a notification of the Lieutenant-Governor of Bengal, dated 14th October 1871, which notification

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¹ 1 L. R., 1 Cal. 431.

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purports to have been issued under the authority of the 9th section of an Act of the Governor-General in Council, called Act XXII. of 1869, which received the assent of the Governor-General on the 24th September of that year.

It is further contended that the clause of this Act which empowered the Lieutenant-Governor to issue such proclamation is a law made by the Governor-General in Council under the authority of 24 & 25 Vic., c. 67; that by virtue of cl. 45, 3 & 4 Will. IV., c. 85, a law so made is of the same force and effect in India as any Act of Parliament, and that, consequently, neither this nor any other Court in India is competent to inquire into the validity of the Act, or to question the mode in which the legislature carries out its conclusions.

I will address myself first to the latter branch of this argument, and for this purpose it is necessary to state what my opinion is regarding the constitution and powers of the Indian legislature.

This body is composed of the members of the Executive Government, with the addition of certain persons (not to be less than six or more than twelve in number) nominated by the Governor-General as members of the Council for the purpose of making laws and regulations only. It derives its powers from Parliament and from no other source (see Forsyth's Cases and Opinions on Constitutional Law, p. 17; see also 1 Harington's Analysis, Part I., s. 1), and those powers are to be exercised in a particular manner, and are compassed by certain bounds.

The powers in question, sparingly granted at first, subjected originally, and, down to 1834, to the necessity of registration in the Supreme Courts, and thereafter to the inspection and control of both Houses of Parliament, were gradually enlarged by successive regulating Acts, until they reached their present limits. They are now defined by the Statute known as the Indian Councils' Act, 1861. By that Act, the Council, when constituted for legislative purposes, was declared absolutely incapable of transacting any business or entertaining any motion other than the consideration and enactment, or the introduction of measures of a legislative kind, except that it might amend the rules for the conduct of its business which had been made before it came into existence. The legislative powers committed to the Governor-General in Council are described, and the restrictions on them set forth, in the 22nd clause of the Statute.

It was observed during the argument that there is a distinction between the grant of powers which are absolute, except as to matters expressly reserved, and that of powers extending only up to certain limits, not beyond; it was contended that the former of these was the description applicable to the powers of the Indian legislature. It seems to me that the contrary is the case for the following reasons: The section which defines and guards, by various provisos, the powers conferred for legislative purposes, is thus entitled: "Extent of the powers of the Governor-General in Council to make laws and regulations at such meetings." It is, no doubt, one of the rules for construing Statutes that no weight is to be allowed to the marginal notes, nor should I refer to this one, but that the powers for like purposes entrusted to Governors in Council are similarly defined in ss. 42 and 43, and such defining clauses are afterwards referred to in s. 48 as provisions *limiting* the power of the Governors in Council.

The powers expressly conferred by s. 22 are—

"Subject to the provisions herein contained to make laws and regulations, for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in Indian territories, and to make laws and regulations for all persons, and for all Courts of justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty."

This language appears to me to contemplate the exertion and exercise of the legislative mind of the Council in relation to the subject-matters indicated, and not to include the enabling of any person or any body of persons to repeal laws at their pleasure, or to make laws for Courts of justice or the like.

But, before pursuing this topic further, I return to the question of the competency of this Court to discuss the validity of the Act; and on this point I think that one argument may be derived in favour of the opinion which I hold from the very provision of the Act of Will. IV., on which the advisers of the Crown have placed so much reliance. If we are to interpret the 45th section of that Statute in the way contended for, and the words are given the fullest sense of which they are susceptible, it would be necessary to hold that an Act of the Indian legislature once passed, whether it observed or transgressed the provisos, would be good and valid until repealed, for the words of the section are "that all laws and regulations made as aforesaid (which means, *vide* s. 44, 'by the said Governor-General in Council made'), so long as they shall remain unrepealed, shall be of the same force and effect," &c.

Now, it is not contended that a law and regulation made by the Governor-General in Council, forbidding the Secretary of State from borrowing money in England for the service of India, or altering the Mutiny Act, would be valid, or would have any force or effect, and therefore some limitation must be put upon the sweeping terms of s. 45. But it seems manifest that Parliament must have had in mind the possibility and propriety of such laws being questioned on grounds apart from the breach of any of the provisos contained in s. 22.

For s. 24 expressly provides that—

"no law or regulation made by the Governor-General in Council shall be deemed invalid by reason only that it affects the prerogative of the Crown;"

and s. 14 provides that—

"no law or regulation made by the Governor-General in Council, *in accordance with the provisions* of this Act, shall be deemed invalid by reason only that the proportion of non-official members hereby provided was not complete."

Clearly, therefore, in these cases it was thought necessary to protect the laws in question from being called in question, and the place of question must certainly have been the Courts in this country.

From these premises, therefore—the limited character of the legislature, the conspicuous absence of sovereign or even general powers, the language of the Statute in s. 48, and the provision against challenge on specified grounds—I deduce the opinion that the Courts in India must have the power of examining the Acts of the Indian legislature for the purpose of inquiring whether they have been made in accordance with the limited (though doubtless extremely large) powers conferred by a Parliament, and also in the manner prescribed by Statute; and, further, that the effect and force attributed to such Acts by s. 45 of 3 and 4 Will. IV., c. 85, belong only to laws passed under those same conditions.

But it is further contended that if the Courts have any such power, it can only apply to the provisions touching forbidden subjects, or to those connected with the enacting machinery which are contained in the Statute, and that it cannot extend to criticising the mode in which the legislature thinks fit to carry out its intentions. If this were so, my answer to the objection would be that, in the case before us, the legislature has expressed no intention at all, but has merely given anticipative sanctions to any course which the Local Government may at any time think fit to take in reference to a matter as extensive and important as

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any matter can be. But I think this Court is bound, where its jurisdiction is concerned, and more especially in a matter of criminal jurisdiction, to examine every objection to the validity of an Act, not of course in a captious spirit, remembering indeed that it is under the legislature, but also that both are the creatures of Parliament.

I have already said that the language of the 22nd clause of the Indian Councils' Act appeared to me not to warrant the handing over to any specified person the power to repeal or to make laws, and it is manifest that such is the effect of s. 9, Act XXII. of 1869. It, in fact, enables an authority, quite distinct from the Government of India, in either its legislative or its executive capacity, to abolish, if it thinks fit, all tribunals and all constituted authorities in a given tract of country, and to do so at any future time, and with reference to a condition of things not even approximately understood by the legislature. In point of fact, the discretion entrusted to the Lieutenant-Governor was not exercised till more than two years after the passing of the Act—was not exercised at all by the Lieutenant-Governor in office when it was passed, nor even was that Lieutenant-Governor a member of the Council which passed it; for the Act, as is well known, was passed at Simla, where, by Statute, the Lieutenant-Governor of the Punjab, and not the Lieutenant-Governor of Bengal, sits in the Indian legislature.

It seems to me, therefore, clear that the mind of the Governor-General in Council was not, and could not, have been applied at all, for legislative purposes, to the circumstances of the Cossyah and Jynteah Hills in or about October 1871, and that he did not by any law, at that or any other time, take away the jurisdiction of the High Court. The legislature, being competent to take away by a law this Court's jurisdiction, might also, no doubt, by a law declare that at the end of two years such jurisdiction should cease; but it made no such law, and evidently had not made up its mind upon the subject one way or the other.

Bentham, in his *Chrestomathia* (Vol. VIII., Works, p. 94, Note), defines a law as—

"a discourse expressive of the *will* of some person or persons to whom, on the occasion and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience ;"

and he gives a very similar definition elsewhere (Vol. III., p. 215). A regulation can be hardly a less positive or determinate expression of will enforced by sanction. If a law includes a declaration that a given person may do, or not do, a particular thing as he chooses, and if the permissive enactment in s. 9, Act XXII., is a lawful exercise of the legislative power conferred on the Governor-General in Council, then it would be equally within that power to enact that it should be competent to the Lieutenant-Governor to abrogate and to re-introduce at his pleasure the whole of the existing law in every part of the Lower Provinces. That, it will doubtless be said, would be a lawful but an absurd and culpable stretch of legislative power; and it ought to be assumed that no such extravagance could emanate from the Governor-General in Council; but, in truth, the case supposed is not by many degrees removed from the case before us, only the character of such an Act is palpable when applied to our own case, which escapes observation when it refers to a distant and little known object. At any rate, the argument for the Crown is capable of being pushed to the most dangerous lengths; and, if the case appeared to me only doubtful, I should think it more reasonable to conclude that Parliament had not intended to allow a latitude which might, though it presumably would not, be so abused.

But there are other reasons which, as I think, point with equal plainness to the same conclusion. Parliament itself seems to have commented on this matter, in some places indirectly, in others directly.

The 25th section of the Indian Councils' Act recites that it has been doubted whether the Government of India had the power of making rules or laws for the Non-Regulation Provinces otherwise than by way of formal legislation; and it then proceeds to validate all such rules or laws made prior to the passing of this Act. Now, irrespectively of what seems to me the unmistakable provision in favour of past rules only, it occurs to me to ask why, if the powers of the Indian legislature have as wide an extent as is claimed for them, resort was had to the authority of Parliament in this matter? Why should not the Governor-General in Council have passed an Act legalizing such rules of previous date, and permitting them for the future? It was, it seems to me, because its powers were considered unequal to that strain, and because Parliament, in legalizing the past, thought it not right to sanction the practice in the future.

A somewhat similar measure of those powers is presented by the enactment of the Stat. 34 and 35 Vic., c. 34, which, it seems to me, in the view contended for on the part of the Crown, would have been at least in part superfluous.

These declarations of the British Parliament seem to me on the one hand to indicate a distinct view as to the powers of the Indian legislature, and on the other an equally distinct determination that every relaxing of the strict rule as to the form of legislation should emanate from itself. In short, it seems to be clear that, after the passing of the Indian Councils' Act down to 1870, all legislation for very part of British India was required to be by laws passed at a meeting for making laws and regulations. That undoubtedly was, and probably continues to be, the opinion of Sir Henry Maine, for it is plainly so stated in a paper of his written in 1868, which he has published as an appendix to his work on Village Communities. And on this point I think myself justified in referring to the despatch of Sir Charles Wood in transmitting a copy of the Indian Councils' Act to Lord Canning's Government. I am aware that there is high authority against such references, and also of the danger in some instances of making them, but the despatch is in this instance to be used against the Crown, whose Minister Sir Charles Wood then was; and I believe there is no reason whatever for supposing that the Secretary of State was not on that occasion a perfectly faithful interpreter of the meaning of Parliament, or that the decision of Parliament in this particular was at all other than what the Ministry intended it to be. Sir C. Wood says in para. 27 of the despatch (written in August 1861): "You will observe, however, that henceforth legislative measures affecting any of the territories, regulation or non-regulation, under the dominion of Her Majesty at the date of the passing of the Act, must be passed either by the Council of the Governor-General, or by that of the Government to which such territories may be subject." It would be, I think, a very imperfect and unreal compliance with that injunction, if the Governor-General in Council contented himself with a legislative declaration that the local Executive might in a given locality do any thing that pleased it.

But further, as in regard to some of these provinces, a more convenient and flexible procedure was found to be requisite, and, as the remedy was in the hands of Parliament, a further Act was passed in 1870 (33 Vic., c. 3), wherein it was declared to be expedient that provision should be made to enable the Governor-General of India in Council to make regulations for the peace and good government of certain territories in India otherwise than at meetings for the pur-

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pose of making laws and regulations ; and provision was made accordingly. It cannot have been intended that there should be in existence, simultaneously, two methods of changing the law for such territories, and I should, therefore, consider that for this reason alone the course taken under the Act of 1869, about a year and a half after the passing of the Statute just mentioned, was bad ; but I also think it in plain contravention of the Indian Councils' Act.

As to the nature and extent of the legislative powers intended to be conferred on the Indian Government (it is really that) by the Indian Councils' Act, any one who desires to observe how differently Parliament works when it gives complete authority, reserving only its own supreme and paramount rights, need only compare that Act with the Stat. 30 Vic., c. 3, constituting the Dominion of Canada with its superior and subordinate legislatures.

One argument, however, which was much relied on, I must not leave unnoticed, although I do not deal very fully with it. Our attention was drawn to a great number of instances in which, beginning from 1844-45, and coming down to the present time, a power had been exercised more or less analogous to that used in the present instance ; and with reference to these enactments it was contended, *first*, that a long course of legislation of the permissive or delegatory kind must be taken to have established the practice and therefore the authority of that course ; and, *secondly*, that, inasmuch as many of such enactments were anterior to the Indian Councils' Act, Parliament must be taken to have noticed the course of practice, and by passing it over in silence to have sanctioned what it observed. As to this it seems to me, in the first place, that the great majority of the Acts named in the list handed up to us differ so widely from the present one as to be of little value for the purpose of the argument. It often happens, and must often happen, that the usurpation of a power passes unnoticed, or at least unchallenged, when the occasion is insignificant, or when the attendant circumstances appear to justify or to excuse the encroachment. To leave to an inferior or a different authority the provision of means for carrying out a law, or to entrust to its discretion the choice of a precise date for putting it in force, appears to me not incompatible with the retention by the legislature in its own hands of the principal decision as to the policy of the law ; and many of the Acts referred to go no further than this trifling delegation. Speaking without any claim to precision, because I have not thought myself bound to go through the list, I venture to affirm that not more than two or three of these instances can be at all classed in importance, and in departure, as I view it, from the statutory powers of the Government of India to legislate, with the present one. And, as the questioning of such assumptions of powers is matter of accident not originating with the Courts, no argument can be founded on their having hitherto passed unnoticed by the Judges. With Parliament, of course, the case is widely different. The sovereign legislature intervenes when and as it pleases of its own motion or impelled thereto from outside ; and, if any consent could be inferred from the silence of Parliament, the Courts would be concluded. But on such a topic as this I do not think that we are bound to presume the knowledge of Parliament, or that it would be safe to draw so important an inference from its silence. It cannot be said that the practice under consideration has ever been free from doubts as to its legality. Judicial doubts on the subject were expressed in the case of *Biddle v. Tarney Churn Banerjee*,¹ to the decision, in which case, so far as it went, we are bound to pay the highest respect ; and we may feel tolerably certain that, if the matter had attracted the attention of Parliament, it would have been dealt

¹ 1 Tay. and Bell 390.

with in a manner similar to that adopted in the 25th section of the Indian Councils' Act, that is to say, the doubts would have been recited and the practice legalized either for the past or for all time.

I am unable, therefore, to assume even that Parliament was cognizant of, still less that it intended by silence to approve, the mode of legislation referred to.

Upon these considerations, it seems to me that the notification of the Lieutenant-Governor issued under authority of Act XXII. of 1869, s. 9, could not have the effect of putting an end to the jurisdiction of the High Court. I take it as clear that this Court had jurisdiction in the Cossyah and Jynteeah Hills, because that was a jurisdiction vested in the Court of Nizamut Adawlut at the time of its abolition; and the result is that, *me judice*, such jurisdiction has not been validly taken away, but still exists.

I wish now to say that, when I first committed to writing the views which I held upon this very important question, I found myself to have arrived, by a nearly similar train of reasoning, at the same opinion which my brother *Markby* has expressed with a fulness of treatment and an amplitude of research to which I do not pretend. I might have adopted, perhaps, every word of that exhaustive judgment, but I thought it on the whole more respectful to the Government, as well as more satisfactory to myself, that I should indicate, however slightly, the grounds of my own independent conclusion.

GARTH, C.J.—The important questions which we have to decide in this case have now been maturely and anxiously considered by this Court; and although I regret for some reasons the decision at which the majority of the Court have arrived, it is satisfactory to know that the points have been argued as fully as they could have been, and that our attention has been called, as I believe it has, to all the available materials which could guide our minds to a just conclusion.

The case has been twice argued—first by the Legal Remembrancer on behalf of the Government of Bengal; and again, at the instance of the Government of India, by the Advocate-General and the Standing Counsel, Mr. Kennedy, for the Crown, and by Mr. Phillips on behalf of the prisoners, whose services the Government have very properly retained for that purpose.

Upon the first point which we have to determine, there is little or no difference of opinion. We are all agreed that the Governor-General in Council could, in the exercise of his legislative powers, have removed the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

The only question is, whether, by the means which they have adopted, they have effectually carried out that object.

The jurisdiction of the Court has certainly not in this instance been taken away by any *direct action* of the legislative body. Act XXII. of 1869 did not of itself even profess to take away that jurisdiction. It can only be said to have done so *indirectly*, by conferring upon the Lieutenant-Governor of Bengal what was undoubtedly a very large discretionary power. He was by that Act invested with authority to remove the district in question from the jurisdiction of the High Court, and to abolish entirely, at his own discretion and at his own time, the laws and the system of judicature which prevailed there. He had also the power of introducing new laws, and of reconstituting a judicial system in accordance with his own views; or he might, if he had so pleased, have left the district entirely destitute of any laws or any judicial system whatever.

It may indeed be open to grave doubt whether, looking only to the Statutes from which the legislature of India derive their powers, it was contemplated

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by Parliament that they should exercise those powers by conferring on any other person, or body of persons, so large a discretion.

But the question which we have to decide is, not whether in this instance the legislature have exercised their powers wisely, or in such a way as Parliament intended that they should exercise them; but—

1st—Whether they had the power to take away the jurisdiction of the Court by the means which they adopted? and

2ndly—Whether that is a question which the Courts of this country have a right to determine?

It will be convenient to deal first with the last of these points.

It was argued at the bar that the power of making laws and regulations which was given to the legislature of this country by the Councils' Act was as extensive a power (subject to the restrictions contained in s. 22) as was possessed by the imperial legislature; and that any enactment which they were pleased to pass under the name of a law could be no more questioned by the Courts than an Act of Parliament. But it seems to me that a great and dangerous fallacy underlies this argument, because there may be many enactments which the Indian legislature may pass, and honestly believe that they have a right to pass, but which may, nevertheless, be *ultra vires*, and of no force at all as laws. Suppose, for example, that an Act were passed, which in point of fact infringed one of the restrictions in s. 22, but which the legislature *bona fide* believed was no infringement: would the belief of the legislature that they were justified in passing such an Act prohibit Courts of Justice from inquiring into the validity of it? Or to take another instance unconnected with the restrictions in s. 22: suppose the legislature were to pass an Act, by which they authorized certain police-officers to arrest a French subject in Chandernagore, and upon the man being arrested in Chandernagore, and brought in custody to Calcutta, he were to institute a suit here for illegal imprisonment, would the Courts here have no jurisdiction to enquire into the legality of the imprisonment, and would the prisoner be utterly without remedy, simply because the Government had passed the Act, and believed that they had a right to pass it as a law? These instances are, of course, very clear; but in others considerable doubt might arise as to whether an Act passed by the legislature was or was not within their powers; and in all such cases, unless Courts of law had jurisdiction to determine this question, the Indian public would have no means of redress, and the Government here would be virtually autocratic.

It may be said, no doubt, that the right which Her Majesty in Council possesses of putting a veto on any Act which is passed by the legislature affords some security against any excess of their powers; but it must be borne in mind that the scrutiny to which Indian measures are subjected by Her Majesty in Council is not so much a legal security for the purpose of ascertaining whether the Act is or is not strictly within the powers of the legislature, as a scrutiny of policy and prudence to determine whether the Act is in accordance with the views of the Home Government, and a wise and prudent measure having regard to the interests of the Empire.

I am, therefore, of opinion that it is the province and duty of this Court to determine whether by the Act of 1869, and the notification in the *Gazette* which was made in accordance with its provisions, the jurisdiction of this Court has been abolished; and that it is not because that Act has been passed by the legislature as a law that we are disabled from inquiring into its validity.

No doubt, as soon as the fact is once established, that an Act of the legislature which has been duly passed is within the scope of their powers, the Courts have no right to inquire into the propriety or wisdom of the law which is established by that Act; but it is not every Act which the legislature may pass which can legally be considered as a law. Thus, to bring the argument nearer home to our present purpose, suppose the legislature were to pass an Act, transferring the whole of their legislative powers over the Indian Empire to the Governor-General. That, in my opinion, would not be a law at all within the meaning of the Statute. It would simply be an abdication of their legislative powers in favour of the Governor-General, directly at variance with the language and plain meaning of the Councils' Act; and I should say the same of a similar transfer of their powers with regard to any portion of the Indian Empire.

Now, I consider that the question in the present case is, whether that portion of the Act of 1869 which relates to the Cossyah Hills is a law properly so called, or a mere transfer of the powers of the legislature to the Lieutenant-Governor of Bengal.

I quite agree with my learned brothers, that this is a question of construction, and one to be determined not only by reference to the Councils' Act itself, but to other Acts of the Imperial Legislature which may be found to have a bearing upon the subject, and to other important considerations, to which I shall presently refer.

If the Act of 1869 stood alone, as the only instance of its class, and we had only to determine whether the transfer of power to the Lieutenant-Governor which is thereby made was such a law as the Councils' Act authorized, I confess I should feel more doubt upon the question. But, having regard to the course and character of the legislation which has been going on in this country and in England, with reference to this country, for the last forty years, it appears to me that the Imperial Legislature have themselves put a construction upon the Councils' Act, which (so long as it is not inconsistent with the language of the Act itself) we are bound in duty to adopt, however much it may be opposed to our first impressions; and I quite think also that every reasonable intendment, which can legally be made by this Court in favour of the validity of the acts of legislature, should undoubtedly be made.

Now, upon looking back through the Acts of Council since the year 1833, when the East India Company's Charter Act was passed, it seems to me impossible to resist the conclusion that the principle and the course of action which has constantly been pursued by the legislature of this country is precisely that which is now called in question in the Act of 1869.

By the Act of 1833 the legislative powers which were then conferred upon the Governor-General in Council were in the same language, and (for the purposes of the present case) to the same effect, as those given by the Councils' Act in 1861; and from the time when that Act passed, the Governor-General in Council has constantly been in the habit of exercising those powers through the instrumentality of high officials and public bodies, in whom a large discretion has been vested for that purpose; and, when we consider the extent and variety of the business of the legislature, it is difficult to see how without such machinery they could effectually discharge their functions.

It would seem almost impossible in a country like British India, so vast in extent, so various in its population, its laws, and its customs, that the legislature could perform its multifarious duties satisfactorily, without entrusting to the executive Government, to the Governors of provinces, or to other high officials and

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representative bodies, a considerable share in the working out of their manifold and comprehensive measures ; and it would also seem impossible that they should do this effectually without vesting in those high personages and bodies a large amount of discretionary power.

Moreover, it must be borne in mind that, whatever important trusts are thus created by the legislature, they are by no means absolute or irrevocable. Her Majesty in Council can put a veto upon any Act of the Governor-General in Council which her advisers may not approve, and the Government here are always in a position to see how the powers which they have conferred are being exercised, and if they are exercised injudiciously or otherwise than in accordance with their intentions, or if, having been exercised, the result is in any degree inconvenient, they can always, by another Act, recall their powers, or rectify the inconvenience. Now, it will be sufficient for my present purpose that I should refer to a few only of the Acts of Council which were passed by the legislature, between 1833, the year of the East Indian Charter, and the passing of the Councils' Act in the year 1861 ; and I would refer in the first place to the Procedure Codes of 1859 and 1861 as being remarkable instances of the course of action to which I have alluded.

The Civil Procedure Code of 1859, which effected a great change in the law, was only applied, in the first instance, to the Regulation Provinces of Bengal, Madras, and Bombay ; and under the provisions of s. 385 it was not to take effect in any other parts of India, until it should be extended thereto by the Governor-General in Council, or by the Local Government of any Non-Regulation territory. Thus, the Lieutenant-Governors of Non-Regulation Provinces were empowered at their own discretion, and at their own time, to extend, each to his own territory, the provisions of a Statute, which not only introduced an entirely new procedure into the Civil Courts, but contained enactments which affected very materially the rights, liberties, and property of the subject ; and by Act XXIII. of 1861 (which was passed in the same year as the Councils' Act) the Local Governments of Non-Regulation Provinces were invested with a much larger discretion ; because they were by that Act authorized to introduce the same Code into their respective provinces, subject to such *restrictions, limitations, and provisions* as they might think proper.

Then again, by Act XXV. of 1861, the Criminal Procedure Code, a similar power was given to certain Local Governments of introducing at their own option the provisions of that Code into their respective territories ; and this Act not only introduced new modes of procedure, but contained many enactments which made a very material change in the criminal law.

It seems to me impossible to deny that these Acts did, in fact, confer upon the Local Governments of Non-Regulation Provinces precisely the same kind of power, although different in degree, as by the Act of 1869 was vested in the Lieutenant-Governor of Bengal ; they placed entirely in the hands of the Local Government of those Provinces the right of abolishing at their pleasure the old system of procedure, and of introducing a new system, which very materially changed the law, and affected the rights and liberties of the inhabitants of those Provinces. And the Civil Procedure Code of 1861 went further, because it gave the Local Governments a power to alter or modify the Code in any way they might think proper, and so to introduce a different law into their respective Provinces from that which was in force in the Regulation Provinces.

And there were many other Acts passed during the period which I have defined, in which the legislature proceeded upon the same principle, although the

powers conferred by those Acts might not have been so extensive as in the two instances which I have just named. Thus, Act II. of 1835 gave the Bengal Government full power to issue any instructions which it might think proper for the control and guidance of the Courts of Assam and Cachar. Act VI. of 1835 contained similar provisions with regard to the Courts in the Cossyah Hills. Act XXI. of 1845 authorized the Governor-General in his executive capacity to place any of certain specified territories under a totally different system of law from that to which they were then subject. Act IX. of 1846 empowered the Madras Government to make laws for the regulation of the Madras Harbour. Act XVI. of 1846 conferred upon certain Commissioners the right of making bye-laws for the town of Calcutta. Act XI. of 1848 gave the same Commissioners still larger powers of a similar kind. Act I. of 1852 empowered the Bombay Government to make laws for the regulation of the Bombay Harbour. Act XXII. of 1860 affords a more striking illustration of the same principle. By that Act the Chittagong Hill Tracts were entirely excluded from the jurisdiction of the ordinary Courts, both Civil and Criminal, and from the control of the revenue-laws and officers; and they were placed entirely in the hands of the Lieutenant-Governor of Bengal, who was to appoint what Courts and officers he thought proper, and give what instructions he pleased for the governance of such Courts and officers. And again Act XIV. of 1861 contained similar provisions with regard to the Rohilcund Hill Tracts: placing the administration of justice and the management of the revenue in the hands of the Lieutenant-Governor of the North-West Provinces.

Now, all these Acts amount in one sense to a transfer of legislative power, because in each of them the legislature entrusts to some other person or body of persons the making of laws and regulations which it might have made itself. Thus, instead of making laws for the regulation of the Harbours of Madras and Bombay, it has transferred the power of making those laws to the Local Governments. Instead of introducing the Procedure Codes into the Non-Regulation Provinces, it has left the introduction of those Codes to the discretion of the Local Governments. Instead of organizing a system of judicature and revenue-laws for out-lying districts, such as Assam and the Chittagong and Rohilcund Hill Tracts, it has transferred to the Local Government the duty of making laws for these districts.

The difference between the transfer of authority in all these cases and in that which we are now called upon to decide appears to me one of degree only, not of principle; and if Courts of justice had to determine in each of such cases how far the legislature might or might not go in the creation of these important trusts, and in conferring powers upon high officials, which they might have exercised themselves, the task would not only be one of extreme difficulty, but must lead, in my opinion, to most inconvenient results.

Has, then, the legislature of this country been proceeding all these years upon a principle unwarranted by law? Has it been abdicating its proper functions and transferring powers which it had no right to transfer? The answer to this question will be found in the Councils' Act of 1861. That Act has put a construction upon the meaning of the Indian Charter of 1833 which it seems to me almost impossible to misunderstand.

It cannot seriously be supposed that the Imperial Parliament, when it was reconstituting and strengthening the Legislative Council in 1861, conferring upon it fresh powers, and subjecting it to restrictions which had not been previously imposed, could have been in ignorance of the mode in which the powers of legislation, which had existed for nearly thirty years, had been exercised

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by the Governor-General in Council. The Acts of that legislature had been regularly transmitted to England for the approval of Her Majesty in Council. They were well known to the authorities at the India House. They had been considered by Her Majesty's advisers; and many of them, more especially the Procedure Codes, had been carefully discussed and considered both in England and in this country. The Act of 1859 was prepared and passed under the auspices of Sir Barnes Peacock; and the Acts of 1861 were also passed at the time when he was, not only Chief Justice of the High Court, but also a Member of Council.

It cannot be supposed, therefore, that, if the provisions of those Acts had been contrary to law or even questionable, they would have escaped the vigilance of Sir Barnes Peacock, whose keen perceptions and long experience, both as a legislator and as a judge, rendered him peculiarly capable of detecting any such illegality. Nor, on the other hand, can it be supposed that the Imperial Parliament would have renewed in the Councils' Act of 1861 the legislative powers which the Governor-General in Council had so long exercised, if they had disapproved of the course of action which the legislature had been pursuing. The fact that, with the knowledge of the circumstances which they must be assumed to have possessed, Parliament did, in the Councils' Act, renew the powers which were given by the Act of 1833, appears to me to amount to a statutory acknowledgment that the course of action which had been pursued by the legislature in the exercise of those powers was one which the Act had authorized.

As regards the case of *Biddle v. Tariney Churn Banerjee*,¹ which has been relied upon by Mr. Justice *Markby*, I need only say that, although I entertain the greatest respect for the learned Judges who took part in that decision, I cannot help considering that the view which they took in that case of the powers of the legislature has been since virtually disregarded by the legislature itself, and overruled by the Imperial Parliament by the construction which they have put upon the Act of 1833. I believe that, at the time when that case was decided, it was generally supposed that the power of the legislature to transfer its authority was very limited. If that case were now law to the full extent of the decision, it would follow that a great many Acts of the legislature, which have been acted upon as laws for years past, and are acted upon now, were altogether illegal.

I am, therefore, of opinion that Act XXII. of 1869, the principle of which I cannot distinguish from that of the Acts which I have mentioned, was a law which the legislature were justified in passing, and which did, in conjunction with the notification which was made under it, effectually remove the districts in question from the jurisdiction of the High Court. But, as the majority of the Court are of a contrary opinion, the appeal made by the prisoners will be entertained, and the records will be sent for.

It is much to be desired that this adverse judgment, and the vast importance of the question which it involves, may induce the Government of India to take this case, if it is open to them to do so, on appeal to the Privy Council.

¹ Tay. and Bell 390.

APPELLATE CRIMINAL.

*Before Mr. Justice Markby and Mr. Justice Mitter.*THE EMPRESS *v.* HARAI MIRDHA AND UMED SARDAR.¹*Criminal Procedure Code (Act X. of 1872), s. 263—High Court, Power of—
Jury, Verdict of Acquittal by.*

1877.

Nov. 28.

3 Cal. 189.

Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by s. 457 of the Criminal Procedure Code, *held* that the High Court could, on the case coming before them under s. 263 of the Criminal Procedure Code, find the prisoners guilty of such offence.

THIS case was referred to the High Court by the Officiating Sessions Judge of Nuddea under s. 263 of the Code of Criminal Procedure.

The two prisoners, together with four others, were tried before the Officiating Sessions Judge of Nuddea under ss. 302 and 149, and 326 and 149 of the Penal Code. In the case of two of the prisoners, the jury returned a verdict of guilty under s. 326. Two others were found not guilty, but the remaining two, Harai Mirdha and Umed Sardar, though also found not guilty on the charges framed, were found, by a majority of three out of five of the jury, to have been present with the others, but it was added that they only went for the purpose of rioting, which the jury explained to mean "in order to punish the deceased to a certain extent, but not to go as far as to inflict grievous hurt on him."

The facts of the case were as follows :—

The deceased was not on good terms with the people of the zemindar, amongst whom were the two prisoners; the two prisoners, with others, went to the house of the deceased, and the deceased was enticed out, and received two wounds, either of which the evidence went to show were sufficient to kill him. The deceased ran some distance after he was wounded, and the two prisoners, Harai and Umed, were identified by several witnesses as having, with others, run after the deceased till he fell. Further, Harai and Umed were named to one Badul, who was present when the deceased made his dying declaration as being amongst his pursuers; and although they set up *alibis* in the Court of the Sessions Judge, yet, when previously brought up before the Deputy Magistrate, they admitted they were present, but denied participation in the outrage.

The Sessions Judge, being dissatisfied with the verdict of the jury regarding Harai and Umed, submitted their case to the High Court under s. 263 of the Criminal Procedure Code.

The *Junior Government Pleader*, Baboo Juggodanund Mookerjee, for the prosecution.

Mr. G. Gregory for the prisoners.

MARKBY, J.—The two prisoners, Harai and Umed, whose case is now before us under s. 263 of the Criminal Procedure Code, were put upon their trial before the Sessions Court on a charge "that, being members of an unlawful assembly, and in prosecution of the common object of that assembly, they had committed murder." This was a charge under ss. 302 and 149 of the Indian Penal Code. They were also charged "that, being members of an unlawful assembly,

¹ Criminal Reference, No. 223 of 1877, from the order of R. Towers, Esq., Officiating Sessions Judge of Nuddea, dated the 19th September 1877.

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and in prosecution of the common object of that assembly, they had voluntarily caused grievous hurt." This was under ss. 326 and 149 of the Indian Penal Code. Other prisoners were likewise charged at the same time, and the verdict of the jury as regards these two prisoners was a verdict of acquittal upon both these charges; but, in answer to a question put to them by the Sessions Judge, they stated that the two prisoners, Harai and Umed, were in the company of two of the other prisoners, whom they found guilty on the second of the charges I have stated, for the purpose of committing riot, but that they did not commit it, and, further, that they were not present in order to commit grievous hurt on the deceased, but only to punish him to a certain extent. The Sessions Judge has declined to record the verdict of acquittal as regards these two prisoners, and has referred the case to this Court, in order that these prisoners may be convicted under the second of the two charges which I have mentioned. Now, we may say that we have been relieved from all difficulty in this case by the course which has been taken by the Government, and which, in our opinion, has been very wisely and prudently taken. All that the Government now asks for is a conviction under s. 143 of the Indian Penal Code, that is, that the prisoners now before us were members of an unlawful assembly. That really amounts to this, that we are asked now to carry out the legitimate consequence of the finding of fact at which the jury arrived in respect of these two prisoners. If the Sessions Judge had been so minded, instead of referring this case to us, he might, as pointed out by Mr. Justice *Mitter* in the course of the argument, have pointed out to the jury that their finding was in fact a conviction of an offence under s. 143 of the Indian Penal Code, and that, under the provisions of s. 457 of the Criminal Procedure Code, they were at liberty to find the prisoners guilty under that section. They found the prisoners guilty, not of the whole of the offence with which they were charged, but upon that part of the charge which amounts to a different offence. This is not a case in which we are called upon to differ in any way from the conclusion of the jury. We adopt this conclusion, and we are also relieved from the necessity of accurately defining what our powers are under s. 263. Whatever may be the exact position of this Court in dealing with a reference of this kind under s. 263, as to which we express no opinion, we feel no doubt whatever that this Court has a right to convict a prisoner of any offence which the jury could have convicted him of, upon the charge framed and placed before them. Upon the charge as framed and placed before the jury in this case, the jury could have convicted these prisoners of an offence under s. 143. We, therefore, undoubtedly possess that power ourselves. Accordingly we convict these two prisoners of the offence "that they were members of an unlawful assembly, and thereby committed an offence punishable under s. 143 of the Indian Penal Code," and we direct that they be rigorously imprisoned for a period of six months.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

THE EMPRESS v. THACOR DYAL SING AND ANOTHER.¹

Criminal Procedure Code (Act X. of 1872), s. 530—Constructive Possession—Intermediate holders.

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 Jan. 9.
 3 Cal. 320.

In a case of disputed possession between two rival zemindars, constructive possession through intermediate holders (*ticcadars*), to whom the ryots pay rents, is not such possession as is contemplated by s. 530 of the Code of Criminal Procedure.

¹ Criminal Reference, No. 2790 of 1877, from the order of *W. S. Wells, Esq.*, Magistrate of Shahabad, dated the 13th December 1877.

THE reference to the High Court arose out of the following circumstances : Disputes arose between one Sidhu Singh and Kasa Singh on the one side, and Dirgopal Singh and Thacoor Singh on the other, concerning their respective shares as rival zemindars to certain villages. Each party was, under s. 491 of the Criminal Procedure Code, bound down by the Deputy Magistrate of the Sub-division to keep the peace for six months. Sidhu Singh and Kasa Singh appealed to the Magistrate of the district, who, while upholding the order of the Deputy Magistrate, suggested that the case seemed one of disputed possession, and might therefore be dealt with under s. 530 of the Code of Criminal Procedure. The Deputy Magistrate thereupon commenced proceedings under this section against the parties. A proportion of the villages comprising the lands in dispute were admittedly not held directly by the zemindars, but through *ticca* or intermediate holders to whom the ryots paid their rents. The Deputy Magistrate decided against the claim of Dirgopal Singh and Thacoor Dyal, and they appealed to the Magistrate of the district, who referred the matter to the High Court.

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Baboo Gopal Lall Mitter and Baboo Anund Gopal Paulit for the appellants.

The judgment of the Court was delivered by

AINSLIE, J. (who, after disposing of the case on grounds immaterial to this report, proceeded as follows). Independently of this there is another reason for which the order must be set aside. In the order of the Magistrate by which he referred the case to the Deputy Magistrate for explanation, it is said that the petitioner before him had asserted that six and twenty villages out of the thirty which formed the subject of the order were actually held in *ticca*. The Deputy Magistrate in his reply does not deny that there are certain villages in the possession of *ticcadars*, but he contends that, there being a dispute between the contending parties as to collection of rent, it is necessary to decide the question of possession in respect of all the villages held in *khas* and *ticca* jointly, by which he apparently means all the villages, whether held *khas* or leased out. No doubt, it has been held that questions between zemindars as to the right of collecting rents directly from the ryots may be considered by Magistrates, and that this right of so collecting rents is in fact possession within the meaning of s. 530 ; but that does not apply when there is an intermediate holder who admittedly receives rents from the ryots. Therefore, the order of the Deputy Magistrate is clearly bad as to all the villages which are not held direct by one or other of the zemindars, but are in the possession of farmers. Whether they be six-and-twenty in number or less is immaterial. It does not appear on this record which villages are held in farm, and which are not. Therefore, we are unable to set aside any specific portion of the order of the Deputy Magistrate.

The only question before us is, whether we ought to quash his proceeding altogether, or direct a further enquiry. We think, on the whole, that it is unnecessary that any further enquiry should be held on the present proceedings. They originated in a suggestion of the Magistrate of the district, and it appears that the sub-divisional officer would not, but for that, have taken any proceedings under s. 530. He was satisfied with the steps that he had taken, in binding down both parties in recognizances to keep the peace. It is still open to him, if he thinks fit, to make an enquiry, and, if he is satisfied that, unless proceedings be taken under s. 530, breach of the peace is imminent, he can institute proceedings afresh ; but, if he should deem it proper to record any fresh proceeding under s. 530, it will be necessary for him to ascertain clearly and define the particular villages or portions of villages to which the enquiry is to apply, excluding all those which are not in the immediate possession of either one party or the other.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Markby, and Mr. Justice Ainslie.

1878.

THE EMPRESS *v.* BAIDANATH DAS.¹

Feb. 18.

3 Cal. 366.

Offence punishable by Fine and Confiscation—Act XXI. of 1856, s. 49—Offences triable in a summary way—Summons Cases—Sentence—Criminal Procedure Code (Act X. of 1872), ss. 4, 8, 148, 149, & 222.

An offence under s. 49 of Act XXI. of 1856 can be tried summarily under s. 222 of the Criminal Procedure Code, the confiscation provided by s. 49 being merely a consequence of the conviction, and not forming part of the punishment for the offence.

THE prisoner in this case was charged with the illegal possession of ganja, convicted under s. 49 of Act XXI. of 1856, and sentenced by the Joint-Magistrate of Rungpore to a fine of Rs. 100, or, in default, to rigorous imprisonment for one month. The Sessions Judge, referring to the case of *Juddoonath Shaha*,² was of opinion that the order was illegal, as the Joint-Magistrate had no power to try the case summarily, or to pass sentence of rigorous imprisonment. He, therefore, referred the case under s. 296, Act X. of 1872.

The High Court (*Markby* and *Prinsep*, JJ.) held that the sentence of rigorous imprisonment was illegal, and modified the order in that respect. They referred the question as to whether the offence could or could not be tried in a summary way to a Full Bench with the following remarks:—

PRINSEP, J. (*MARKBY*, J., concurring).—The matter which remains for our decision is, whether an offence under s. 49, Act XXI. of 1856, can be tried summarily by a Magistrate, under s. 222 of the Code of Criminal Procedure.

The punishment for that offence, on which this matter depends, is thus described: the offender “shall forfeit for every such offence a sum not exceeding Rs. 200.” It is further stated, “and the liquors and drugs, together with the vessels, packages, and coverings in which they are found, and the animals and conveyances used in carrying them, shall be liable to confiscation.”

S. 222 of the Code declares that the Magistrate of the district may try certain offences in a summary way, and among these offences are “offences referred to in s. 148 of this Code.” Such offences are described in the Code, s. 4, as “summons cases,” see definition.

S. 148 is to the following effect: “When a complaint is made before a Magistrate having jurisdiction in the case, that any person has committed, or is suspected of having committed, any offence triable by such Magistrate, and punishable with fine only, or with imprisonment for a period not exceeding six months, or with both, the Magistrate may issue his summons directed to such person, requiring him to appear at a certain time and place before such Magistrate to answer to the complaint.”

So only offences punishable with “fine only, or imprisonment for a period not exceeding six months or both,” would be triable in a summary way under the first clause to s. 222 already quoted.

Is an offence under s. 49, Act XXI. of 1856, one punishable with fine only, or does the confiscation which follows on conviction form a part of the punishment, so as to alter the character of the offence as regards the mode of trial to be adopted?

¹ Criminal Reference, No. 48 of 1877, by *H. Beveridge, Esq.*, Officiating Sessions Judge of Rungpore, dated the 30th August 1877.

² 23 W. R., Cr. Rul., 33.

In two reported decisions of this Court—*Khetter Mohun Chowrunghee*¹ and *Judoonath Shaha*²—it has been held that such offences are not summons cases, and therefore are not triable in a summary way, because they are punishable with confiscation as well as with fine.

We have great doubts regarding the correctness of those decisions—doubts which, we would add, are shared by the only Judge of this Court now present, who was a party to one of those decisions. We are informed that Magistrates constantly try offences of this description summarily, probably in ignorance of the rule laid down in these decisions; and we, therefore, think it right to submit the matter to be authoritatively settled by a Full Bench of this Court.

We are inclined to hold that such an offence can be tried summarily as a “summary case,” for the following reasons, which we state, because the parties to this case are unrepresented, and therefore it is not probable that there will be any argument at the bar.

For the procedure in the trial of offences, the Code has divided them into three classes:

Summons cases, defined in s. 148. Warrant cases, defined in s. 149. Sessions cases, or trials in the Court of Session, defined in s. 4.

If the offence under s. 49, Act XXI. of 1856, is not a summons case, it must be either a warrant case or a sessions case; and whatever opinion may be expressed regarding its falling under the category of summons cases, it clearly cannot fall within either of the two other classes. No special mode of trial has been prescribed for such an offence, and it is difficult to suppose that such cases were overlooked by the Legislature.

The proper solution of this difficulty seems to be to regard confiscation not as a punishment contemplated by the Code of Criminal Procedure so as to affect the mode of trial.

It may be said that a sentence is the declaration of the punishment imposed. S. 20 of the Code of Criminal Procedure sets forth the powers of Magistrates in passing sentence, and these powers are limited to imprisonment, fine, and whipping. It is in consideration only of such punishments that the Code has prescribed the different modes of trial, and though confiscation of certain articles may be awarded on conviction of any offence under a special or revenue-law, such confiscation is not taken into account by the Code so as to form a portion of the sentence, or to affect the nature of the offence or the mode of trial.

Further, we observe that s. 8 of the Code, in providing for the trial of offences under local or special laws, states that “no Court shall award any sentence in excess of its powers,” and the powers of Magistrates in respect to passing sentences on persons convicted is set forth in s. 20, which, as already stated, only refers to three kinds of punishments—imprisonment, fine, and whipping. Confiscation under Act XXI. of 1856, and also under the Salt Act, can, however, be ordered by a Magistrate.

Under these circumstances, we are inclined to hold that confiscation is no part of the sentence or punishment under the Code of Criminal Procedure, but that it follows as a consequence of the conviction.

The question referred is that stated in the first paragraph of this reference. If the answer to the question be in the affirmative, the conviction will stand.

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¹ 22 W. R., Cr. Rul., 43.² 23 W. R., Cr. Rul., 33.

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If the answer be in the negative, the conviction and sentence, including the order of confiscation, will be set aside, and a new trial ordered.

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No one appeared on either side before the Full Bench.

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The judgment of the Full Bench was delivered by

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3 Cal. 366.

GARTH, C.J.—We are clearly of opinion that an offence under s. 49, Act XXI. of 1856, can be tried summarily by a Magistrate under s. 222 of the Criminal Procedure Code.

The confiscation, which is provided for by s. 49, is merely a consequence of the conviction, and does not form part of the punishment for the offence. We observe that, in the case of *Khetter Mohun Chowrunghie*,¹ to which we are referred, the question which we are called upon to decide was given up by the Government pleader without argument; and that in the second case the learned Judges merely followed the ruling in the first, so that this would appear to be the first occasion on which the point has been seriously considered.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

1878.

THE EMPRESS ON THE PROSECUTION OF MICHELL v. JOGGESSUR MOCHI.²

Jan. 24.

3 Cal. 379.

Government Currency Note, Theft of—Title of Original Owner—Appealable Order—Criminal Procedure Code (Act X. of 1872), ss. 418 & 419—Cashing a Currency Note—Sale—Contract Act, ss. 74, 76, and 108.

A Government currency note was stolen from A, and cashed by B in good faith for C. On the conviction of C for theft, the Magistrate ordered the note to be given to B. A appealed to the Sessions Judge, who was of opinion that he was not competent to interfere as a Court of Appeal under s. 419 of the Criminal Procedure Code; but submitted the case for the orders of the High Court.

Held that the case could be disposed of by the Judge under s. 419 of the Criminal Procedure Code, and that the words "Court of Appeal" in that section are not necessarily limited to a Court before which an appeal is pending.

Held further that the provisions of s. 76 of the Contract Act did not apply, as the change of a currency note for money is not a contract of sale, and that as the note came honestly into the hands of B, the order of the Magistrate was right.

THE facts of this case appear sufficiently from the memorandum of reference made by the Sessions Judge, which ran as follows:—

"This is an application questioning the propriety of an order passed by the Joint-Magistrate under s. 418 of the Code of Criminal Procedure, by which a currency note of Rs. 100, found to have been stolen from Captain Michell, has, on conviction of the thief, been given to Subal Chunder Poddar, with whom it was cashed by the thief, rather than to its original owner. When this application was first made to me, I thought that, having regard to the terms of s. 419, the petitioner had the right of appeal; but, on reconsideration, I am of opinion that no appeal lies *only* from such an order. There is no express provision of law allowing an appeal only against an order under s. 418, and therefore it would seem that, under s. 286, no appeal can be entertained. The terms of s. 419 would seem to refer to a case in which an appeal has been lawfully made

¹ 22 W. R., Cr. Rul., 43.

² Criminal Reference, No. 223 of 1877, by H. T. Prinsep, Esq., Sessions Judge of the 24-Pergunnahs, dated the 13th of December 1877.

against an order of conviction or acquittal, and an order under s. 418 being a part or consequence of such order, thus comes under consideration by the 'Court of Appeal, Reference, or Revision,' who are empowered to order that order to be 'stayed, or may modify, alter, or reverse it.' In this view of the law, as the application made to me concerns only the matter dealt with under s. 418, I am of opinion that I am not competent to interfere as a Court of Appeal; but, as I am also of opinion that the order of the Joint-Magistrate is contrary to law, I submit the case for the orders of the Honorable High Court.

"As far as the evidence goes, there is no reason to doubt the honesty of the *poddar* with whom the currency note was cashed by the thief. The question is, whether the *poddar* should be allowed to retain it as against its original owner from whom it was stolen. It seems to me that this is a matter which can properly be dealt with by a Magistrate; but that the order passed by the Joint-Magistrate, though it is in accordance with the principles of the law of England, is not in accordance with s. 108 of the Contract Act. Currency notes would seem to be 'goods' within the definition given in s. 76 of that Act, and therefore this case is similar to that given in *illus. (a)* to s. 108.

"I think it right, however, to state that the case of the Collector of Salem¹ would seem to lay down a different view of our law; but in that case the position of Government was alone under consideration, and the judgment seems to have proceeded on the ground that, under the law, the Government treasury officer was bound to cash a currency note, and that therefore the Government was protected against any claim if it should happen that a note so cashed was a stolen note. In the present case there was no such obligation on the *poddar*, and, though the result of an order directing him to give it up to the person from whom it was stolen would seem to be somewhat unreasonable, it is, in my opinion, in accordance with our law in India, and therefore I feel bound to submit the matter for the orders of the Honorable High Court."

No one appeared upon the hearing of the reference, and the judgment of the Court was delivered by

AINSLIE, J.—We think that the Sessions Judge might have disposed of this case under s. 419, Criminal Procedure Code, without a reference to this Court.

The words "Court of Appeal" in that section are not necessarily limited to a Court before which an appeal is at the moment pending. It may very often happen, as in this case, that the question of the propriety of an order under s. 418 for the disposal of any property produced before the Court may in no way concern the convicted person; and we think it unreasonable to put such a construction on s. 419 as shall make the power of the Judge to modify, alter, or annul a Magistrate's order affecting one, contingent on the accident whether another person has or has not chosen to appeal.

S. 286, by the words "except in the cases provided for by this Act," must include cases in which the power to alter or annul the order of a Magistrate is expressly given.

We are further of opinion that the case does not call for our interference. It is admitted in the order of reference that the note came honestly into the hands of the *poddar*, to whom it has been returned by the Magistrate. The Sessions Judge refers to s. 108 of the Indian Contract Act, and to the definition of 'goods' in s. 76 of the same Act, in which, for the purposes of that particular chapter dealing with contracts of sale, the word is defined.

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¹ 7 Mad. 233.

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No one has appeared to argue the points raised before us. As at present advised, we are of opinion that the provisions of the Contract Act do not apply to this case. The change of a Government currency note for money is no more a contract of sale than the payment of the same note over the counter of goods is a sale of the note for the goods. In this last case the note is paid as money being "legal tender" for the amount expressed therein under s. 15, Act III. of 1871. S. 77 of the Contract Act defines 'sale' to be the exchange of property for a price, but this is the exchange of money in one form for money in another form. Either form being legal tender, it is impossible to say that one is the price of the other. If we are to look to s. 76 of the Contract Act, we must read it with s. 77, and this latter section shows that the provisions of that Act do not apply in this case.

APPELLATE CRIMINAL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

1878.
 Feb. 12.

THE EMPRESS ON THE PROSECUTION OF JOHARDI SHEIK *v.*
 HEMATULLA.¹

3 Cal. 389. *Criminal Procedure Code (Act X. of 1872), s. 215—Evidence for the Prosecution—Examination of Witnesses.*

A Magistrate is bound, before he discharges an accused person under s. 215 of the Criminal Procedure Code, to examine all the witnesses, and should not refuse to examine witnesses simply because their evidence will be to the same effect as that already taken for the prosecution.

THE complainant, Johardi, in this case charged another man with forcibly cutting paddy. The Deputy Magistrate to whom the case was referred took evidence as to the possession of the land and crop in dispute. The complainant produced four witnesses, of whom the Deputy Magistrate examined two only, because (as it appeared) the remaining two witnesses were only cognizant of the same facts as the two previously examined. After hearing both sides, the Deputy Magistrate discharged the accused under s. 215 of the Code of Criminal Procedure, because the evidence for the prosecution did not clearly establish the sowing of the crop by the complainant.

The Magistrate was of opinion that the other two witnesses ought to have been examined, and referred the case to the High Court under s. 296 of the Criminal Procedure Code.

No one appeared on the hearing of the reference, and the judgment of the Court was delivered by

JACKSON, J.—The Deputy Magistrate was bound, under s. 215 of the Criminal Procedure Code, to hear all the witnesses for the prosecution. We direct that he do this, and then pass such order on the case as the evidence appears to him to call for.

¹ Criminal Reference, No. 1114 of 1878, from *F. W. J. Rees, Esq.*, Officiating Magistrate of Maldah, dated the 5th of February 1878.

APPELLATE CRIMINAL.

*Before Mr. Justice L. S. Jackson and Mr Justice Cunningham.*THE EMPRESS *v.* AMIRUDDEEN.¹

1878.

Feb. 12.

Penal Code, ss. 217, 218—Evidence that Offence has been committed.

3 Cal. 412.

It is sufficient for the purpose of a conviction under s. 217 of the Penal Code that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he has done this with the intention of saving a person from legal punishment; it is not necessary to show that in point of fact the person so intended to be saved had committed an offence, or was justly liable to legal punishment.

THE charges against the prisoner, who was a police-constable, were that he, when in charge of the Gourruddey police-station, on the 28th of July, in his capacity of head-constable of police, induced one Radha Churn Dhopa to compromise a complaint, which he came to make against one Adhari Dhopa,² of cutting off his ear, and, in further violation of his duty, suppressed the fact that Radha Churn Dhopa came to make a complaint; and, in so doing, framed an incorrect public record with a view to save one Adhari Dhopa from legal punishment. The prisoner, Amiruddeen, was committed for trial under ss. 217 and 218 of the Penal Code, and, on conviction under these sections, was sentenced to imprisonment and fine. He appealed to the High Court.

Mr. M. M. Ghose for the appellant.

The judgment of the Court was delivered by

JACKSON, J.—It has been pressed upon us in this appeal that the prisoner has not been duly convicted under s. 217 of the Indian Penal Code, because there was not before the Court upon the present trial any evidence to show that in point of fact an offence had been committed, still less that such offence had been committed by the person in respect of whom the wrongful act of the police-officer, the prisoner, had been done. What appears is, that a person named Adhari Dhopa was charged before the Court of Session, and was tried and acquitted of an offence, the offence charged being the cutting of somebody's ear; and it appears that the particular act which the prisoner in this case had committed, and which amounted to knowingly disobeying a certain direction of the law as to his conduct as a public servant, had a tendency to save a person, namely, the person charged, as first stated, from legal punishment. It appears to me quite sufficient, for the purpose of a conviction under s. 217, that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he should have done this with the intention of saving a person from legal punishment, and that it is not further necessary to show that, in point of fact, the person so intended to be saved had committed an offence, or was justly liable to legal punishment. It appears to me certain that a public servant charged under that section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was founded upon a mistaken belief as to that person's liability to punishment. We have been pressed with a case in which I myself gave judgment—the case of *Queen v. Joynarain Patro*.³ It is not necessary for us at present to consider whether that judgment was right, because the section on

¹ Criminal Appeal, No. 34 of 1878, against the order of H. C. Sutherland, Esq., Sessions Judge of Backergunge, dated the 17th November 1877.

² Adhari Dhopa was charged before the Sessions Court with the murder of Radha Churn, who died from the wound in his ear, and was acquitted.

³ 20 W. R., Cr. Rul., 66.

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which that case turned was wholly different from the section now under consideration. That is a section under which any member of the community is punishable, and it is one under which the essence of the offence is that the person to be dealt with must know, or have reason to believe, that an offence has been committed. This is an offence applying only to public servants, and an act of a certain kind is made punishable as an offence when such act is done knowingly against the direction of the law and with the intention of saving a person from legal punishment, whether the person so intended to be saved from punishment had committed the offence or not.

I think, therefore, that the conviction in this case was right, and that the appeal must be dismissed.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

1878.
 March 22.
 3 Cal. 495.

THE EMPRESS v. KUDRUTOOLLAH AND OTHERS.¹

Practice—Committal for trial after charge has been drawn up—Criminal Procedure Code (Act X. of 1872), ss. 4, 220, 221.

S. 221 of the Criminal Procedure Code authorizes a Magistrate, after a charge has been drawn up, to stop further proceedings, and commit for trial.

Although the explanation to s. 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew the charge.

The prisoners were charged with rioting under s. 147 of the Penal Code.

The facts of the case, and the reasons for the reference, sufficiently appear from the order of the Sessions Judge referring it to the High Court, and which ran as follows:—

“At the sitting of the Court for the trial of this case an illegality was apparent on the very face of the commitment. It appears that the Joint-Magistrate has gone through the case, and all but decided it, having drawn up a charge, examined the witnesses for the defence, and recorded two judgments, or a judgment with a postscript, the former dated 29th December 1877, and the latter dated 18th January 1878. On this last date the Joint-Magistrate records an order that the charge which he had himself drawn up was cancelled, and that the prisoners were committed to the Sessions. This I hold that the Joint-Magistrate had no power to do. Having drawn up a charge, the Joint-Magistrate was bound to convict or acquit. He had no third course open to him, *vide* explanation, s. 220, Criminal Procedure Code. It cannot be contended that s. 221 helps the Joint-Magistrate, because it is clear that the two sections must be read together. It cannot be said that s. 221 justified a procedure which s. 220 distinctly precludes; and there is all the more reason for this when it is borne in mind that the explanation to s. 220 is altogether new in the Criminal Procedure Code. Clearly then the legislature knew what they were about, and they could hardly, with their eyes open, have introduced the explanation to s. 220, providing that if a charge is drawn up, the prisoner must be either acquitted or convicted, and go on in s. 221 to provide a third course for Magistrates to follow. I hold, then, that, by the words “at any stage of the trial” in s. 221, the legislature fully and deliberately intended that the explanation in the pre-

¹ Criminal Reference, No. 17 of 1878, from the order of *H. C. Sutherland Esq.*, Sessions Judge of Zilla Backergunge, dated the 13th March 1878.

vious section should be followed and read consistently, and read to mean at any stage before the Magistrate had drawn up a charge.

"There is a further difficulty in the case. The Joint-Magistrate has only committed on the same charge on which he had previously charged the prisoners as triable before him. The necessity for the commitment is not, therefore, apparent.

"I have searched in vain for any reported case to throw light on the present difficulty. I certainly never before heard of a Magistrate cancelling a charge once made.

"The case must be referred to the High Court under s. 197, explanation, Criminal Procedure Code, in order that the Joint-Magistrate's commitment may be quashed."

No one appeared upon the hearing of the reference, and the judgment of the Court was delivered by

JACKSON, J.—"Trial," according to the definition in s. 4 of the Criminal Procedure Code, means "the proceedings taken in Court after a charge has been drawn up." It is clear, therefore, that s. 221 of the Criminal Procedure Code, which follows s. 220, authorizes a Magistrate, although a charge may have been drawn up, to stop further proceedings and commit for trial: for this purpose s. 221 may be regarded as a proviso to s. 220. It may be added that, though the explanation to s. 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew it.

We see no reason, therefore, to quash the commitment.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

THE EMPRESS *v.* BUTTO KRISTO DOSS AND ANOTHER.¹

Public Servant—Penal Code, ss. 21 and 109.

A person appointed by the Government Solicitor, with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as Prosecutor in the Calcutta Police Courts, is a public servant within the meaning of s. 21 of the Indian Penal Code.

In this case the accused were charged under s. 109 of the Penal Code with offering a bribe to Mr. Hume, who was alleged to be a public servant. It would appear that Mr. Hume was appointed by the Government Solicitor, with the approval of the Government, and under arrangements sanctioned by the Governor-General in Council, to act as Government Prosecutor in the Calcutta Police Courts.

The point referred by the Presidency Magistrate for the opinion of the High Court was, whether, under these circumstances, Mr. Hume was to be considered a public servant.

No one appeared on the hearing of the reference, and the judgment of the Court was delivered by

JACKSON, J.—We think it clear that the person appointed by the Government Solicitor, with the approval of the Government, to act as Government Prosecutor, under the arrangements made by the Governor-General in Council, is a public servant within the meaning of s. 21, Indian Penal Code.

¹ Criminal Reference, No. 51 of 1878, from an order passed by *F. F. Marsden, Esq.*, Presidency Magistrate of Calcutta.

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APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

1878.

Jan. 17.

3 Cal. 540.

THE EMPRESS ON THE PROSECUTION OF RAM MANIKYA CHAKROBUTTY AND OTHERS *v.* DONONJOY BARAJ.¹*Practice—Distinct Offences—Separate Charges—Criminal Procedure Code (Act X. of 1872), ss. 532, 553, 554 (illus. b), 555.*

S. 453 of the Criminal Procedure Code simply places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in the section, however, to prevent an accused from being separately charged and tried on the same day for any number of distinct offences of the same kind committed within the year.

THE letter of reference showed that the accused was tried and convicted by the Deputy Magistrate in eight cases for extorting various sums of money from some villagers; the complainants in each case being separate individuals. Five out of the eight cases were tried on the same day, and, so far as can be gathered from the letter of reference, it would appear that each of these cases were tried separately. Separate sentences were inflicted on each case. The accused appealed to the Court of the District Magistrate, who affirmed the order of the Deputy Magistrate. A further application was then made on behalf of the accused to the Sessions Judge, who referred the matter to the High Court under s. 296 of the Criminal Procedure Code, on the ground that the convictions were bad in law. The alleged offences being of one kind, and having been committed within one year, it was not open to the Court, under s. 453 of the Code of Criminal Procedure, to draw charges and try the accused at the same time for more than three of such offences.

No one appeared on the hearing of the reference.

The judgment of the Court was delivered by

AINSLIE, J.—We see no grounds for interfering. S. 453 of the Criminal Procedure Code modifies s. 452, which requires a separate charge and a separate trial for every distinct offence, by allowing three charges of three distinct offences of the same kind, and committed within one year of each other to be tried at the same time; but this does not mean that, if at one time or within one year a man commits fifty distinct offences of the same kind, he shall not in one day be prosecuted for more than three such offences. This is clear from illus. (b), s. 454.

APPELLATE CRIMINAL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

1878.

Mar. 25 & 27.

3 Cal. 573.

THE EMPRESS ON THE PROSECUTION OF DENONATH GHATTACK *v.* RAJCOOMAR SINGH AND ANOTHER.²*Land held by Joint-owners—Abatement of a Nuisance—Riot—Criminal Trespass—Mischief—Penal Code, ss. 141, 147, 425—Examination of Witnesses for Defence—Criminal Procedure Code (Act X. of 1872), ss. 219, 359, 362—High Court, Extraordinary Jurisdiction—High Court Charter, cl. 15.*

A, a joint-owner of a parcel of land, erected on it an edifice without the consent and against the will of B, another joint-owner. A dispute having arisen in consequence, the

¹ Criminal Reference, No. 88 of 1877, from the order of *F. H. McLaughlin, Esq.*, Officiating District and Sessions Judge of Noakhally, dated the 7th December 1877.

² Criminal Rule, No. 39 of 1878, against the order of *J. P. Grant, Esq.*, Sessions Judge of Zilla Hooghly, dated the 28th February 1878, enhancing the order of *A. H. Haggard, Esq.*, Joint-Magistrate of Serampore, dated the 12th October 1877.

Magistrate held an enquiry, and made an order under s. 530 of the Criminal Procedure Code, awarding to A exclusive possession of the part of the land on which the edifice had been erected. *Held per JACKSON, J.*, that such order was erroneous, as the matter was not one to which s. 530 could apply.

B subsequently brought a suit in the Civil Court to establish his title to joint-possession of the whole parcel and for a declaration that A was not entitled to erect any edifice thereon; and he further prayed that such edifice should be removed. B obtained a decree, whereupon his servants went on the land and pulled it down. They were charged before the Deputy Magistrate with having committed mischief, and on this convicted and fined. *Held per JACKSON, J.*, that, as there had been no causing of wrongful loss, the accused had not been guilty of mischief.

On the 8th October, the accused, who were the servants of B, found the men in the employ of A were putting up this erection, a *nawbut-khana*, again, and accordingly protested against its erection, pulled down the bamboos, thrust aside the servants of A, throwing to the ground one man who was clinging to the bamboos. On the 9th October 1877, these servants were charged before the Magistrate with rioting, and, being called upon for their defence, named several witnesses, and summonses on the following morning were issued for their appearance, but they were not found. The accused then applied for further time for the appearance of the witnesses. This the Magistrate refused to grant, and convicted the accused on 12th October 1877. *Held per JACKSON, J.*, that, this being a warrant case, it was the duty of the Magistrate to summon the witnesses that might be offered by the accused, and that he might at his discretion have adjourned the case.

Held further per JACKSON, J., that the meaning of s. 359 of the Criminal Procedure Code is that, if, among the persons named by the accused as witnesses, the Magistrate considers that any witness is included for the purpose of vexation and delay, he is to exercise his judgment, and enquire whether such witness is material; but that the section is not intended to enable the Magistrate to inquire into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused; and further that in the present case there was not any purpose of vexation or delay, and that by the refusal to grant further time the accused had been probably prejudiced in their defence.

Held further per JACKSON, J., that, as the accused were not on the land in question as members of an unlawful assembly, nor for any unlawful purpose, the conviction, as well as the procedure, was illegal.

Held per CUNNINGHAM, J., that the accused were merely exercising the remedy of abating a private nuisance, and were exercising a legal right of self-defence.

Held further per CUNNINGHAM, J., that the acts of the complainants in erecting the *nawbut-khana* amounted to mischief, and came within the purview of s. 425 of the Penal Code.

Held further per AINSLIE and McDONELL, JJ., that the High Court, in the exercise of its powers of extraordinary jurisdiction, cannot, in criminal matters, interfere, unless all other remedies provided by law have been previously exhausted. Therefore, where parties who had been convicted of riot by a Magistrate, and who, having a right of appeal to the Sessions Court, instead of doing so, moved the High Court under cl. 15 of the Charter, the Court would not interfere until that remedy had been resorted to.

In this case a piece of land was the joint-property of Gopee Kisto Gossain and Shama Churn Lahirie and a third party, who took no part in these proceedings. Shortly before the Durga Poojah Holidays, 1876, a dispute arose between Gopee Kisto Gossain and Shama Churn Lahirie in consequence of the latter having erected a *nawbut-khana*, or platform for musicians, resting on bamboo posts, on a portion of the joint-piece of land, to which the former objected. Hearing of this dispute, the Magistrate of the Sub-division held an enquiry and made an order under s. 530 of the Code of Criminal Procedure, adjudging exclusive possession of that part of the land on which the *nawbut-khana* stood, to Shama Churn Lahirie. On this Gopee Kisto Gossain instituted a suit in the Court of the Subordinate Judge, the object of which was to have it declared that he, Gopee Kisto Gossain, was entitled to joint-possession over the whole of this piece of land, and that Shama Churn Lahirie was not

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entitled to erect a *nawbut-khana* thereon; and it was specially prayed that this declaration should be granted, and that the *nawbut-khana* should be broken down. On the 19th May 1877, the Subordinate Judge made a decree, which was in terms that the plaintiff's suit be decreed.

In September 1877, the *nawbut-khana* not having been taken down by Shama Churn Lahirie in compliance with the decree of 19th May, some servants of Gopee Kisto Gossain went to the place and pulled it down. On this, upon the complaint of Shama Churn Lahirie, the men who had pulled down the *nawbut-khana* were brought before the Deputy Magistrate, and, on the 28th September 1877, convicted of the offence of mischief under s. 425 of the Indian Penal Code, and fined.

On the morning of the 8th of October 1877, some servants of Gopee Kisto Gossain, including the petitioners in the present case, seeing some *gharamis* in the employment of Shama Churn Lahirie engaged in re-erecting this *nawbut-khana*, not only protested against the erection, but pulled down the bamboos, thrusting aside the servants of Shama Churn Lahirie, and throwing to the ground one of them who had climbed up on one of the bamboos and refused to come down.

On the forenoon of the 9th October, complaint was made by Shama Churn Lahirie to the Joint-Magistrate, who at once summoned the accused; and, on their being brought before him on the same day, at first proposed to deal with the case summarily; but this course being objected to by the pleaders of the accused, he proceeded to frame a charge under s. 141 and s. 147 of the Indian Penal Code, and then and there called upon the accused for their defence. Several witnesses were named for the defence, and summonses for their attendance were issued next morning. These witnesses not having been found, the accused, on the 12th, applied to the Joint-Magistrate for further time, representing that the time was that of poojah, and they had not had a fair opportunity for procuring the attendance of their witnesses. The Joint-Magistrate declined to allow further time, and proceeded to convict the prisoners of the offence of rioting under s. 147 of the Indian Penal Code, and sentenced each of them to rigorous imprisonment for three months.

The prisoners, without appealing to the Sessions Court, on the 26th October moved the High Court (*White* and *McDonell*, JJ.), under cl. 15 of the Charter, to send for the records; and obtained a rule calling upon the complainant, Denonath Ghattack, to show cause why the sentence passed should not be set aside, and the High Court directed the prisoners to be released on bail. On 18th January 1878, the rule came on for argument before *Ainslie* and *McDonell*, JJ., and was discharged. The learned Judges delivered the following judgments:—

"*AINSLIE, J.*—Mr. Justice *White* has expressed a wish that this matter should be disposed of by this Bench. I am of opinion that this Court cannot interfere in the exercise of its powers of extraordinary jurisdiction, unless all other remedies provided by law have been exhausted. The petitioners in this case clearly have the remedy of an appeal. Therefore, until that remedy has been resorted to, this Court, in the view I take of the proper application of cl. 15 of the Charter, ought not to interfere.

"Whether, under any circumstances, it would do so, I need not say. The rule will be discharged. I concur in the suggestion of my learned brother as to the propriety of admitting an appeal, should the petitioners think fit to tender it, and in suspending the execution of the Magistrate's order for one week from this date."

"McDONELL, J.—I have only to add that Mr. Justice *White* entirely concurred in the view taken by my learned brother *Ainslie*; and that, had it been brought to our notice that there was an appeal, we should not have granted the rule. At the same time, we think that the Judge would exercise a wise discretion if, under the circumstances, he would admit the appeal after time.

"The applicants are at present on bail, and if they do not appeal within one week from this date, the sentence will be carried out."

An appeal was, accordingly, presented to the Judge of Hooghly. On 5th February 1878 that learned Judge dismissed the appeal, enhancing the punishment to six months' rigorous imprisonment, and further directed that proceedings should be taken against Gopee Kisto Gossain, the employer of the accused, and also against Nundolal Gossain, his son.

A rule to show cause why the conviction should not be quashed having been granted by the High Court (*Jackson and Cunningham, JJ.*), the records were sent for, and the matter came on for argument.

Mr. *J. D. Bell* (with him Baboo *Sreenath Chunder*), for the complainant, showed cause.

Mr. *Branson* (with him Mr. *Jackson* and Baboo *Troyluckonath Mitter* and Baboo *Obhoy Churn Bose*) for the prisoners.

Mr. *Bell*.—The destruction of the *nawbut-khana* was mischief under s. 425 of the Penal Code. [*JACKSON, J.*—We must take it as being found by a competent Civil Court that Gopee Kisto Gossain was entitled to joint-possession of the whole parcel of land.] Although he may have a certain right, still he cannot take the law in his own hands, and enforce it as was done here. If we had acted contrary to or inconsistently with the Civil Court's decree, the Civil Court could have been appealed to, and an injunction to stop proceedings obtained. S. 425, para. 2, applies to property held joint. [Mr. *Branson*.—The *nawbut-khana* itself was not joint-property.] Again, the conduct of the other side amounted to criminal trespass under s. 441. [*CUNNINGHAM, J.*—If co-proprietors disagree as to the enjoyment of joint-property, and a row ensues, can that be called a riot?] Yes, assuming there was an unlawful assembly, each member of it is guilty of riot. Granting the other side had a right, they sought to enforce it by means which amount to criminal force as defined by s. 350. Bamboos were pulled down, our servants thrust aside, one man thrown to the ground. Clearly this was criminal force, and, as it was committed when more than five persons were present, it amounted to an unlawful assembly, and the parties are, therefore, guilty of riot. As to procedure, no material injury has resulted from evidence not being called, as it would not have altered the Magistrate's finding. Moreover, the witnesses were summoned, and, although they were in Serampore, they did not choose to appear.

Mr. *Branson*.—It is not clear that five persons were present; if not, then there would be no unlawful assembly. With the exception of a man being pushed aside, there was no force; if there had been, the police would have interfered. We were entitled under the decree of the Civil Court to pull down the *nawbut-khana*, although it would have been more regular if the decree had contained a mandatory injunction directing its removal. Admitting five of our servants were present, still that would not be an unlawful assembly, as they were only removing a nuisance: Blackstone's Commentaries, 3rd vol., fifth ed., p. 354.¹ The question to be considered is, who had the legal title to the land?

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¹ 11 Q. B. 904 (reads at p. 909).

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Lows v. Telford.¹ Here the men were protecting their master's property, and cannot therefore be considered as forming an unlawful assembly: *Shunker Singh v. Burmah Mahto*.² We were protecting our property, and endeavouring to prevent mischief being done to it; in fact, exercising the right of private defence, and that cannot be said to amount to criminal force.—*Brijo Singh v. Khub Lall*.³

As to procedure, the accused were prejudiced in their defence by not having their witnesses examined, as their testimony might have been most material.

Cur. adv. vult.

The following judgments were delivered:—

JACKSON, J. (after stating the previous proceedings as set out above, continued as follows).—It appears to me, in the first instance, that the Joint-Magistrate was in error in making any order in this matter under s. 530 of the Code of Criminal Procedure. It seems to me that the subject-matter was one to which that section could have no application. There was really no question of possession. The land was in the joint-possession of the disputants, and the only question was, whether one of them being a joint-owner was at liberty to make use of the land in such a manner as to cause what the other joint-owner chose to consider an annoyance, and against the will of that joint-owner. In fact, the Magistrate himself, in a passage of his judgment, seems to furnish an excellent reason why he should not have exercised jurisdiction under that section. Adverting to an argument of the pleader for the accused as to the right of Gopee Kisto Gossain to forbid this mode of enjoyment, he says: "I am unable to accede to the application of this doctrine. The vakeel says that the doctrine would be monstrous that a co-sharer might build a house upon land held in joint-partnership for his sole use," and so on. Then he goes on to say: "The objection does not apply here, for a *nawbut-khana* is not a house; it is the flimsiest and most unsubstantial of structures. It occupies the air rather than the earth. It is an elevated platform on which musicians may sit. The grass can grow under it, and goats and cattle graze there." The Magistrate's own argument, therefore, was, that Shama Churn Lahirie, in erecting this *nawbut-khana*, proposed to occupy the air; and, although s. 530 applies to land and water, it certainly does not comprehend the air. I have no doubt that the order under s. 530 was beyond the power of the Magistrate, and ought not to have been made. The Magistrate, however, not only made that order, but has relied upon it in the proceedings now before us, because he has ordered a copy of it to be filed on the record, although it is manifest from what afterwards took place that the order had ceased to have any effect whatever, because the result of the order which he made was that Gopee Kisto Gossain, being affected by it, immediately brought a suit in the Civil Court, and that Court declared that the defendant had no right to erect the *nawbut-khana* in that situation, and in fact decreed that it should be removed. But, as an order under s. 530 is only valid until the person to whom possession is given is ousted by due course of law, and as the effect of that judgment of the Civil Court certainly was to oust Shama Churn Lahirie, the order of the Magistrate ought not to have been referred to in any further proceedings. That decree of the Civil Court has not, I understand, been set aside on appeal. But whether it has been appealed or not, and whatever may be the result of such appeal, it is not our business at present to consider the correctness of that decision. Undoubtedly, as far as the parties were concerned, it

¹ L. R., 1 App. Ca. 414 (*reads* at p. 418).

² 23 W. R., Cr. Rul., 25.

³ 19 W. R., Cr. Rul., 44.

was a valid decision of a competent Court, and the Magistrate, as well as the parties, were bound to respect it. In respect of what occurred in September 1877, it appears to me that the first conviction by the Deputy Magistrate was erroneous. The accused persons were convicted of mischief by the Magistrate. Now, the definition of 'mischief' is to be found in s. 425 of the Indian Penal Code, which is this: "Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property, or in the situation thereof, as destroys or diminishes its value or utility, or affects it injuriously, commits mischief." Now, as far as I can see, the only act done by the accused persons in that case was to change the situation of the bamboos (because they were not otherwise destroyed or injured) in so far as to put an end to their continuance in the form of structure. Then, looking to the words 'wrongful loss' as defined in s. 23 of the Indian Penal Code, we have: "Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled." Now, it is clear from the decision of the Civil Court, which was then in force, that Shama Churn Lahirie was not at that time legally entitled to have those bamboos put together in that place in the form of a *nawbut-khana*, and consequently there was no causing of wrongful loss in the act done by the accused persons. It seems to me, therefore, that, if that conviction had been brought before this Court in the exercise of its power of revision, the conviction would have been set aside. But the employer of the accused appears throughout these proceedings to have been singularly ill-advised. He had an illegal order made against him under s. 530, which was allowed to remain untouched. He brings a suit in the Civil Court, of which he fails to obtain the full effect. His servants illegally suffer conviction of the offence of mischief, and that conviction is also allowed to pass unquestioned. He seems to have been then advised to cover this piece of ground with logs of wood and bricks and other materials, which was undoubtedly an unjustifiable act. His servants being then charged with rioting, it appears that their counsel, instead of simply relying upon the decision of the Civil Court, thought fit to argue before the Magistrate at length as to the question of right. Finally, upon the conviction taking place, instead of going at once to the Appellate Court, the accused were advised to come before this Court—a procedure which undoubtedly prejudiced them in the mind of the Sessions Judge, and which has added very much to the cost and anxieties of these proceedings.

I am now coming to the particular proceedings which are before us. These petitioners were charged with the offence of rioting. Now, first as to the procedure, it appears to me that the accused were, undoubtedly, prejudiced by the haste with which the prosecution was pushed on. I am unable to see for what public object this was done, or what was the particular importance of the case to which the Magistrate refers. It seems to have been, in the eyes of the Magistrate, of particular importance that the employer of the accused persons should not gain his object, and from that it seems to result that he thought it of great importance that the complainant should gain his object—that is to say, whatever the result of this prosecution might be, Shama Churn Lahirie, the virtual complainant in this case, should be enabled to erect and keep erected this *nawbut-khana* for such purposes as he thought desirable; and the Magistrate, in a passage of his explanation, which was submitted to this Court some time ago, says that, on looking back to the proceedings, he is unable to see what other course he could have taken. I confess it does seem to me strange, considering that this question had been already submitted to a Civil Court which was competent to entertain it, and that that Court, whether rightly

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or wrongly, had determined that Shama Churn Lahirie was not entitled to that particular form of enjoyment; it does seem to me strange that it should not have occurred to the Magistrate that the right solution of his difficulty would be to restrain Shama Churn Lahirie from doing that which the Civil Court had decided he was not entitled to do, until, at any rate, a further decision upon the matter should have been obtained.

I have now to observe upon the refusal of the Magistrate to allow time to the accused for the appearance of their witnesses. The Magistrate and I observe also the Sessions Judge relies upon the alleged discretionary power of the Magistrate in this matter. Now, this being what is termed a warrant case, the duty of the Magistrate in this particular is stated in the 219th section of the Code of Criminal Procedure. That section says: "The Magistrate shall, subject to the provisions of s. 362, summon any witness, and examine any evidence that may be offered on behalf of the accused person to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time as may be necessary." S. 362 says: "In warrant cases the Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary. The Magistrate shall also, subject to the provisions of s. 359, summon any witness and examine any evidence that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time." S. 359, to which reference is there made, says: "If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice," he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material. Now, I understand this s. 359 to mean that, if, among the persons named by the accused as witnesses to a defence, the Magistrate considers that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment, and enquire whether such witness is material. I have never heard that it was intended by that provision to enable the Magistrate to enquire generally into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. I am aware of no warrant for the exercise of any such sweeping authority. Setting that aside, can it be said here that there was any purpose of vexation or delay for which these witnesses were summoned. The trial was proceeding with great rapidity. The offence of which these prisoners were charged was very serious; the law enabled them to call witnesses in order to disprove or answer the case made against them; and, considering what the time of the year was at which the first attempt to procure the attendance of these witnesses had been made, it does seem to me that it would have been reasonable to allow a further time for that purpose; and I, moreover, think it probable that, by reason of such time not having been allowed, the prisoners were prejudiced in their defence, because this was not a simple question, it was one which depended somewhat upon minute considerations. The conduct of the parties, the mode in which one side or the other had acted, was of the greatest importance in determining, firstly, whether the accused had committed any offence or not; and, secondly, what was the nature and extent of that offence. The Magistrate indeed says, in order to justify his refusal, that the accused had confessed that with which they were charged. The accused had confessed no such thing. They were charged with nothing. That which they

admitted was, that they had pulled up these bamboos and displaced the erection. That was a long way from confessing the offence of rioting.

Another point on which I think we are bound to remark is, that the Magistrate, having at his command the means of obtaining evidence which was presumably impartial—that is to say, the evidence of his own police-officers—did not either call or examine any one of them. The witnesses for the prosecution were, I believe, only two; and I should have expected, in a case like this, that the Magistrate should have resorted to the evidence of the police-officers as presumably free from having any bias on one side or the other. So far as to the procedure in this case.

I now turn to the conviction. The accused have been convicted of the offence described in s. 147 of the Indian Penal Code. After a good deal of consideration, I am unable to satisfy myself that that which they did came under that section. Rioting, according to the Indian Penal Code, consists of force used in the prosecution of a common object of an unlawful assembly. We must, therefore, find that there was an unlawful assembly, that they had a common object, and that force was exercised in the prosecution of that object. Now, I think it highly probable that, on this occasion, there were five or more persons assembled; but who were these persons? They were not persons assembled together for any unlawful purpose, nor were they persons summoned together for the purpose of committing a breach of the peace. They were the ordinary servants, and probably, relatively speaking, only a few of the ordinary servants, of this Baboo Gopee Kisto Gossain. One of them discovers that stealthily the other party had, in the course of the night, put up this structure, which the Civil Court had declared he was not authorized to do, and he calls other servants to assist him in remonstrating, and in removing this structure which was there illegally erected. It was suggested that this matter came either under the third or fourth clause of s. 141. Now the third clause specifies the object to be that of committing any mischief or criminal trespass or other offence. In regard to mischief, as I have already said with reference to the previous conviction, it appears to me that there was no mischief. In regard to criminal trespass, the allegation appears to me to be absurd. The accused persons were only where they were entitled to be—on their master's own land. They had not gone there, nor did they remain there, for the purpose of trespassing or for any other unlawful purpose. Then it is said that perhaps they had gone there for the purpose of enforcing some right or supposed right. It seems to me they had not gone there for any such purpose, but that the other side having gone there for the purpose of enforcing a right which he perfectly knew the Court had adjudged him not to possess, these persons, merely representing their master, went there for the purpose of resisting that infraction of their master's right. It is admitted that no particular force or violence was used, and that this was the case might be further inferred from the fact that the police-officers who were on the spot saw no occasion to interfere. It appears to me, therefore, that there was no cause for convicting these persons of the offence of rioting, inasmuch as they were not there as members of an unlawful assembly, nor for any unlawful purpose. I think, therefore, that the conviction, as well as the procedure under which the conviction was had, was illegal, and ought to be set aside.

I have only now to make one or two observations upon what had occurred in the Court of Session. The errors into which the Magistrate has fallen are easily explained by the circumstance that he felt himself, whether rightly or wrongly, impressed with the duty of maintaining not only the peace of the district, but also the authority of his own Court, and also by the fact that he had taken a large part

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in previous transactions which led up to this conviction, and therefore that which he did, although it was, as I think, erroneous, was far from unnatural. But these considerations do not apply to the Courts of Session. The Sessions Judge was an officer of infinitely more experience. He was not affected by the necessity of maintaining the authority of the Magistrate's Court, or by any participation in the previous proceeding; and yet he not merely fails to point out the mistakes which the Magistrate had committed, but he actually goes beyond him in the line which the Magistrate adopted. The joint-Magistrate had certainly shown that he was not slow to vindicate the respect due to his own Court, and he passed what he avowedly considered a severe sentence when he punished the petitioners with rigorous imprisonment for three months. I am quite unable to see upon what grounds or for what reasons the Sessions Judge not merely affirmed but doubled that punishment. I think, therefore, that this rule must be made absolute, and the conviction and the proceedings quashed. The proceedings taken by the Joint-Magistrate against Gopee Kisto Gossain and Nundo Lal Gossain must accordingly be stopped.

CUNNINGHAM, J.—I concur in setting aside these convictions. The facts in the case establish that certain co-owners were doing that, in the enjoyment of the common property which, as between the parties, had been decided by a competent Court to be, and therefore must be regarded by us as being, illegal,—*vis.*, erecting a platform, the erection of which the Court had forbidden. Therefore, the other co-owners came in, and without violence or unnecessary force, and with no breach of the peace, abate the nuisance by pulling up certain bamboos of which the structure, so far as the building had gone, consisted. For this they have been convicted of being members of an unlawful assembly, and sentenced to three months' imprisonment. This sentence was on appeal enhanced to six months.

It appears to me that the accused were merely exercising the remedy familiar to English law of abating a private nuisance. This right is thus described in Stephen's Commentaries, 5th edition, Vol. III., p. 354.

The rule was laid down by Lord Denman in *Perry v. Fitzhowe*.¹ In that case a commoner, whose right of pasturage was interfered with by a building erected upon it, came and pulled it down "about the plaintiff's ears" while he and his family were actually in it, and it was held that the serious risk of human life involved, and the consequent imminent danger to the peace had, according to the analogy of the law of distress, the effect of rendering the plaintiff's act unlawful.

In the present case there appears practically to have been no violence and no real danger of any breach of the peace. Indeed, the police were standing by and looking on while the abatement took place; and the act of abatement was, therefore, in my opinion, legal.

The same view of the law appears to be reproduced in the Indian Penal Code. "Mischief is defined in s. 425, Indian Penal Code, as the causing of any change in property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, with an intent to cause wrongful loss to any person." And expl. 2 shows that mischief may be committed by an act affecting property of which the person committing it is joint-owner with others. Under this definition the act of the complainants in erecting the structure was, as I regard it, mischief.

Then, by s. 99, Indian Penal Code, there is a right of self-defence of property, moveable or immoveable, against an act which falls under the definition of

¹ 8 A. & E. 757.

"mischief." I do not think that the third exception in s. 99 applies, as the accused had the right to prevent the structure being made, which they could not have done if they had waited to go to the Court for an injunction.

The observations of *Couch*, C. J., in a similar case—*Birjoo Singh v. Khub Lall*¹—seem applicable to the accused in this case.

Under this view, I think the accused were exercising a legal right of self-defence; consequently, that there was no criminal force, no unlawful assembly, and no riot, and the conviction must be quashed.

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APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Mitter.

IN THE MATTER OF BHOOBUNESHWAR DUTT, PETITIONER.²

1877.

Dec. 14.

Refusal to give Receipt for Summons—Indian Penal Code (Act XLV. of 1860), s. 173.

3 Cal. 621.

A refusal to give a receipt for a summons is not an offence under s. 173 of the Indian Penal Code.

*Reg. v. Kalya bin Fakir*³ followed.

In this case the prisoner was charged with refusing to give a receipt for a summons. The prisoner appealed, on the ground that the conviction was not warranted by law, inasmuch as refusing to acknowledge the receipt of a summons, either personally or by another person, does not constitute the offence under s. 173 of the Indian Penal Code.

Baboo Amarendra Nath Chatterjee for the petitioner.

MARKBY, J.—It appears to us that this conviction must be set aside. The charge against the petitioner was, that he had refused to give a receipt for a summons. This has been held by the High Court of Bombay in *Reg. v. Kalya bin Fakir*³ not to be an offence under s. 173 of the Indian Penal Code, which is the section under which this conviction has been made. We concur in that decision.

This conviction will, therefore, be set aside; and the fine, if paid, will be refunded. If the petitioner is in jail, he will be released.

Before Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS v. GANGADHUR BHUNJO AND OTHERS.⁴

1878.

April 16.

Stamp Act (XVIII. of 1869), ss. 29, 43—Procedure—Magistrate authorised to prosecute.

3 Cal. 622.

A Magistrate who has been authorized by the Collector of a district, under s. 43 of the Stamp Act, to prosecute offenders against the stamp laws, is not competent also to try persons whom he prosecutes. The Collector should appoint some person other than a Magistrate to conduct the prosecutions.

¹ 19 W. R., Cr. Rul., 66.

² Criminal Motion, No. 232 of 1877, against the conviction and sentence of *H. A. D. Phillips, Esq.*, Officiating Joint-Magistrate of Sub-Division Sewan, Zilla Sarun, dated 18th September 1877.

³ 5 Bom. H. C. Rep., Cr. Cases, 34.

⁴ Criminal Reference, No. 43 of 1878, from an order of *W. Cornell, Esq.*, Officiating Sessions Judge of Midnapore, dated the 8th April 1878.

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THE petitioners were convicted by the Assistant Magistrate of Contai, under s. 29 of Act XVIII. of 1869, for evasion of the stamp law, and were fined Rs. 18.

PRINSEP, J.—These cases have been submitted to us by the Sessions Judge of Midnapore, because sentences of fine have been imposed by the Magistrate of the Division of Contai for breaches of the stamp law contrary to the rule laid down in the case of the *Queen v. Nadi Chand Poddar*.¹

It appears that the Collector authorized this officer, under s. 43 of the Stamp Act, to institute and conduct the prosecution in these cases. Under these circumstances we think that he was not competent also to try them. Any possible inconvenience might have been obviated by the Collector's employing the Government pleader or some other person to conduct the prosecution under s. 43. We quash the convictions and sentences, and direct that the fines, if paid, be refunded.

Before Mr. Justice Markby and Mr. Justice Prinsep.

IN RE THE EMPRESS v. SAHAE RAE.²

1878.

April 18.
3 Cal. 623.

Criminal Procedure Code (Act X. of 1872), s. 263—Verdict—Disagreement in finding of Jurors—Dissent of Judge from Verdict of Majority—High Court, Power of.

An accused struck a woman, carrying an infant in her arms, violently over head and shoulders. One of the blows fell on the child's head causing death. *Held* that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt.

Where a jury are not unanimous in their finding, and the Judge dissents from the opinions expressed by them, on the case being referred under s. 263 of Act X. of 1872, the High Court is competent to find the prisoner guilty, notwithstanding an acquittal by the majority of the jury.

It is the duty of a Judge in sending up a case to the High Court under ss. 263 and 464 of the Criminal Procedure Code, when he disagrees with a verdict of acquittal, to state the offence which, in his opinion, has been committed.

THIS was a reference to the High Court under s. 263 of the Criminal Procedure Code. The prisoner had assaulted a woman, who, at the time of the assault, had a child in her arms, and one of the blows which the prisoner was aiming at the woman fell on the child's head and caused its death.

The prisoner was thereupon charged with (i) culpable homicide not amounting to murder; (ii) of causing death by a rash and negligent act; (iii) grievous hurt; (iv) hurt. No charge was made with reference to the assault upon the mother.

The jury unanimously found that the prisoner had been guilty of an assault upon the woman Chettya; but made no mention of the infant. On being told to re-consider their verdict, three of them announced that they did not believe the child had been killed by the prisoner; but the remaining two were of opinion that the prisoner was guilty of culpable homicide not amounting to murder of the child.

¹ 24 W. R., Cr. Rul., 1.

² Criminal Reference, No. 318 of 1878, from an order of J. F. Browne, Esq., Officiating Sessions Judge of Patna, dated the 29th March 1878.

On account of this finding of the jury, the Officiating Sessions Judge of Patna, differing from the verdict of the majority, sent up the case, on the 29th March 1878, to the High Court.

Baboo *Juggodanund Mookerjee* for the prosecution.

Mr. *Twidale* for the prisoner.

The judgment of the Court was delivered by

MARKBY, J.—The facts of this case do not appear to be susceptible of any doubt. The prisoner was employer of a man named Behary, his wife Chetya, and his sister Foolcoomaree. Some disagreement appears to have arisen as to the payment of the wages due to this family. In the morning in question the prisoner went to the house of Behary, and called Chetya, the wife of Behary, and Foolcoomaree, his sister, to execute some work on his behalf. They refused, and made use of language which, no doubt, was disrespectful. Therefore, the prisoner, with the shoes which he was wearing, commenced striking Chetya about the head and shoulders. Chetya had at that time a child of a few months old in her arms, the head of the child, as she describes it, being either upon or close to her shoulder. One of the blows delivered by the prisoner fell upon the child's head, and, as was almost certain to happen, the child died in consequence.

The prisoner was charged with culpable homicide not amounting to murder of the child, of causing the death of the child by a rash and negligent act, of grievous hurt to the child, and of hurt to the child; the last two charges being added by the Sessions Judge. There was no charge made with reference to the assault upon the mother.

The result of the trial was, that three of the jury thought that the prisoner should be acquitted altogether; the other two jurors seem to have thought that the accused was guilty of culpable homicide of the child.

The Judge has told us that he differs from the verdict of the majority, who have acquitted the prisoner altogether; but we feel somewhat embarrassed in the matter by this, that he has not told us of what crime in his opinion the prisoner was guilty. Reading ss. 263 and 464 of the Criminal Procedure Code together, we think that it is the duty of the Judge in cases like this to give us his own opinion, if he disagrees with the verdict of acquittal, as to the exact offence of which he considers the prisoner is guilty. We think that this Court has a right to expect from the Sessions Judge his opinion in a case of this kind. Nevertheless, we think we are still competent to deal with the matter, and the Government pleader, who has appeared before us, has very properly not pressed for a conviction of culpable homicide. We are extremely doubtful whether technically the charge of culpable homicide could be supported. But we think we are justified upon the facts proved in finding the prisoner guilty of grievous hurt under s. 322. There being no doubt whatever as to the facts of the case, we have no hesitation in finding the prisoner guilty under that section, notwithstanding that he was acquitted altogether by three of the jury, probably because they did not fully understand the law upon the subject. No doubt, what the prisoner intended was to inflict some injury upon the mother; and in one sense he did not intend to inflict any injury upon the child at all; but it seems to me that the language of s. 321 covers a case in which a man intending to aim a blow at one person strikes another. That section says: "Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt

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1878. to any person, is said voluntarily to cause hurt to such person." The very general language of that section was, I think, used expressly for the purpose of covering a case of this kind. I also think that the prisoner is also liable for causing grievous hurt. S. 322 provides that "whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said voluntarily to cause grievous hurt." I think that it is impossible to say, when a man strikes a woman with a child in her arms, and strikes her on that part of her person which is close to the head of the child, that he does not know that he is likely to cause grievous hurt to the child. He must, as a reasonable being, know that nothing is more probable than that the blow which he aims at the woman would fall on the child, and that any blow which would fall upon the child's head would be likely to cause such hurt as would endanger the child's life. This is one of the definitions of grievous hurt, and, therefore, in my opinion, the prisoner ought to be convicted under s. 322.

Of course, the most important matter in this case is, what is the punishment which the prisoner ought to undergo. The evidence certainly shows that the prisoner's conduct was very violent. There was nothing which could justify his conduct even as regards the mother; and to strike a woman with a child of tender age in her arms is certainly a most unjustifiable act. No doubt, the prisoner never intended to do any injury to the child, but still he has done an act which deserves severe punishment. Under s. 322 of the Indian Penal Code he will be sentenced to rigorous imprisonment for two years.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878. IN THE MATTER OF TROYLOKHANATH BISWAS AND RAM CHURN
 April 30. BISWAS (PETITIONERS).¹
 3 Cal. 742. *Inquiry into Cause of Death—Report by Magistrate—Privileged Communication—Judicial Proceeding—Finding—Coroner's Inquest—Criminal Procedure Code (Act X. of 1872), ss. 127, 133, 135, 296—Evidence Act (I. of 1872), s. 124.*

Where the Magistrate of a division held an inquiry, under s. 135 of the Criminal Procedure Code, into the cause of the death of a person found dead under suspicious circumstances, and, without making a specific charge against any person, drew up a report embodying the result of his inquiry, and sent the report to the Magistrate of the district, and subsequently proceedings were taken against one of the witnesses, which ultimately resulted in an acquittal, held, by the High Court, that, there being nothing in the language of s. 135 requiring the Magistrate holding such an inquiry either to make a report or to come to a finding, the report actually sent could not be considered as part of a judicial proceeding, and that therefore the High Court had no power to send for it under s. 296 of the Criminal Procedure Code.

No analogy exists between a Coroner's Inquest and an inquiry into the cause of death under the Criminal Procedure Code.

In this case, the facts of which are sufficiently stated in the judgment of Mr. Justice Markby, a rule had been obtained, calling upon the Magistrate of Nuddea to show cause why he should not send up a certain report containing

¹ Criminal Reference, No. 35 of 1878, from an order of H. B. Lawford, Esq., Sessions Judge of Nuddea, dated the 12th March 1878.

the results of an inquiry by Mr. Skrine, the Magistrate of the division, under s. 135 of the Criminal Procedure Code, into the death of one Ramgotti Biswas; and why, in the event of the Court holding the report to be a judicial proceeding, the proceedings should not be quashed under s. 297 of the Code.

The *Advocate-General* and Mr. *Kilby*, for the Magistrate of Nuddea, showed cause.—The question is entirely one of principle. If such a document as this is to be considered as part of a judicial proceeding or record, subordinate officers will no longer be able to furnish confidential reports to their superiors. [MARKBY, J.—There are three points to be considered: (1) Whether, under s. 135 of the Criminal Procedure Code, it was imperative on Mr. Skrine to make a report? (2) Supposing that it was not imperative, still whether he was not at liberty to make one? (3) Whether this report was made under s. 135, or whether it was independent?] The law makes no provision for such a report as was made. There is not one word in s. 135 of the Criminal Procedure Code which says that the Magistrate is to put down in writing the conclusion at which he arrives. The omission is intentional. That appears from the provisions of ss. 127 and 133. These two sections provide for investigations and reports by police-officers. These reports have to be sent to the Magistrate of the district. S. 135, which relates to investigations by a Magistrate, does not require him to send in a report. Mr. Skrine acted under this section, and, therefore, as he was not directed or required under the law to make a report, the report which he did make must have been made under rules of the service, and does not form part of the proceedings. The fourth section of the Criminal Procedure Code defines a judicial proceeding as “any proceeding in which any judgment, sentence, or final order is passed.” It may be one which culminates in an order or not. This report is neither a judgment, sentence, nor final order. It is in the form of a letter to the Magistrate of Nuddea with certain appendices. These were sent up to the High Court for its assistance, as some portion of the letter is illegible. They form no part of the record. The character of the report is not judicial. There must be an intention in order to make a judicial report. This is a letter, and nothing more than a letter, to the Magistrate. [MARKBY, J.—Mr. Ghose, in applying for the rule, argued that the document spoke for itself, and relied on the first line.] The last five paragraphs show that this was not a judgment, but was a private letter. That which may be evidence of a fact is not necessarily part of a record or judicial proceeding. Suppose a Magistrate tries a case summarily, he is not bound to write a judgment, and no evidence is recorded. Suppose that the prisoner subsequently indicts a witness for perjury, the notes on counsel’s brief made during the hearing before the Magistrate would not be a part of the record. There is no “case” under s. 297 of the Code. A “case” is a proceeding against some one. This report is not a proceeding. It cannot be said that there has been a “material error” in a judicial proceeding. Even supposing that Mr. Skrine had not written this report, no inquiry could be ordered, for the proceedings were purely optional; and there is nothing upon which the Court could pass any judgment, order, or sentence. The rule requires Mr. Stevens to show cause why these proceedings should not be quashed. What is there to quash? No one is affected by the proceedings. There is merely an opinion, that cannot be quashed; there is no judgment, order, or sentence. Finally, this is a confidential letter from Mr. Skrine, both in form and matter. It recites things which had transpired, that does not make it a judicial proceeding. If the Court orders this report to be given up, it will be doing more in a criminal case than it could in a civil case. Suppose this to be a special appeal, would the report be considered as a letter or as a judgment? The Government think that this is a communication privileged under s. 124 of

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the Evidence Act. It cannot form part of the record. A record should be kept in the office of the Magistrate together with other records of proceedings. Letters of this kind belong to the executive department, not to the judicial.

Mr. *M. M. Ghose* and Mr. *Paulit* in support of the rule. As to the first question we submit that it is imperative on the Magistrate to come to a finding or report. S. 135 provides for two cases: the Magistrate may hold a judicial inquiry, and he may either stop the police or he may adopt their proceedings. [MARKBY, J.—Suppose a police-officer makes a report, must the Magistrate come to a finding?] If he makes an inquiry, he must. The legislature could not have intended to allow a Magistrate who enters upon such an inquiry as this to decline to come to a finding. It cannot have intended to allow the proceedings to be abortive. Suppose a Magistrate in case after case refused to come to a finding after taking evidence, would not the Court have power to make him? When a case is of such a description that the Magistrate would exercise power under the section, then the proceedings become of a judicial nature, and the High Court has jurisdiction to enquire into them. Here the Magistrate arrested persons, discharged them, made inquiries, and embodied the result in a document which he describes as his official report. This is a judicial document, for it was imperative on Mr. Skrine to come to a finding. Even if it was not imperative, still the finding that he came to was judicial. True there are passages in the report which are not in the form of a judgment; but, taking it as a whole, it is judicial. Mr. Skrine never intended to treat it as confidential. [MARKBY, J.—On the question of intention, we should consider ourselves bound by Mr. Stevens's statement refusing to send up the report, on the ground that it was confidential. Mr. Skrine's intention is immaterial.] I do not say that his intention is material. Mr. Stevens's opinion does not conclude the matter. His statement is a mere matter of opinion on his part, not a matter of fact within his knowledge. Where the law declares that proceedings shall be judicial, a mistake on the part of an officer does not alter their nature. Suppose a suit was brought against him, he could plead that he was acting in a judicial capacity and therefore protected. The form of the report will not help us in deciding this question. Some parts of it do not appear to be judicial, and it is in the form of a letter. But this is the only document which embodies the result of the inquiry; the fact that irrelevant matters are contained in it does not alter its character. It has been argued that the report was made by Mr. Skrine in his executive capacity. But Magistrates in deciding judicial questions have no executive functions, and there is nothing to make them police-officers; the distinctions are perfectly clear. All the Magistrate's powers are judicial, except some few which are declared by s. 518 of the Criminal Procedure Code to be non-judicial. The word "judgment" is not defined in the Code. [PRINSEP, J.—Have you looked into Ch. XXXIV. of the Code?] That chapter merely says what the judgment in a trial is to contain. This report is a "proceeding" of which my clients would be entitled to a copy under s. 276, as they were "affected" by it. This section has been amended by Act XI. of 1874, which made it much wider. The report directs the prosecution of all the witnesses but two, and under that direction my clients were prosecuted. [PRINSEP, J.—The paragraph you refer to merely suggests the prosecution.] It would be a sanction. [PRINSEP, J.—To whom?] There would be a sufficient sanction to any one who liked to prosecute. It does not matter what this document is called, so long as it is judicial under the law. It may contain extraneous matter, there may be irregularities, but the judicial character is not taken away. It has been argued that counsels' notes in a summary trial would not form part of the record. But suppose that the Magistrate, though not bound to do so,

takes down evidence, would not that be part of the record? and would he not be bound to produce it?

MARKBY, J.—The short facts of the case, so far as it is necessary to state them for the purpose of disposing of the present rule, are, that, on the 10th June last, a man named Ramgotti Biswas was found lying dead at no great distance from the factory of Lokenathpur. Under the circumstances in which he was found, I think that there was no possibility of doubt, or at any rate there was very good reason to suppose, that the man had either committed suicide or had been murdered. It was therefore a proper case for the institution of an inquiry under s. 135 of the Code of Criminal Procedure, and accordingly, as we must take it now, the Magistrate of the division proceeded to hold this inquiry. Those proceedings lasted a considerable time, and ultimately they were communicated to the Magistrate of the district. The final conclusion to which the Magistrate who held this inquiry came was, that the man had committed suicide, and that he had purposely committed suicide under such circumstances as might raise a suspicion that the factory people or some persons connected with the factory had caused his death. Subsequently some proceedings, which arose out of this enquiry, were taken against one of the petitioners now before us, and those proceedings went on appeal before the Sessions Judge of Nuddea. The Sessions Judge of Nuddea acquitted the petitioner, but he desired to see the proceedings taken under s. 135, and he accordingly sent for those proceedings; but the Magistrate of the district, in whose hands they were at that time, thinking that the proceedings under s. 135 were not judicial proceedings at all, declined to send them. The Sessions Judge of Nuddea reported the matter to this Court, and another Bench of this Court, after having heard the Legal Remembrancer on the subject, came to the conclusion that the proceedings taken by Mr. Skrine, the Magistrate who held the inquiry, were proceedings under s. 135, and that they were judicial proceedings. They did not, however, order the proceedings to be sent to the Sessions Judge of Nuddea, but sent for those proceedings themselves, and an order was issued that the record of the proceedings under s. 135 should be sent up to this Court. The Magistrate of Nuddea in answer to that order sent up certain papers, but he intimated at the same time that he was in possession of a report by Mr. Skrine, and he informed this Court that he did not send that report as that was written by Mr. Skrine as a confidential report to him.

In that stage of the proceedings the case was transferred from the Bench which issued the original order to this Bench, and, as the matter then stood, the only point for our consideration was whether or no the Magistrate of Nuddea was right in the view which he took—*viz.*, that the report of Mr. Skrine did not form part of the proceedings under s. 135. In the meantime, however, before we came to any conclusion upon that, the present application was made, specially requesting that we should send for this report, and that, after obtaining that report, we should quash it.

Now a good many questions would have to be considered before granting such an application. There may be some doubt whether Troylokhanath Biswas, the only one of the petitioners who had ever been put upon his trial, having been acquitted, the petitioners had any *locus standi* at all. There may be considerable doubt, even putting all other questions out of the way, whether this Court would, at the instance of persons standing in the position of the petitioners, quash a finding under s. 135; and there is still a further objection taken by the Advocate-General, which is really not answered, *viz.*, that, as the inquiry under that section is optional, this Court has no power to order fresh pro-

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ceedings to be taken, and, unless fresh proceedings can be taken, there is but little use in our interfering at all. But it is not necessary to go into these questions, for on another ground I think that this application must fail.

The reason why, notwithstanding these objections, we thought it desirable without further considering them that this rule should issue, was this: It was absolutely necessary for us in the way the case came before us to consider whether the Magistrate of Nuddea had duly complied with the order of this Court. The proceedings having been sent for, the report was not sent, and I understand the course taken by Mr. Stevens to have been to submit to the decision of this Court, whether or no he was bound to send up that report. I may say in passing that the course so taken by Mr. Stevens shows that he acted with perfect propriety in the matter. But it was necessary to decide the question which he submitted to us quite independently of the present application. For my own part also I strongly desired to have the assistance of the advisers of the Crown in a discussion of this character. The question is of considerable importance, and one which may in some cases be of very serious consequence, whether the result of an inquiry under this section is such that, without the possibility of using any discretion in the matter, the Magistrate is bound to make it public. I therefore thought it desirable to issue a rule in order to bring in the Crown, and have the question discussed. Accordingly we issued a rule in order to have the benefit of the argument of counsel for the Crown upon the construction of this section.

The matter has now been argued, and we have to determine what is the true construction of this section. But, before I enter into that question, I wish to say one word as to what I understand to be the object of the petitioners in this case. I may say at once that, if there was the slightest indication that there was an intention of opening up a charge against any individual whatsoever by these proceedings, I would not have been a party for a single moment to any discussion in the matter. I would not, by issuing a rule, have given the least semblance of encouragement to such proceedings. But I fully understood Mr. Ghose from the first, as he has also represented now, that that is not the object of these proceedings. I understand the real object of these proceedings to be to clear the memory of the deceased man from an imputation which has undoubtedly been cast upon him. Whether we can arrive at that result under the law as it stands, is a different matter; but I am bound to say that I consider that the object, if it can be attained by law, is a perfectly legitimate object. No one can doubt that it must be a matter of great pain to persons connected with this unfortunate man that this statement, *viz.*, that he had committed suicide under such circumstances as the Magistrate supposes, should have been made. It may, no doubt, sometimes be the duty of public officers to make statements which are painful to others, but there is nothing objectionable if persons affected by those statements try by any legal means in their power to get rid of those statements; and I go one step further, I think that the relatives of this deceased person were not rash in their inference, when they found a document of this kind printed and published, that it was intended to be put forth as the judicial result of a judicial inquiry. It commences thus: "From F. H. Skrine, Esq., Officiating Joint-Magistrate on special duty, to the Magistrate of Nuddea. I have the honour to submit a report embodying the results of my enquiry into the cause of the death of Ramgotti Biswas." Reasonably enough the way in which it struck them was, that this was not merely an opinion of an individual formed upon the best materials that he could get together by any means in his power, and reported confidentially to his superior officer; but that it was an

opinion of a judicial officer formed upon evidence and in a judicial manner. Although they were misled in supposing that it was a document of this nature, I think that they were very reasonably justified in assuming that it was so. I may also say that if this document had been of that character, and one therefore under our control, I should not have hesitated for a moment, if the law would allow me, in setting it aside. I think that it is of the utmost importance to keep a clear distinction between judicial and executive proceedings; and if this report was before me as a judicial proceeding, I should feel bound to say that it was a very unsatisfactory one. I think that it is impossible to read this document without seeing that this is not the result of an enquiry by Mr. Skrine himself, but of Mr. Skrine assisted by a variety of persons of inferior position. That might be a most useful thing for an ulterior object, but would not be an enquiry which ought to go forth to the world as a judicial proceeding by a Magistrate. I think it, therefore, right to say that, if this had been a judicial proceeding, I should have treated it very differently from what I am now doing, and I hope that, if it be once understood that this is not a judicial proceeding, it will be deprived of very much of its injurious effect.

Now with regard to what is the more immediate subject for us now to consider. I am free to admit that, during the course of the argument, I have had some doubt as to what the intention of the legislature was when introducing this section. I think that it may be fairly argued that *prima facie* when a Magistrate holds a judicial enquiry, and has power to take evidence, we should expect that it was intended that some result should be arrived at. But though that is so at first sight, I think, on further consideration, it is by no means clear, even upon a general view of the Act independently of the exact language of the section itself, that that was the intention of the legislature. The object of these enquiries may be three-fold. The object may be to calm any alarm that had been created in the mind of the public on the occurrence of a violent or unnatural death, and to allay any unfounded suspicion; or the object may be to put in force the law against a particular individual; or it may be merely to gain information to be used by the authorities according to their discretion. Now, looking at the general character of this section and the sections which precede it, I cannot myself see that, merely for the purpose of putting the law in force against any particular individual, there was any necessity for this section at all. As far as I can see, the powers of a Magistrate under the law, if he suspects any person of having committed any particular offence, are ample without having any recourse to this section. Therefore, the enquiry, or inquest, as it is sometimes called, must be to inform either the officers of Government or the public at large as to what has really occurred or is suspected to have occurred. Now, I am by no means prepared to say that, as a matter of policy, more would be gained than lost by the publication of the result of the enquiry. We may, no doubt, imagine cases in which it is very desirable that the result should be published, but we may also imagine cases in which it would be most injurious, even to private individuals, if the result were published. I only say this to show that I approach the consideration of the language of this section without being able to discern any strong reasons of policy in favour of either one construction or the other; and, therefore, though we may look to the policy of an Act as one of our guides in its construction, there is really nothing here to indicate what that policy is. The language of the section is this: "The nearest Magistrate duly authorized may hold an enquiry into the cause of any such death, either instead of or in addition to the investigation held by the police-officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an enquiry into an offence,

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although no specific charge has been made against any person. The Magistrate holding such an enquiry shall record the evidence taken upon it in any of the manners hereinafter prescribed according to the circumstances of the case." Now, Mr. Ghose argued that the language of the section at once pointed to the provisions of s. 133, and that the enquiry held by the Magistrate was to be either supplemental to, or, if he thought proper, substituted for, the enquiry held by a police-officer under s. 133, and he quite rightly indicated to us that, under s. 133, a report is required, for that section says that the police-officer shall make an investigation, and report the apparent cause of death, and so on. That argument which struck me at first seems to me to fail, because, whilst the police-officer necessarily has some superior to whom he can report, it is by no means always so with the Magistrate. The Magistrate of the district holding an enquiry under s. 135 has, under the Code of Criminal Procedure, no executive superior to whom he can report at all. It is not impossible for him to report to the Judge or to the Commissioner or to Government; but I may say that it would be entirely out of the ordinary course of proceeding in this country if he were, judicially and not executively, to make a report either to one or to the other. At any rate, I feel sure that, if it had been intended that the Magistrate should report judicially either to the Sessions Judge, or to the Commissioner, or to Government, this would have been stated expressly in the Act.

Then, Mr. Ghose says that, although the Magistrate is not bound to report, he must come to a finding. That also clearly was not the intention of the legislature, because, under s. 133, although there is to be a report to the Magistrate, which is clearly not a finding, there is no person ordered to come to any finding at all. I can see nothing which gives any support to the argument that, if there is not to be a report, there must still be a finding as distinguished from a report. The language of the section does not require a report, nor does it require a finding; and it seems to me that, if we were to say that, under this section, the Magistrate who holds an enquiry is bound to make a report or come to a finding, we should be making an unjustifiable addition to the language of the legislature.

Some comparison has been made between a Coroner's enquiry and the enquiry under s. 135. As far as I can see, the only semblance of any basis for that comparison arises out of the word "inquest," which is used, not in s. 135, but in the earlier sections, where the legislature apportions the various duties of Magistrates. I think that we ought not to introduce an analogy which does not really exist. The proceedings of a Coroner are in their nature regular criminal proceedings having a distinct result, and a result upon which, if it affects any particular person at all, ulterior proceedings can be taken against that person. I think also I am speaking correctly when I say that even in some cases where no particular person was affected, still the result of the verdict of a Coroner's jury might be to effect a forfeiture of property to the Crown. No doubt, some of these results do not exist now, and have fallen into disuse; but we must, I think, remember what the Coroner's inquest originally was when we are asked to consider why it results in a finding.

On the whole, therefore, I think that this rule ought to be discharged upon the ground that the report sent up by Mr. Skrine to the Magistrate of Nuddea was not part of a judicial proceeding.

PRINSEP, J.—I altogether agree in the view of the law in s. 135 of the Code of Criminal Procedure which has just been laid down by Mr. Justice Markby, and in holding that the report submitted by Mr. Skrine, the Magistrate of the Division of Chooadanga, to the District Magistrate, Mr. Stevens, is no part of any judicial proceedings held under that section. It seems to me quite clear that the form of an

enquiry under s. 135 is directed more to elucidate the facts of a violent or unnatural death before there is any reasonable suspicion of the commission of any offence, and that, when such grounds do exist, the enquiry comes under another portion of the Code.

As regards the form in which the present application is made to us, I must say that I have always entertained serious doubts as to the *locus standi* of the petitioners, and it was, as has already been stated in the judgment which has been just delivered, on account of the importance of deciding the position of the Magistrate with regard to this particular report and the proceedings taken by him that led me to agree in the course taken.

Whatever grounds the relations of the deceased may have to complain of the terms of the report in the form in which they produce it before us, and the aspersions that it may cast on the memory of the deceased Ramgotti Biswas, I think that the observation of the learned Advocate-General in the course of his argument completely disposes of any objection that they may take to the terms in which that report mentions Ramgotti. That report was never published, until through some injudicious agitation of the friends or advisers of the petitioners a pressure was brought to bear on the Government, which induced the latter to consent to the publication of that report in the expurgated form in which it has been laid before us. Had this course not been taken on behalf of the petitioners, that report would never have been published or been made known except to the officials immediately concerned. We have no power to quash that report as we are asked to do, nor has it been suggested that any good result would ensue in the ends of justice by any re-opening of the enquiry, since it is admitted that nothing is forthcoming or likely to be elicited which would throw any fresh light on the circumstances attending the death of Ramgotti Biswas.

Before Mr. Justice Markby and Mr. Justice Prinsep.

SUFFERUDDIN v. IBRAHIM.¹

Jurisdiction—Bench of Magistrates—Criminal Procedure Code (Act X. of 1872), ss. 50, 530.

A Bench of Magistrates has no power to deal with cases coming under s. 530 of the Criminal Procedure Code. A Bench may be empowered under s. 50 of the Code "to try such cases or such class of cases only and within such limits as the Government may direct." The definition of the term "trial" shows that it refers to trials for offences, and these do not come within the miscellaneous matters mentioned in s. 530.

THE reference in this case was as follows :—

"There is a dispute between Ibrahim and Sufferuddin concerning the possession of some lands. The former claims the land as being in his own cultivation as his bowlah lands, subordinate to the brahmatur tenure of Gobinda Chandra Banerjee in Kismut Kistokate. The latter sets up a *burga* right,² and claims to be in direct possession. Subsequently, on the application of Ibrahim, the Magistrate of the district took up the matter under s. 530 of the Criminal Procedure Code, and made the case over for trial to Baboo Trailokhya Nath Sen, Deputy Magistrate, exercising second-class powers, with directions to try it in the Bench over which he presided, with first-class powers. The Bench, consisting of the Deputy Magistrate, with the Honorary Magistrate, Baboo Chundra Nath Sen,

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3 Cal. 754.

¹ Criminal Reference, No. 26 of 1878, by H. C. Sutherland, Esq., Sessions Judge of Backergunge, dated the 16th April 1878.

² Tenure for which rent is paid in kind.

1878. took the case up, and examined all the witnesses on behalf of Sufferuddin, and two of the important witnesses on behalf of Ibrahim. But at a later stage, a Bench, consisting of the same Deputy Magistrate and another Honorary Magistrate, Moulvie Mohamed Fazil, examined the rest of the witnesses, finally disposed of the case, and directed that Ibrahim should retain possession of the land until ousted by due course of law.

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"It is first urged in this case that the evidence has been improperly received, inasmuch as the witnesses were heard, some by one Bench, and others by another Bench of Magistrates. It appears from the record that the witnesses for the second party were all examined by a Bench consisting of the Deputy Magistrate, with an Honorary Magistrate, Baboo Chundra Nath Sen, who also examined two of the most important witnesses, *vis.*, Shita Nath and Nobin, to prove relinquishment on behalf of the first party. At a later stage of the case, three witnesses were examined for the first party by a Bench consisting of the same Deputy Magistrate and an Honorary Magistrate, Moulvie Mohamed Fazil, and that the final order was passed by this last Bench of Magistrates. Now, this proceeding is altogether illegal. Moulvie Mahomed Fazil, who decided the case, knew nothing whatever of the case for the second party, and his knowledge of the case for the first party was very imperfect.

"It is next urged that there is no evidence to support the order. This, I think, is pretty clear from the Deputy Magistrate's explanation, who says that more stress was laid on the sub-inspector's report than on the evidence of the witnesses. The sub-inspector's report is no evidence at all. Had he been examined, it would have been a very different thing altogether.

"I think that the order ought not to stand, and, under the circumstances stated above, recommend that it be set aside."

PRINSEP, J.—In addition to the reasons stated by the Sessions Judge, we are of opinion that it was not competent to a Bench of Magistrates to deal with a case under s. 530. A Bench may be empowered under s. 50 "to try such cases or such classes of cases only and within such limits as the Government may direct." The definition of the term "trial" shows that it refers only to trials for offences, and not to miscellaneous matters, such as those coming within s. 530. So that in this view of the law also the order passed was illegal: it is accordingly set aside.

Before Mr. Justice Markby and Mr. Justice Prinsep.

IN THE MATTER OF CHUMMAN SHAH AND ANOTHER.¹

1878.
April 30.
3 Cal. 756.

Confession—Attestation when unnecessary—Criminal Procedure Code (Act X. of 1872), ss. 324, 346.

The attestation required by s. 346 of the Criminal Procedure Code is unnecessary when a confession is made in Court to the officer trying the case at the time of trial.

THE only question in this case was whether a conviction of a prisoner by a Deputy Magistrate, based mainly upon a confession made by the prisoner in Court to such Deputy Magistrate, ought to be quashed, on the ground that the record of the confession had not been attested as required by s. 346 of the Criminal Procedure Code.

The Deputy Magistrate had convicted the prisoner under s. 411 of the Indian Penal Code; and sentenced him to one year's rigorous imprisonment.

¹ Criminal Reference by F. Cowley, Esq., Officiating Sessions Judge of Monghyr, dated the 24th April 1878.

The Sessions Judge doubted whether this conviction could stand, and referred the matter to the High Court, which ruled as follows :

PRINSEP, J. (MARKBY, J., concurring).—It was unnecessary for the Magistrate to record any "confession" of Chumman Shah, since he was competent, on the admission of Chumman, to sentence him without any further record (s. 324, Code of Criminal Procedure).

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Before Mr. Justice Ainslie and Mr. Justice Broughton.

THE EMPRESS *v.* NURUL HUQQ AND ANOTHER.¹

Recognisance—Power of High Court to interfere when forfeited.

The High Court has no power to reduce the amount of recognizances which have been forfeited, but in a case of hardship the matter should be referred to Government.

In this case Nurul Huqq and Bissember Mitter were, in April 1877, bound under penalties of Rs. 700 each to keep the peace for a year. On the 31st December 1877 they were convicted by the Assistant Magistrate of Khoolna of committing mischief in respect of some cocoanuts, and sentenced to a fine of Rs. 20 each. This sentence was confirmed by the Officiating Magistrate of Jessore on appeal.

On the 2nd of May 1878, the Assistant Magistrate of Khoolna ordered that the penalty (Rs. 700) mentioned in their security-bond should be realized. The Magistrate, to whom an appeal against this order was made, was of opinion that, considering the position of the defendants, who were peons in the cutcherry of a zemindar, and earning probably not more than Rs. 7 or 8 a month, a penalty of Rs. 700 each in the form of forfeited security in addition to the fine in the case of mischief was far heavier than was necessary, and reported the proceedings for the orders of the High Court under s. 296 of Act X. of 1872.

Upon this reference the following order was made by

AINSLIE, J.—In the case of *Nilmadhub Ghosal*² a Bench of this Court held that we have no power to reduce the amount of recognizances which have been forfeited. The Bombay High Court has expressed the same opinion.

The papers must be returned. The Officiating Magistrate should refer the matter to Government, if he thinks the amount of the recognizances was excessive.

1878.

June 24.

3 Cal. 757.

Before Mr. Justice Ainslie and Mr. Justice White.

THE EMPRESS *v.* THE MUNICIPAL CORPORATION OF THE
TOWN OF CALCUTTA.³

1878.

June 5.

Reference—Municipal Commissioners—Public Servant—Act IV. of 1877 (Presidency Magistrates' Act), ss. 39, 240—Indian Penal Code, ss. 11, 21, Descrip. 10, Illus. 1.

3 Cal. 758.

A Municipal Corporation is not a public servant within the meaning of s. 39 of Act IV. of 1877, and may, therefore, be prosecuted under the Penal Code without the preliminary sanction of the Government required by that section.

¹ Criminal Reference, No. P132 of 1878, from an order of *W. H. Page, Esq., Officiating Magistrate of Jessore*, dated the 18th June 1878.

² 19 W. R., Cr. Rul., 1.

³ Reference, No. 177 of 1878, from *J. G. Charles, Esq., Officiating Chief Magistrate of Calcutta*, dated 29th May 1878.

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THE Corporation of the Town of Calcutta was indicted at the instance of Osmond Beeby and others, under ss. 268, 269, 270, and 290 of the Indian Penal Code, for keeping a night-soil depôt in such proximity to the houses of the complainants in the neighbourhood of Shureef Duffree's Lane in the Town of Calcutta as to cause a public nuisance.

On the day fixed for the hearing, the Chief Magistrate doubted whether he could entertain the charge, inasmuch as he considered the Municipal Commissioners to be public servants, and as such privileged from prosecution, except under the sanction of the Government, as provided for by s. 39 of the Presidency Magistrates' Act.

He thereupon, under s. 240 of the same Act, referred the point for the opinion of the High Court, and gave in his letter of reference the following reasons for his views :—

1st.—S. 39 of Act IV. of 1877 provides that no public servant who is not removeable from his office without the sanction of Government shall be prosecuted for any act purporting to be done by him in the discharge of his duty *without the previous sanction of Government.*

2nd.—That the illustration to s. 21 of the Penal Code declares that a Municipal Commissioner is a public servant; and under s. 11 of the same Code the word person is said to include a body of persons.

3rd.—And that therefore a Municipal Corporation as a body was entitled to the same privileges as the individual Municipal Commissioners who composed it.

Mr. *Phillips* for the complainants.—S. 39 does not apply to the present case. In the first place, the sanction only applies where Government has some control over the dismissal of a public servant from his office. Here the Government has no such control, the Corporation of Calcutta being a body created by the legislature, holding no office, and consequently incapable of being dismissed therefrom, and only capable of extinction by an Act of the legislature. It was never intended that, when Government had no means of affording redress by sanctioning the dismissal of the offender, it should have the power of prohibiting a prosecution. This point is entirely overlooked by the Magistrate.

In the second place, the Corporation is not a public servant; the Magistrate infers that the Corporation is a public servant, but he does not profess to find that it comes within any of the clauses of the definition of a public servant in s. 21 of the Penal Code. His reasoning appears to be, that as a single Municipal Commissioner is a public servant, therefore the whole body of Municipal Commissioners must be public servants; and, as he considers the Corporation to be the equivalent to the whole body of existing Municipal Commissioners, he holds that the Corporation is a public servant: he also, without advertng to the point above noticed, holds that, if a single Municipal Commissioner is protected from prosecution, the whole body must be equally protected.

Now, the Corporation is not the same as the whole body of existing members; it is a thing distinct from all its existing members, and includes all past and future members; hence nothing can be inferred as to its being a public servant from the fact that all its members are so. Again, there is the same fallacy in the Magistrate's further reasoning that the Corporation must be protected, if all its members are. The individual member requires such protection, for he may be made to suffer in person and pocket; but a Corporation cannot be imprisoned, nor can its members be made to suffer individually; it can only be reached by distraining its property or be made to pay out of its corporate funds.

The very nature of a Corporation is, therefore, a sufficient protection, and the ground for the Magistrate's inference is thus cut away. Besides, such a protection as is afforded by s. 39 of the Presidency Magistrates' Act, being against common right, is not to be extended by inference.

Mr. Piffard on behalf of the Corporation.

AINSLIE, J.—The question referred by the Presidency Magistrate is, whether the protection extended by s. 39 of Act IV. of 1877 to certain individual public servants extends equally to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance.

By s. 11 of the Penal Code, the word "person" is defined to include a body of persons, whether incorporated or not; and therefore the word "person" in s. 21 may be read as a body of persons incorporated. The words "public servants" in that section may consequently denote a body of persons incorporated, falling under any of the descriptions given therein. It is not necessary to refer to any except the tenth. The illustration in the tenth description says that a Municipal Commissioner is a public servant; but it does not therefore follow that a Corporation, such as that created by Act IV. of 1876 (B.C.), is also a public servant within the meaning of that section.

The words "every officer" in the tenth clause seem rather to point to an individual than to an incorporated body; but assuming, for the purposes of this reference, that the Municipal Corporation of Calcutta is a public servant within the meaning of s. 21 of the Penal Code, still it seems to me that it does not come within the provision of s. 39 of the Presidency Magistrates' Act. By that Act no such Judge or public servant as is described in that section shall, unless with the previous sanction of Government, be prosecuted for any act purporting to be done by him in the discharge of his duty. The class of public servants referred to consists of those who are "not removeable from office without the sanction of Government." It appears to me that this description must be read in its entirety, and that the words "not removeable from office" cannot be separated from the following words "without the sanction of Government."

But if the whole be read as describing the class exempted from prosecution except with the previous sanction of Government, the description can only be applied to a class not removeable from office at all by dropping the words "without the sanction of Government," which have no meaning as applied to such public servants.

The right to prosecute any person, or body of persons, by whom one may have been injured, is a common right which can only be limited by special legislation; and, in considering whether the right has been taken away, we must see that it is taken away by express words, or by necessary implication. It does not seem to me that it must necessarily be implied that, by the words "not removeable from office without the sanction of Government," it was the intention of the legislature to include those who are not removeable from office under any circumstance at all.

I see no reason to suppose that the Government must have meant to extend the same protection to a body, such as the Municipal Corporation of Calcutta, which cannot be taken under a warrant, or sentenced to imprisonment, which it thought fit to extend to certain individuals in the service of that Corporation, who no doubt are protected by s. 32 of the Calcutta Municipal Act and s. 39 of the Presidency Magistrates' Act,

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The answer which I would therefore give to the question referred to us by the Magistrate is, that the protection does not extend to a Municipal Corporation prosecuted under the Indian Penal Code.

WHITE, J.—I am of the same opinion. The question submitted to us by the Presidency Magistrate turns entirely upon the meaning and true construction of s. 39 of the Presidency Magistrates' Act.

It is not disputed, nor could it be disputed, that, unless that section applies to the Corporation of the Town of Calcutta, it is liable, under the Penal Code, to be prosecuted for a nuisance in the same way as if the offence had been committed by an ordinary individual. A Corporation may be proceeded against criminally, as well for a misfeasance as for a nonfeasance—*Reg. v. The Birmingham and Gloucester Railway Company*,¹ *Reg. v. Scott*,² and *Reg. v. The Great North of England Railway Company*.³

S. 39, as regards a Judge or any public servant not removeable from office without the sanction of the Government, exempts them from prosecution for an offence except with the previous sanction of the Government. The word "Government," as used in the section, means the Government acting in its executive capacity. It is contended that the Calcutta Corporation falls within the category of a public servant not removeable without the sanction of the Government. I think it is open to much doubt whether the Corporation, as distinct from its individual members, is a public servant at all, as these words are defined by the 21st section of the Penal Code, which is incorporated with the 39th section of the Act under consideration. Assuming, however, for the purpose of the argument, that that point is decided in favour of the defendants' contention, it seems to me clear that the Calcutta Corporation does not come within the description of a public servant irremovable from office without the sanction of Government.

The Corporation is created by Act IV. of 1876 (B.C.). By the 4th section of that Act certain persons, to the number of 72, who are styled Commissioners, and of whom 48 are elected by the rate-payers, and 24 appointed by the Government, are incorporated by the name of the Corporation of the Town of Calcutta. The Corporation is to have perpetual succession, a common seal, and by its corporate name to sue and be sued. There is no provision in the Act for putting an end to the Corporation, or for removing or dismissing it, either with or without the sanction of Government, which means, as I have said, the Executive Government.

It can only cease to exist by an Act of the legislature, and until and unless the legislature interferes its corporate life must continue. The words "public servant not removeable without the sanction of Government" are wholly inappropriate to describe the legal position of such a corporation.

Again, if it were necessary to go beyond the Corporation, and consider the position of the 72 members comprising it, they appear to be equally without the particular description of public servant mentioned in s. 39 of the Presidency Magistrates' Act.

By s. 22 they are elected for a term of three years, and continue in office during that term. S. 23 enumerates the circumstances under which, and the only circumstances under which, they cease to be members of the Corporation. Those circumstances are death, resignation, or disqualification; the disqualifi-

¹ 3 Q. B. Rep. 223.

² 9 Q. B. Rep. 315.

³ 3 Q. B. Rep. 547.

cation being that which may arise from their becoming bankrupt or interested in a contract with the Corporation, or being absent from Calcutta for six consecutive months, or being sentenced to a term of imprisonment; so that, looking behind the Corporation, if I may so say, to the members who constitute it, it cannot be said of them, any more than of the Corporation, that they are persons who are not removeable without the sanction of Government.

Mr. Piffard has argued that the words in s. 39, which we are now considering, are intended to embrace two classes of public servants—(1) those who are not removeable from office at all, and (2) those who are removeable only with the sanction of Government. But I am unable to agree with him that that is the true construction of the words in question.

They appear to me to point to one class, and one class only, of public servants, *vis.*, that class which is removeable only with the sanction of Government. The words are satisfied by applying them to that class, and whereas, here a privilege is created in favour of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense. Mr. Piffard's contention would require us to construe the section as if its language had been "any public servant not removeable from his office, or, if removeable, not removeable without the sanction of Government."

In fact, to warrant the construction contended for, some additional words would have to be introduced, and this circumstance, I think, is fatal to the argument.

I agree with my brother Ainslie that, if we look to the reason of the privilege conferred by the 39th section, there is a marked distinction between the case of a public servant whose removal required the sanction of Government, and that of a Corporation in the position of the Calcutta Municipality. The Government may have an interest in protecting the former from prosecution without their previous sanction, but no interest in protecting the latter from the consequences of their own acts; moreover, the Corporation, if convicted, cannot be punished by imprisonment, but only by fine. The legislature must have thought it a matter of importance that no public servant whose removal requires the sanction of Government should be subjected to imprisonment without its sanction; but the same reasons for requiring Government sanction do not apply when the result would be merely the infliction of a fine, which must ultimately be paid by the rate-payers of the Town of Calcutta.

I concur, therefore, in the opinion that the question which has been submitted to us by the Presidency Magistrate must be answered in the negative.

Before Mr. Justice R. C. Mitter and Mr. Justice Maclean.

THE EMPRESS *v.* MOHIM CHUNDER RAI AND ANOTHER.¹

Assessors—Trial by Jury of a case properly triable with Assessors—Appeal on facts—Act VIII. of 1871, s. 80—Criminal Procedure Code (Act X. of 1872), s. 233.

Per MACLEAN, J. (MITTER, J., dubitante).—The trial by a jury of an offence triable with assessors is not invalid on that ground, but an accused who would have been entitled to an appeal on the facts, if the case had been tried with assessors, is not debarred from that right merely by the fact that the trial by jury is not invalid.

¹ Criminal Appeal, No. 182 of 1878, against the order of *W. H. Verner, Esq.*, Officiating Additional Sessions Judge, 24-Pargannas, dated the 14th February 1878.

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3 Cal. 765.

IN this case the petitioners, who had been charged with an offence under s. 80 of Act VIII. of 1871, had been tried by the Sessions Judge of the 24-Pargannas with the aid of a jury, and convicted.

Baboo *Boido Nath Dutt*, for the petitioners, contended, among other things, that the petitioners having been tried and convicted of an offence to which trial by jury had not been made applicable by the Government notification of January 1862 (*Calcutta Gazette*), and who ought, therefore, to have been tried by the Judge with the aid of assessors, such trial and conviction was, under the circumstances, invalid, and, if not, the accused were entitled to an appeal upon facts in the same way as they would have been if their trial had been conducted in the manner prescribed by law.

The Government pleader, Baboo *Juggadanund Mookerjee*, *contra*.

The following judgments were delivered by the Court, which, however, confirmed the sentences passed upon the prisoners, being of opinion that the lower Court's decision upon the facts was correct:

MACLEAN, J.—The appellants have been convicted by the Sessions Court of the 24-Pargannas of an offence under the Registration Act VIII. of 1871, and, as the trial was held with a jury, the petition of appeal filed on 13th April was directed to show certain errors of law, such as defects in the Judge's charge to the jury. By a subsequent petition of 17th April, the prisoners claim to be heard against the conviction on questions of fact as well as law, as the offence of which they have been convicted is not one of those to which trial by jury has been made applicable by the Government notification of January 1862 (*Calcutta Gazette*, 8th January 1862, p. 87).

It has been contended before us by the Government Pleader that the Sessions Judge was competent to try the prisoners with a jury, notwithstanding that the offence charged is not included in the Government notification referred to, and therefore the prisoners are not entitled to appeal against their conviction except upon matter of law; but it is not necessary for the purposes of this appeal to decide that question. The trial by a jury of an offence triable with assessors is not invalid on that ground (s. 233, Criminal Procedure Code, Explanation); but it appears to me that the prisoners, who would have been entitled to an appeal on the facts, if the case had been tried with assessors, are not debarred from that merely by the fact that their trial by jury is not invalid. An error of procedure not affecting the merits of the case ought not to affect the prisoner's right of appeal.

Dealing, however, with this appeal as an appeal upon the facts, I consider the conviction of the prisoners a proper one, and I would dismiss the appeal.

MITTER, J.—I concur; but I do not desire to express any opinion as to whether the prisoners are entitled to appeal on questions of fact. But, assuming that they have this right, I concur with my learned colleague that the conviction of the prisoners is fully supported by the evidence. We accordingly dismiss the appeal.

Appeal dismissed.

VOLUME IV.

APPELLATE CRIMINAL.

*Before Mr. Justice White and Mr. Justice Prinsep.*IN THE MATTER OF THE EMPRESS *v.* ABDPOOL KURREEM.¹*Abetment—Bigamy—Indian Penal Code, ss. 109 and 494.*

1878.

July 19.

4 Cal. 10.

A Mahomedan guardian of a married female infant, who, while her husband is living, causes a marriage ceremony to be gone through in her name with another man, but without her taking any part in the transaction, does not commit the offence of abetment under ss. 109 and 494 of the Penal Code.

The practice of instituting criminal proceedings with a view to determining disputes arising in cases of this class condemned.

HOORUNNISSA BEGUM, a Mahomedan female infant of six years of age, having at the time a mother and two paternal uncles, Abdool Kurreem and Abdool Sobhan, living, was first given away in marriage to one Abdool Hosain by her mother. This marriage being admittedly invalid, as the paternal uncles alone, and not the mother, could, according to Mahomedan law, dispose of the infant in marriage, a second marriage was shortly afterwards solemnized between the same parties; and at such second marriage, Abdool Sobhan, the younger of the infant's paternal uncles, was alleged to have been present, and to have given away the bride. A few weeks later the same Hoorunnissa Begum was again married to one Dabeerooddin, having this time been given in marriage by both her guardians, Abdool Kurreem and Abdool Sobhan. Upon this the guardians, Abdool Kurreem and Abdool Sobhan, were charged with having been guilty of an offence punishable under ss. 494 and 109 of the Indian Penal Code.

The case of the prosecution was, that the marriage of the infant Hoorunnissa Begum, with the consent of her uncle Abdool Sobhan, was a legal one according to Mahomedan law; and that, therefore, the accused, by sanctioning and promoting the subsequent marriage with Dabeerooddin, had been guilty of the offence of abetting a marriage which was, and which they knew to be, void.

Abdool Sobhan pleaded that he had taken no part, and had not been present at either marriage. Abdool Kurreem admitted that he had sanctioned, and been present at, the marriage with Dabeerooddin, but denied that he had any knowledge of the alleged marriage to Abdool Hosain; and further disputed the validity of such a marriage, if it had, in fact, taken place, without his consent.

The result of the trial at the Sessions Court at Hooghly was, that the Court and assessors were of opinion that the infant Hoorunnissa Begum had, in fact, been married, as alleged, to Abdool Hosain in the presence and with the consent of the accused Abdool Sobhan, and that such a marriage was a valid one; but that the accused Abdool Sobhan had not taken any part in the subsequent marriage with Dabeerooddin. They, therefore, acquitted Abdool Sobhan. As to the accused, Abdool Kurreem, they found that, at the time when he sanctioned, and took part in, the marriage with Dabeerooddin, he must have been

¹ Criminal Appeal, No. 379 of 1878, against the order of *J. P. Grant, Esq.*, Sessions Judge of Zilla Hooghly, dated the 23rd of May 1878.

1878.
 IN THE
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 THE EMPRESS
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 4 Cal. 10.

cognizant of the previous marriage with Abdool Hosain and of the validity of such previous marriage. Abdool Kurreem was, accordingly, convicted and sentenced to eighteen months' rigorous imprisonment.

Against this conviction and sentence Abdool Kurreem appealed to the High Court.

Mr. *E. P. Wood* and Moulvie *Siraj-ul-Islam*, who appeared for the appellant, contended that the finding of the Court below was erroneous upon the evidence before it, and further submitted that, taking the facts as found by the Court below, the appellant had been guilty of no offence, and that, even if he knew, or had reason to know, that a pretended marriage ceremony had been solemnized between his ward and Abdool Hosain, he would have committed no offence in ignoring a pretended marriage, the validity of which he denied; and that he committed no offence in giving his sanction to a marriage of which he was willing to approve, leaving to the Civil Court to decide, if necessary, which of such marriages should be binding. The case for the appellant was further strengthened by the fact that the infant Hoorunnissa Begum was not personally present at her marriage with Dabeerooddin, and that what took place was more an assertion of his rights as guardian than anything else.

WHITE, J. (after stating the facts, proceeded as follows) : The prisoner before us has appealed against the finding of the Sessions Court on the facts and also against its conclusions in law. It appears to me unnecessary to enter into the merits of the appeal, for, taking the facts as found by the Court to be true, and the law applied by it to be correct, I am of opinion that this conviction cannot be sustained.

The prisoner is charged with the abetment of an offence under s. 494 of the Penal Code. To establish a charge of abetment under the Penal Code, the accused must be proved either to have instigated or aided some other person to commit the offence, or to have engaged with another in a conspiracy for the commission of the offence. The acquittal of Abdool Sobhan, who was jointly charged with the prisoner, puts an end to the case of conspiracy, for, except with Abdool Sobhan, there is no evidence to support a case of conspiracy. If, therefore, the conviction can be upheld, it must be in consequence of the prisoner having instigated or aided Hoorunnissa to contract a second marriage. The evidence shows that Hoorunnissa took no part in, nor was present at, the ceremony which the prisoner caused to be performed in her name, and there is not only no proof of instigation or aiding, but not even the slightest evidence that Hoorunnissa was consulted, or even communicated with, by the prisoner before the ceremony took place. In fact, the nature of the transaction almost precludes the notion of abetment as far as the infant girl is concerned. The prisoner purported to dispose of her in marriage, not by virtue of any authority derived from her or from any consultation of her wishes, but by virtue of his legal position as elder paternal uncle. The girl was a mere cypher in the transaction. Her name was used, the ceremony was on her behalf, and the prisoner symbolically gave her in marriage to Dabeerooddin; but the girl was personally a stranger to the whole proceeding. Although the effect of the ceremony would have been, supposing the prisoner was acting within the authority given him by law, to bind the infant by the marriage so contracted, yet she was not the less personally a stranger to both the ceremony and the contract.

It appears to me, therefore, that, without determining any of the questions of fact or law raised by the prisoner's appeal, the conviction must be set aside,

on the ground that the prosecution has failed to show that the prisoner is guilty of the offence of abetment within the meaning of the Penal Code.

Assuming the facts and law to be as found and laid down by the Sessions Court, the prisoner has committed an illegal act in disposing of his infant ward in marriage after he knew that she had been previously lawfully disposed of in marriage by her younger paternal uncle; but in doing this act he was, according to the evidence, the sole actor, and the act, though illegal, is not, if done by one person alone, an offence provided for by the Penal Code.

In disposing of this case, I would observe that it ought not to have been made the subject of a criminal prosecution. A dispute has evidently arisen between the relatives of this little girl, who appears to be entitled to some property, as to which of them should dispose of her in marriage. The several questions which the dispute has given rise to, *viz.*, what marriage ceremonies have been performed on the girl's behalf, and by whom, and what is their legal effect, are eminently questions to be submitted to a civil tribunal, if the parties disagree about the same; and it is much to be deprecated that one of the rival parties should endeavour to procure a decision on this point through the medium of a criminal trial.

The inconvenience and hardship to the accused of making such a dispute the subject of a criminal prosecution is well illustrated by the present case. The first marriage, which the mother solemnized, is admitted by the prosecution to be wholly invalid. To show that the third marriage, solemnized by the prisoner, was invalid, it is essential for the prosecution to establish that an intermediate ceremony took place in which Abdool Sobhan disposed of the girl in marriage, and that that intermediate ceremony constituted a valid marriage according to Mahomedan law. Although the evidence of Abdool Sobhan is of the utmost importance on this question, the prosecution has chosen to put him on his trial jointly with the prisoner, and so prevented him from being called as a witness. Abdool Sobhan denies that he did solemnize the second marriage, and this cardinal point has been determined by the Criminal Court without hearing his testimony.

Another objection to the course adopted in the present case is, that the criminal trial will not be a bar to the taking of civil proceedings at some future time in order to ascertain to which of the two boys the girl was legally married; and, should such proceedings take place, the conviction of the prisoner in the criminal trial will be no evidence against him in the civil proceedings. The whole matter will have to be investigated upon such evidence as the parties may then adduce, and it is possible that the Civil Court may arrive at a conclusion different from that of the Criminal Court, and uphold the marriage, for contracting which the prisoner has been found guilty.

The conviction and sentence will be set aside, and the prisoner released.

PRINSEP, J.—I altogether agree with my learned colleague, that in this case it is not necessary to come to any finding upon the facts, and that, accepting the facts as stated by the prosecution, the appellant cannot be convicted of the abetment of bigamy under ss. 109 and 494 of the Indian Penal Code.

The girl Hoorunnissa, who forms the subject of this case, is aged about six years, and apparently is possessed of considerable property, which fully accounts for the strife which is going on for her person and for procuring her marriage into one or other of the two families. She was married first to Abdool Hosain with the consent of her mother, but this was not a proper consent such as would render the marriage valid. She was afterwards, according to the pro-

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secution, again married to the same boy Abdool Hosain with the consent of Sobhan, her younger paternal uncle—that is, one of her two guardians. Then the prosecution goes on to say that she has been married for the third time (so as to cause bigamy) with the consent and at the instigation of the appellant, Abdool Kurreem, the elder uncle, to another boy. Now, the first marriage is admittedly void, and, if the facts are as stated by the prosecution, the third marriage would also be void as being a bigamous marriage. But, however that may be, as has been forcibly pointed out, this matter should be decided, and can only be properly decided, in the Civil Court. Even if the appellant, Abdool Kurreem, did procure that marriage, he cannot, on the facts stated by the prosecution, be rightly convicted of abetment of bigamy. It does not appear, nor is it stated, that the girl was present or even cognizant that this marriage was to be contracted on her behalf. The offence of abetment and its definition is to be found in s. 127 of the Indian Penal Code, and that section is supplemented by a definition of the term “abettor” in s. 108; but both these sections contemplate either the instigation or the aiding of some person to commit a substantive offence, or the engaging in the conspiracy on the part of a person in the position of the appellant with one or more other persons. It has been pointed out by Mr. Justice *White* that there must be either a principal committing a particular act or instigating to commit that act, or there must be some other person engaged with the appellant in abetting this act to constitute an abetment under the Indian Penal Code. But nothing of the kind is alleged by the prosecution, and therefore, even if the appellant should have committed all the acts imputed to him, he would not be guilty of any criminal offence under the Indian Penal Code.

The conviction will be set aside, and the prisoner released.

Conviction set aside.

Before Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS v. HARY DOYAL KARMOKAR.¹

1878.
 July 3.
 4 Cal. 16.

Criminal Procedure Code (Act X. of 1872), ss. 195, 295, 296—Discharge of accused—Jurisdiction—First Evidence—Revival of Proceedings.

A Deputy Magistrate having dismissed a case instituted under s. 380 of the Penal Code without taking certain evidence which, in his opinion, would have been of little value, the Magistrate of the District, on the application of the complainant, took such evidence, and committed the accused for trial before the Sessions Court.

Held, on reference to the High Court, that, as the words “sessions case” in s. 296 of the Criminal Procedure Code have reference only to a case triable exclusively by a Court of Session, the Magistrate’s action could not be supported under that section, but that (as further evidence in addition to that taken by the Deputy Magistrate was forthcoming) it was sustainable on the principle laid down in *Empress v. Donnelly*.²

In this case the accused was charged with theft in a dwelling-house under s. 380 of the Penal Code, an offence triable by any Magistrate. The Deputy Magistrate who tried the case discharged the accused under s. 195 of the Code of Criminal Procedure, omitting, however, to take the evidence of the prosecutor’s mother, a material witness, presumably because she was reputed to be of weak intellect. On the application of the complainant, the Magistrate of the

¹ Criminal Reference, No. 938 of 1878, by C. B. Garrett, Esq., Sessions Judge of Dacca, dated the 28th June 1878.

² 1. L. R., 2 Cal. 405, see p. 412.

District sent for and examined this witness, and ultimately committed the accused for trial before the Sessions Court, overruling the plea of want of jurisdiction raised by the accused, on the ground that the offence with which the accused was charged being triable by the Court of Session as well as by a Magistrate, the Court, under s. 296 of the Criminal Procedure Code, had jurisdiction to commit the case for trial. The Sessions Judge referred the case to the High Court, and in his letter of reference said: "I think that in this case the Magistrate's order is contrary to the law as at present settled. The offence for which the prisoner was tried was theft under s. 380 of the Indian Penal Code, and this not being an offence exclusively triable by the Court of Session, the Magistrate had not the power to commit."

MARKBY, J.—The Deputy Magistrate, Moulvie Abdool Guffoor, discharged the accused; but, on the application of the complainant, the District Magistrate has committed him to the Court of Session, notwithstanding that objection to his jurisdiction was raised. The Magistrate appears to have considered that he had jurisdiction, because, this being a case regarding an offence triable by the Court of Session as well as by a Magistrate, he could act under s. 296 of the Code of Criminal Procedure.

The Sessions Judge has referred the case to have this commitment set aside as illegal.

The grounds on which the Magistrate held that he could re-open this case are bad, as it has been held that the term "sessions case" in s. 296 means a case triable exclusively by the Court of Session. But we think that the commitment should be maintained on another ground.

The Deputy Magistrate discharged the accused without examining the principal witness in the case, the woman who was alone present in the house when it was robbed, because, as the Sessions Judge expresses it, "she was reported not overstrong in the head." The Deputy Magistrate's order was, therefore, bad; and, under the rule laid down in the case of *Empress v. Donnelly*,¹ the District Magistrate was competent to revive the proceedings, further evidence being available.

We, therefore, decline to interfere.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

THE EMPRESS *v.* ABDŌOL KARIM; AND THE EMPRESS *v.* GOLAM MAHOMED.²

Summary Procedure—Unlawful Assembly armed with a deadly weapon—Indian Penal Code, ss. 143, 144.

No Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction. If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to show from the deposition of the complainant that the circumstances of aggravation are really mere exaggeration and not to be believed. Therefore, a Magistrate, when he has before him a person charged with having been armed with a deadly weapon while a member of an unlawful assembly, is not at liberty to disregard that part of the charge which charges the prisoner with having been armed with a deadly

1878.

EMPRESS

v.

HARY DOYAL

KARMOKAR,

4 Cal. 16.

1878.

June 6.

4 Cal. 18.

¹ L. L. R., 2 Cal. 405, see p. 412.

² Criminal Reference, No. 482 of 1878, from an order of J. F. Browne, Esq., Officiating Sessions Judge of Zilla Patna, dated the 29th May 1878.

1873.

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v.

ABDOOL

KARIM

EMPRESS

v.

GOLAM
MAHOMED,

4 Cal. 18.

weapon, and so to give himself jurisdiction to try the case summarily, and then, by inflicting a sentence of imprisonment not exceeding three months, to deprive the prisoner of his right of appeal.

THE prisoners in this case had been charged before a Deputy Magistrate with the offence of having been members of an illegal assembly, and there was evidence, which, if true, showed that they had at the time been armed with swords; and were, therefore, punishable under s. 144 of the Indian Penal Code. The Deputy Magistrate chose to disregard that portion of the evidence which made the offence with which the prisoners were charged an offence punishable under s. 144 of the Indian Penal Code; and, treating the charge as one under s. 143, tried and convicted them summarily, and sentenced them to terms of imprisonment not exceeding three months each.

On the proceedings of the Deputy Magistrate being brought to the notice of the Officiating Sessions Judge of Patna, he submitted the record for the orders of the High Court, addressing at the same time a letter to the Registrar of the High Court, of which the following is an extract:—

“It seems to me quite clear that the Deputy Magistrate had no right to take the case up summarily, as it was alleged that the members of the alleged illegal assembly were armed. This being so, the offence was one under s. 144, and not under s. 143. In the same way, Gholam Mahomed, who is charged with hiring persons to join an unlawful assembly, was punishable, if the members of the assembly were armed, under the provisions of s. 144, and therefore could not be tried summarily.

Mr. *M. L. Sandel*, for the petitioners, contended that the petitioners had been injured by the course adopted by the Deputy Magistrate, who ought to have framed a charge against them under s. 144 of the Penal Code. By charging them under s. 143, and sentencing them to short periods of imprisonment, he had deprived them of their right of appeal.

AINSLIE, J. (BROUGHTON, J., concurring).—S. 274 of the Code of Criminal Procedure takes away the right of appealing from persons convicted by Magistrates of the first class exercising summary jurisdiction when the sentence is one of imprisonment not exceeding a term of three months. Therefore, in the present case, the convicted persons, who have been sentenced to a term of imprisonment not exceeding three months, are deprived of the right of appeal on the facts, if the Deputy Magistrate was right in trying the case summarily.

The Deputy Magistrate seems to think that the fact that he had not the police-papers at the time that the prisoners were put on their trial entitled him to deal with the case on the verbal statement of a Court sub-inspector. But, on looking at the record, it appears that the very first witness for the prosecution states distinctly that there were two persons who appear to have been the leaders of the unlawful assembly (if the evidence of this witness is to be believed) armed with swords. It is quite clear that the Deputy Magistrate should have looked to the sworn evidence before him, and not to any verbal statement of a Court sub-inspector, for the purpose of determining how the trial was to be conducted; and when he found that the charge actually made before him was a charge which would not fall under any section of the Penal Code admitting summary trials, the proceedings should have been framed as in ordinary trials. If this conviction had been recorded under s. 144, the accused would have had a right of appeal.

This Court has frequently laid down that no Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself sum-

mary jurisdiction. If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to show, from the deposition of the complainant, that the circumstances of aggravation are really mere exaggeration, and not to be believed.

As the Deputy Magistrate was bound to treat this case as a charge under s. 144, it follows, from the construction that has been put on the 34th section of the Criminal Procedure Code, that we are bound to hold his proceedings void.

All these proceedings must, therefore, be quashed, and the Deputy Magistrate must try the prisoners *de novo*.

The same order will be made in the case of Golam Mahomed.

Proceedings quashed.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

IN THE MATTER OF THE PETITION OF HURRO SOONDERY CHOWDHRAIN
(PETITIONER).¹

Par-da-nashin Female—Right to be examined on Commission—Procedure on Examination—Mode in which a Magistrate should show cause against a Rule.

A par-da-nashin woman summoned as a witness in a criminal case has a right to be exempted from personal attendance at Court, and to be examined on commission.

When a Magistrate wishes to show cause against a rule issued by the High Court, the proper course for him to adopt is to apply to the Legal Remembrancer to cause an appearance to be made for him in Court, and not to address the Registrar by letter.

In this case the petitioner, Hurro Soondery Chowdhraïn, was summoned by the Magistrate of Mymensing to attend at his Court on the 7th of June, and give evidence for the prosecution at a trial in which her son and five others were the persons accused. The petitioner, on the 30th of May, applied to the Magistrate to be excused from personal attendance, on the ground of being a par-da-nashin. She further stated that she had no personal knowledge of the matters about to be enquired into, and prayed that, should her evidence be deemed essential, it might be taken on commission, and not in open Court. The order of the Magistrate on this application was—"The evidence of Hurro Soondery Chowdhraïn appears, on the sworn information of the police, to be of the first importance, and her attendance cannot be dispensed with."

From this order the petitioner appealed to the High Court, which, on the 12th of June, made an order directing the Magistrate to issue a commission for the examination of Hurro Soondery Chowdhraïn, at the same time giving him leave to abstain from doing so, and to show cause why the order should not be withdrawn. The Magistrate, instead of applying to the Legal Remembrancer to cause an appearance to be made for him in Court, addressed a letter to the Registrar of the High Court, which was as follows:—

"SIR,—I beg to acknowledge receipt of the orders of the High Court, No. 841, dated 12th instant, and to request that the Court may be pleased to withdraw its direction for the examination of Sreemutty Hurro Soondery Chowdhraïn on commission, for the following reasons:—

"In the case against Mohim Chunder Rai Chowdhri, petitioner, his mother will be wanted as a witness; but, as the precise nature of the falsehoods that may

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¹ Criminal Reference, No. 105 of 1878, from an order of R. H. Pawsey, Esq., Magistrate of Mymensing, dated the 17th June 1878.

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have to be exposed is not known to me, I cannot frame a series of questions which will extort the whole truth.

"It is an untrue allegation that, in the absence of her son, petitioner had no hand in the management of the affairs of the estate; and I am in possession of certain letters purporting to have been written at the dictation of petitioner, and undoubtedly written by the naib at her residence. In some cases these letters contain her specific directions for collection, payment, and operations of lattials or club-men, and for the commission of affrays on her son's behalf.

"In order to determine the full responsibility of the zemindars in these matters, the examination of Hurro Soondery Chowdhraim will, I think, now appear to the Court to be necessary.

"Further, as the petitioner is likely to persevere in avoiding attendance here, I would beg the favour of the Judges of the High Court having her bound down in substantial bail to appear within fifteen days before me."

On the 24th of June 1878, the Advocate-General (the Hon'ble G. C. Paul) appeared for the petitioner, and submitted that the letter addressed by the Magistrate to the Registrar could not properly be taken into consideration by the Court on disposing of the rule; and, further, that, even if the statements in the letter were accepted, they afforded no reason for discharging the rule.

The judgment of the Court was delivered by

AINSLIE, J. (BROUGHTON, J., concurring).—On the 12th of this month we made an order directing the Magistrate to issue a commission for the examination of Hurro Soondery Chowdhraim, at the same time giving him leave to show cause why the order should not be withdrawn.

The Magistrate has now sent up a letter addressed to the Registrar of this Court. This is not the proper form in which he ought to have shown cause. If he wished to show cause, he should have applied to the Legal Remembrancer to cause an appearance to be made for him in Court.

We might deal with this matter as if the Magistrate had not made any appearance at all, but we think it better, under the circumstances, to dispose of the rule on its merits.

The reasons assigned by the Magistrate in his letter appear to us to be wholly insufficient. It may be that this lady, as well as any other person under examination, may make statements which are not wholly true; but the Magistrate can guard against that by deputing some person thoroughly instructed for the purpose of examining on any fresh matters that may arise on her answers to written interrogatories, if it is necessary in the case to issue written interrogatories at all. At any rate, we cannot assume beforehand that the witness will make false statements.

There is in the letter of the Magistrate some indication that an attempt was to be made to make the witness criminate herself by her answer. This ought not to be done, and is a further reason for directing that she should be examined by commission, in order that what she may give may be carefully weighed by her, and not given without full consideration.

The rule is made absolute.

Rule made absolute.

APPELLATE CRIMINAL.

*Before Mr. Justice Markby and Mr. Justice Prinsep.*IN THE MATTER OF THE PETITION OF SHIBO PROSAD PANDAH
(PETITIONER).¹

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Defamation—Penal Code, ss. 52, 499 (Exceptions)—Bona fides—Practice—Act XVIII. of 1862, ss. 26, 27—Evidence Act (I. of 1872), s. 105.

4 Cal. 124.

In all criminal cases tried in the mofussil it is incumbent on the accused, since the passing of the Evidence Act (I. of 1872), to prove the existence (if any) of circumstances which bring the offence charged within the general or special exceptions or provisos contained in any part of the Penal Code or in any law defining such offence.

Query as to the state of the law in this respect in the Presidency-towns.

In dealing with the question of good faith, the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are in substance true, but whether he was informed and had good reason after due care and attention to believe that such allegations were true.

MARKBY, J.—Although ss. 235 and 237 of Act XXV. of 1861 have been repealed, it may still be inferred from *illus. (a)*, s. 439 of the present Criminal Procedure Code, that it is unnecessary specifically to allege in a charge the absence of all general and some at least of the other exceptions mentioned in the Penal Code. The operation of the illustration, however, is strictly confined to the statement of the offence in the charge.

ONE Shibo Prosad Pandah was convicted and sentenced to simple imprisonment for two months by the Joint-Magistrate of Balasore, under s. 500 of the Indian Penal Code, for defamation contained in a petition presented to that Magistrate, in which he stated that one Harnarain was preparing to bring false charges against him. The Magistrate found that the evidence of the defendant's witnesses, who stated they had overheard Harnarain discussing with others the possibility of getting up a false case, was entirely false; and that Shibo Pandah had not acted "in good faith," so as to bring himself within the exceptions of s. 499 of the Penal Code, when he filed the petition.

This sentence was confirmed on appeal by the Officiating Sessions Judge.

An application was then made to the High Court to set aside the order of the Officiating Sessions Judge.

Mr. Branson and Baboo Mohindro Lall Mitter for the prisoner.—It has been amply proved by several witnesses that they overheard the prosecutor was about to bring false charges against Shibo, and therefore the petition filed (the basis of this charge of defamation) is a true one, and comes under the exceptions of s. 499. Act XVIII. of 1862, s. 27, clearly lays down that *bona fides* is to be presumed unless the contrary appear.

Judgments of the Court were delivered by

MARKBY, J.—The defendant in this case has been convicted and sentenced to simple imprisonment for two months by the Joint-Magistrate of Balasore under s. 500 of the Penal Code of defamation, and he has applied to us to set aside the conviction and sentence as illegal. The defamation charged is contained in a petition to the Magistrate of Balasore, in which the defendant stated that Harnarain Mohapattur and others were preparing to bring false charges against him, and it was upon Harnarain Mohapattur's complaint that the allegations in this petition were injurious to his character that these proceedings were instituted. The defendant at the trial tried to prove that the allegations in the petition were

¹Criminal Motion, No. 56 of 1878, against an order of *P. Dickens, Esq.*, Officiating Sessions Judge of Cuttack, dated the 16th March 1878.

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true, and he called several persons who swore that they had heard conversations between Harnarain Mohapattur and other persons in which Harnarain Mohapattur had expressed his intention of getting up false charges against the defendant, and they had reported these conversations to the defendant. The Joint-Magistrate convicted the defendant, but he does not state clearly in his judgment whether he disbelieves the witnesses when they state that they told the defendant these conversations took place, or only when they state that these conversations did in fact take place; but he finds that the defendant did not act with good faith when he filed the petition. The Sessions Judge seems to consider that the only question is whether the defendant acted in good faith when he presented the petition; upon this point he considers what he has called "the English practice" more consistent with logic and the principles of criminal jurisprudence, but thinks that he is barred by a judgment in a case decided by *Phear and E. Jackson, JJ.*¹ from following the English practice. I presume that what the Judge means by "the English practice" is a presumption that the defendant acted *bona fide* until the contrary is proved. I do not think that any Judge, with a reasonable amount of common sense, and apart from any special statutory provisions, would doubt as to what course he ought to pursue in such a case. The course taken by the defendant was, if not a very unusual one, at least one which is not warranted by the law. The imputation made was a very serious one, and it was made in a very public manner. When, therefore, the complainant denied upon his own oath or by credible witnesses that the imputation was true, it would, I think, be proper to call upon the defendant to show that he had some reasonable ground for making the imputation, either by showing that the imputation was true, or that, if false, he had reasonable ground for believing it was true, looking to the source from which the information was obtained. But the matter has been dealt with by the legislature and by provisions which are by no means altogether easy to comprehend.

The Penal Code contains a chapter relating to what are called general exceptions, such as mistake, infancy, lunacy, intoxication, consent, the right of private defence, and so forth. Certain sections of the Code also contain exceptions, some of which modify the definition of the crime, and others modify the punishment or show that it is not applicable.

The first Code of Criminal Procedure provided (s. 235) that it should not be necessary in a charge to allege circumstances showing that the case did not come within any of these general exceptions; also that it should not be necessary to allege, even generally, that the case did not come within those exceptions, but that every charge was to be understood to assume the absence of all such circumstances. By s. 237, "when the section referred to in the charge contains an exception not being one of such general exceptions, the charge shall not be understood to assume the absence of circumstances constituting such exception so contained in the section, without a distinct denial of the existence of such circumstances." These provisions, it will be observed, in terms contain rules of pleading only. Whether they would in any way affect the evidence to be adduced in support of the charge is a question of difficulty. Subsequently Act XVIII. of 1862 was passed, which provides by s. 26 "that absence of circumstances bringing the case within the general exceptions under the Penal Code need not be alleged, but proof of their non-existence may be given by prosecutor if accused give evidence of their existence." S. 27 provides "that in indictments for defamation, where defence is made under certain exceptions to s. 499 of the Penal Code, good faith is to be presumed." These

¹ 14 W. R., Cr. Rul., 27.

provisions, it will be observed, apply both to pleading and evidence. Apparently they were only intended to apply to the Supreme Court. After this, Aft I. of 1872, s. 105, provided "that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances." The former Code of Criminal Procedure containing the provisions above-mentioned has been repealed, and the new Code of Criminal Procedure does not contain any analogous provisions; but from s. 439, illus. (a), it may be inferred that the absence of all general exceptions is to be assumed as before without allegation, and that the averment of the absence also of some other exceptions is to be assumed; but whether this applies to all exceptions, is not clearly stated. It affects, however, only the statement of the offence in the charge, and the rule of evidence must, I conceive, in the Mofussil Courts, be governed entirely by Aft I. of 1872, s. 105. At first sight, therefore, it would seem that the law upon this subject is directly the reverse in the Presidency-towns to that which is in the mofussil, unless the provision of the Evidence Aft override the provisions of Aft XVIII. of 1862, ss. 26, 27. I should very much doubt whether so sweeping a rule as is contained in s. 105 of the Evidence Aft will be found to work well in all cases. But in the present instance the law in the Mofussil Courts is apparently that which common sense seems to me to teach—namely, that in a case of this kind the Court had a right to call upon the party making the imputation to show that he has some reasonable ground for making it.

It appears to me, however, that in this case the defendant did show reasonable grounds for making the imputation. He had been long at enmity with Harnarain Mohapattur; he had been falsely accused in 1868, and he had left the district; subsequently he returned on an assurance from some officer of Government that he would not be molested. He was again falsely accused in January of this year, and there is reasonable ground for believing that Harnarain Mohapattur was connected with all these accusations. Very soon after the last accusation, the defendant presented the petition which is the foundation of these proceedings. The defendant is probably a timid man, and nothing is more likely than that these conversations were got up expressly with the object that they might be reported to him, and so frighten him away again from the neighbourhood. This appears to me to be the true point of view from which this case had to be looked at. The Sessions Judge seems to have rather looked upon the question before him as one of law, whereas to my mind it is one purely of fact. In my opinion, the judgment of the Sessions Judge is erroneous in law in that he has not considered the true question which arose for his determination, but I do not think it necessary to send the case back. I have no doubt whatever that the defendant ought to have been acquitted.

The conviction and sentence of the Joint-Magistrate will be set aside.

PRINSEP, J.—One Shibo Prosad Pandah appears to have got involved in disputes with his zemindar and some of his own relations, which led to two cases being brought against him in the Criminal Courts. These were dismissed. He then presented a petition to the Joint-Magistrate of Balasore on 14th December, stating that he had been informed, and had good reason to believe, that his enemies were conspiring together, and would shortly bring some false charge of a serious nature against him. It does not appear that this petition was filed with any intention except to give general information to the Magistrate, and

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it should therefore have been returned by that officer. Harnarain Mohapattur, a mukhtear's mohurrir, who was one of the persons named in that petition, at once took advantage of his knowledge of the Penal Code, and brought a charge of defamation under s. 500. There can be little doubt that the petition does *prima facie* amount to defamation as defined in s. 499. The Magistrate, in dealing with this case, required the accused to prove his allegation that the imputations were true, and, finding that he had failed in this and also to prove "good faith" so as to bring himself within excepts. 8 and 9 to s. 499, the Magistrate convicted the accused and sentenced him to simple imprisonment for two months, and to a fine of Rs. 50, or, in default of payment, to imprisonment for another month. The Sessions Judge of Cuttack dismissed the appeal, holding that the accused had failed to prove good faith so as to get the benefit of excepts. 8 and 9, and agreeing with the Magistrate in thinking the evidence of the witnesses for the defence false.

Mr. Branson, who appears before us sitting as a Court of Revision, contends that, as laid down in Act XVIII. of 1862, s. 27, "good faith" should have been presumed unless the contrary appeared; and next, that neither the Magistrate nor the Sessions Judge had considered whether the accused had been informed by his witnesses, persons of respectability, of this conspiracy against him, and so had good reason for believing that information; but that they had rather only considered whether these witnesses had themselves heard the use of threats of injury to the accused. In order to understand rightly the first objection, it is necessary to consider the course of legislation. The Penal Code (Act XLV. of 1860) has since 1st January 1861 been law throughout British India, and applies equally to Presidency-towns within the jurisdiction of the Supreme Courts or of the High Courts in their Original Criminal Jurisdiction as to Mofussil Courts without that jurisdiction. At the same time Act XXV. of 1861 prescribed a Criminal Procedure for all Courts except those in Presidency-towns.

The Penal Code contained a chapter of general exceptions to offences (Ch. IV.), and for certain offences (one of which is defamation) special exceptions were provided. The Code of Criminal Procedure made special provisions for these exceptions and the burden of proof to establish any of them. The effect of ss. 235 and 236 was, that it was for an accused person to establish the existence of any of the general exceptions; while s. 237 provided that, if the charge denied the existence of any of the special exceptions to an offence, the absence of circumstances constituting such exception was to be assumed. This was the state of the law without the Presidency-towns until the Evidence Act I. of 1872 and the Code of Criminal Procedure of 1872 were passed, when ss. 235 and 237 were repealed with the rest of that Code, and in their place s. 105 of the Evidence Act was enacted, which threw the burden of proof on the accused to prove the existence of any general or special exception. Act XVIII. of 1862, which came in force on 1st May of that year, laid down the procedure on several points for High Courts in the exercise of original criminal jurisdiction, and s. 26 of that Act laid down a rule similar to that contained in ss. 235 and 237 of the Code of Criminal Procedure of 1861. But s. 27 declared that, "on proving the existence of circumstances to a defence under the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, or 10th exception to s. 499 of the Indian Penal Code, good faith shall be presumed, unless the contrary appears." It is remarkable that, though the greater portion of Act XVIII. of 1862 was repealed by Act X. of 1875, and though s. 26 of Act XVIII. is identical with s. 105 of the Evidence Act of 1872, both ss. 26 and 27 still remain law. Act XVIII. of 1862 was passed, so its preamble sets forth, pending the preparation of the Code of Criminal Procedure for Her

Majesty's Supreme Courts of Judicature, and it therefore applies only to such Courts. The provision contained in s. 27 does not extend to Mofussil Courts, and I am not prepared to concede that what is expressed law for one set of Courts must necessarily be the law for another set. For some reason or other, the legislature thought proper to make this provision for the Supreme Courts, or what are now the High Courts, in the exercise of their original criminal jurisdiction; but it is clear that this is not the law elsewhere in British India. I observe that this has been so held by the Bombay High Court in the case of *Reg. v. Kikabhai Parbhadas*.¹

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The question then remains, has the accused shown that he acted with good faith (that is to say, with due care or attention to s. 52, Penal Code) in making that petition to the Magistrate? It appears to me that this point has not been properly tried either by the Magistrate or by the Sessions Judge on appeal. The Magistrate confined his attention to determining whether the allegation of conspiracy was true, instead of finding whether the accused was told of it by his witnesses, and consequently had good reason to believe that it was true, unless we are to understand from his judgment that, because the Magistrate did not believe the statements of the witnesses as to the existence of the conspiracy, the accused could have no sufficient reason for believing them, and therefore that he did not act on good faith, *i.e.*, with due care and attention, in believing the mode of those persons' statements. I do not think that I should be justified in placing this construction on the Magistrate's judgment. The Sessions Judge seems to have indulged himself in theoretical speculations, instead of applying himself to a consideration of pure questions of fact; and at the conclusion of his judgment he briefly endorses the conclusions of the Magistrate. For these reasons I am of opinion that the conviction and sentence as they stand cannot be maintained, and that the real question at issue has never been tried; but I do not think that it is necessary that this trial should be continued, since the facts seem to me to show that the accused, a comparatively ignorant and timid man, has been much harassed by the complainant in this case, a mukhtear's clerk, and others of superior intelligence and knowledge of the law, and, though he would seem to have acted in a somewhat unusual manner in presenting this petition to the Magistrate, I have little doubt that he acted with a desire to protect himself by an appeal to the Magistrate, rather than to injure others; and I would remark that the Magistrate would have acted more properly had he refused to take the petition which has given rise to the present proceedings.

I therefore agree in setting aside the conviction and sentence.

Conviction set aside.

¹ 9 Bom. H. C. Rep. 451.

PRIVY COUNCIL.¹THE EMPRESS *v.* BURAH AND ANOTHER.

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May 15, 16,
& June 5.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

4 Cal. 172. *Jurisdiction of High Courts—Legislative Power of the Governor-General in Council—Delegation—Conditional Legislation—24 & 25 Vic., c. 104—Act XXII. of 1869, s. 9.*

By the terms of the Act 24 & 25 Vic., c. 104, the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council.

An exercise of legislative authority by the Governor-General in Council, whereby any place or territory is removed from the jurisdiction of the High Courts, is one expressly contemplated by the Stat. 24 & 25 Vic., c. 104, and by the Letters Patent issued under that Statute.

By the 9th section of Act XXII. of 1869, passed by the Governor-General of India in Council, the Lieutenant-Governor of Bengal was empowered, from time to time, to extend, *mutatis mutandis*, to the Jaintia, Naga, and Khasia Hills, the provisions contained in other sections of the Act, whereby the administration of civil and criminal justice within the district called the Garo Hills was, from a date to be fixed by the said Lieutenant-Governor, to be withdrawn from the jurisdiction of the Courts of civil and criminal judicature constituted by the Regulations of the Bengal Code and the Acts of the Legislature of British India, and to be vested in such officers as the Lieutenant-Governor might appoint. *Held* by a majority of the Calcutta High Court that, as the Indian Legislature was to be regarded as an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself, the above provisions, purporting to authorize the Lieutenant-Governor of Bengal to extend Act XXII. of 1869 to the Jaintia, Naga, and Khasi Hills, since they involved a delegation of legislative power, were void and of no effect. *Held*, by the Judicial Committee of the Privy Council, that the decision of the majority of the High Court was erroneous, and rested on a mistaken view of the powers of the Indian Legislature. That Legislature has powers expressly limited by the Act of the Parliament which created it, but has, when acting within those limits, plenary powers of legislation as large and of the same nature as those of Parliament itself.

When plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may be well exercised either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is not uncommon, and, in many circumstances, may be highly convenient.

THIS was an appeal from a decision of a Full Bench of the High Court, which will be found reported at pp. 63—145 of the 3rd volume of the Indian Law Reports, Calcutta Series.

Sir *J. Stephen*, Q.C., and Mr. *Graham*, for the appellant, argued against the decision of the High Court, contending that the Governor-General in Council had full legislative authority to remove a district from the jurisdiction of the High Court, and had power to do so in the manner provided by Act XXII. of 1869. In the course of their arguments they referred to the following cases: *The Queen v. Meares*,² *The Queen v. Reay*,³ *In the matter of the Petition of Feda Hossein*,⁴ *Phillips v. Eyre*,⁵ and *Biddle v. Tarreny Churn Banerjee*.⁶

¹ *Present* :—Lord SELBORNE, SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

² 14 B. L. R. 106.

³ 7 Bom. H. C. R., Cr. Ca., 77.

⁴ I. L. R., 1 Cal. 431.

⁵ L. R., 4 Q. B. 225 at p. 242.

⁶ 1 Tay. & Bell 391.

Mr. Norton and Mr. Raikes (Mr. Eardley Norton with them) supported the decision and the jurisdiction of the High Court. They cited *Doyle v. Falconer*,¹ and the following decisions of the American Courts: *Barto v. Himrod*,² *Parker v. Commonwealth*,³ *Thorne v. Cramer*,⁴ and *Bradley v. Baxter*.⁵

Sir J. Stephen replied.

Their Lordships took time to consider their judgment, which was delivered by

LORD SELBORNE.—This appeal has been brought under the following circumstances:—

In the year 1869 the Indian Legislature passed an Act (No. XXII. of 1869), purporting (1) to remove a district called the Garo Hills from the jurisdiction of the Courts of civil and criminal judicature, and from the control of the offices of revenue constituted by the Regulations of the Bengal Code and the Acts passed by any Legislature then or theretofore established in British India, and from the law prescribed for such Courts and offices by such Regulations and Acts; and (2) to vest the administration of civil and criminal justice within the same territory in such officers as the Lieutenant-Governor of Bengal might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of Bengal should, by notification in the *Calcutta Gazette*, direct. By the 9th section, the Lieutenant-Governor was empowered "from time to time, by notification in the *Calcutta Gazette*," to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections to the Jaintia Hills, the Naga Hills, and such portion of the Khasia Hills as might, for the time being, form part of British India," being, as their Lordships understand, a mountainous district, conterminous towards the east with the Garo Hills.

The Lieutenant-Governor of Bengal, by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the Garo Hills; and afterwards, by another notification, published in the *Calcutta Gazette* on the 14th October 1871, he extended all its provisions to the district of the Khasia and Jaintia Hills, declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of Assam, subject to the general direction and control of the Lieutenant-Governor; and adding that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district: provided that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

Under this Act and these notifications one Burah (the respondent here), and another person since deceased, were, in the year 1876, tried by the Deputy Commissioner of the Khasia and Jaintia Hills upon a charge of murder committed within that hill territory. They were convicted and sentenced to death, but on the 23rd April 1876 the sentence was commuted by the Chief Commissioner

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¹ L. R., 1 P. C. 328.

² 4 Selden's (New York) Rep. 483.

³ *Id.* 122.

⁴ 6 Barr's (Pennsylvania) Rep. 507.

⁵ 15 Barbour's (New York) Rep. 112.

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of Assam to transportation for life. On the 9th July 1876 they presented a petition of appeal to the High Court at Calcutta; and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the case fell within their appellate jurisdiction; and they sent for the record of the proceedings with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that the 9th section of the Act of 1869, purporting to authorize the Lieutenant-Governor of Bengal to extend the Act of 1869 to the Khasia and Jaintia Hills, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, *viz.* : (1) that the Act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the Garo Hills, and, therefore, could not do so as to the Khasia and Jaintia Hills, assuming them to have been brought within its operation; and (2) that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not s. 9 only, was void and *ultra vires* of the Indian Legislature. The latter of these arguments had been urged unsuccessfully before the High Court at Calcutta; but the former was not presented to that Court, and was first suggested, at the hearing before their Lordships, by the Junior Counsel for the respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition that the 4th section of Act XXII. of 1869 purports to remove the Garo Hills, not from the jurisdiction of the High Court established by Her Majesty's Letters Patent under the authority of Imperial Statutes, but only from that of the local Courts constituted by the Regulations of the Bengal Code or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those local Courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of Bengal) substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Jurisdiction" mentioned in the 4th section of the Act of 1869 were only the Courts of original jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible that, under the terms of the 8th and 9th sections of the High Courts' Act (24 and 25 Vic., c. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December 1865), under which the Calcutta High Court is constituted, appeals might have gone to that Court from criminal tribunals of first instance established by the Lieutenant-Governor of Bengal in the Garo or the Khasia and Jaintia Hills, if Act XXII. of 1869 had made no other provision for such appeals. But the 5th section of that Act distinctly authorized the Lieutenant-Governor to appoint tribunals, not of first instance only, but also of "Reference and Appeal;" and, by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of Assam, with an ultimate controlling authority to himself. Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

The next question is, whether the whole Act of 1869 is void? It is said to be so, because the jurisdiction of the High Court was established by the Act

of the Imperial Parliament already referred to (24 and 25 Vic., c. 104), which passed in the same Session with the Indian Councils' Act; and because, by s. 22 of the Indian Councils' Act (24 and 25 Vic., c. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places or things whatever within the said territories," is qualified by certain conditions; one of which is, "that the Governor-General shall not have the power of making any laws or regulations which shall repeal, or in any way affect, any of the provisions of any Act passed in this present Session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof." None of the other conditions expressed in the Act apply to this case.

The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 and 25 Vic., c. 104?

Now, it appears to their Lordships, from the express terms of the Act 24 and 25 Vic., c. 104, that (unless there should be anything to the contrary in the Letters Patent under which the High Court is established) the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

By the 1st section of that Act, Her Majesty was authorized, by Letters Patent, "to erect and establish a High Court of Judicature for the Bengal division of the Presidency of Fort William," and others at Madras and Bombay. The next six sections relate to the qualifications, tenure of office, and emoluments, &c., of the Judges of such Courts. The 8th section abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several Presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 and 29 Vic., c. 15). But, as some argument was founded on the 18th, it may be fit here to observe that, by that section, Her Majesty was empowered to make Orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts," and that the same power was, in substance, conferred upon the Governor-General of India in Council, not in his legislative, but in his executive, capacity by the Repealing Act of 1865.

The 9th section of 24 and 25 Vic., c. 104, expressly says that each of the High Courts shall, within its own Presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by Her Letters Patent, grant and direct;" and that, "save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council," the High Court in each Presidency shall have all the jurisdiction of the former Supreme and Sudder Courts abolished by s. 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's Letters Patent) is here distinctly recognized.

I. L. R., Cal. 22.

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The 11th section is similar in effect. It enacts that, after the establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of India, which had been applicable to the Supreme Courts of Bengal, Madras, and Bombay, shall be applicable to the High Courts, as far as may be consistent with that Act itself and the Letters Patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council." The 12th section contains nothing of importance to the present question.

The Act of 1865 (under which the Calcutta Letters Patent of the 28th December 1865 were actually issued) concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the Letters Patent of the 28th December 1865 (cl. 44), it is "ordained and declared that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

So far, therefore, from being in contravention of any of the provisions of the Stat. 24 and 25 Vic., c. 104, or of the Letters Patent issued under that Statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council, as might remove any place or territory from the jurisdiction of the High Court at Calcutta, is expressly contemplated and authorized both by those Statutes and by the Letters Patent themselves. Their Lordships, under these circumstances, agree with the High Court that Act No. XXII. of 1869 was, in its general scope, within the legislative power of the Governor-General in Council; and they are therefore brought to the consideration of the more limited question, whether, consistently with that view, the 9th section of that Act ought, nevertheless, to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice Markby, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must, in all cases, be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of Bengal by the 2nd, and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation, which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may, with quite as much reason, be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem, *a fortiori*, to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

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But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits, which circumscribe these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils' Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by, and responsible to, the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, "in the other territories subject to his government." The Legislature determined that so far a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could, with equal convenience, be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the Garo Hills, what was done as to the Khasia and Jaintia Hills? The Legislature decided that it was fit and proper that the adjoining district of the Khasia and Jaintia Hills should also be removed from the jurisdiction of the existing Courts, and brought under the same provisions with the Garo Hills, not necessarily, and at all events, but if and when the Lieutenant-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to

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any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (No. XXII. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII. of 1859, XXIII. of 1861, and XXV. of 1861).

By s. 385 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories not subject to the general Regulations of Bengal, Madras, and Bombay, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity), "or by the Local Government to which such territory is subordinate, and notified in the Gazette." S. 445, in the Code of Criminal Procedure, is precisely similar. And by s. 39 of Act XXIII. of 1861, when any such extension as that authorized by s. 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation, or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of India; great part of which belongs to the period antecedent to the year 1861, and must, therefore (as Sir *Richard Garth* well observed), be presumed to have been known to, and in the view of, the Imperial Parliament, when the Councils' Act of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.

Appeal allowed.

Agent for both parties: *The Solicitor of the India Office, Mr. H. M. Treasure.*

APPELLATE CRIMINAL.

*Before Mr. Justice Jackson and Mr. Justice White.*THE EMPRESS *v.* TROYLUKHO NATH CHOWDHRY AND OTHERS.¹

1878.

Nov. 12.

Abetment of Abetment—Property removed with criminal intent, but with consent of owner—Penal Code (Act XLV. of 1860), s. 108, expls. 2, 4; s. 378, expl. 5.

4 Cal. 366.

A sought the aid of B with the intention of committing a theft of the property of B's master. B, with the knowledge and consent of his master, and for the purpose of procuring A's punishment, aided A in carrying out his object. On the prosecution of A for theft, *held* that, as the property removed was so taken with the knowledge of the owner, the offence of theft had not been committed.

Held further, it is not necessary to an indictment for the abetment of an abetment of an offence to show that such offence was actually committed.

THE facts of the case sufficiently appear in the following reference made to the High Court by the Officiating Chief Magistrate of Calcutta :—

“Reference to the High Court under s. 240 of the Presidency Magistrates' Act.

“The above defendants were charged under s. 380 of the Indian Penal Code with stealing some iron and brass screws from the godowns of Messrs. Mackinnon, Mackenzie, and Co., at Fairlie Place. The following facts were proved in the case : Messrs. Mackinnon, Mackenzie, and Co. were in the habit of selling hardware by public auction through the agency of Messrs. Mackenzie, Lyall, and Co.; for the purpose of these sales, a sircar used to come from the Exchange to the godown, lot the goods, and take away samples, upon which the auctions were held; after the sales, the same sircar came with the purchaser, and made delivery of the goods. The last sale took place on the 16th of August; on the 19th the first defendant came to deliver some goods, and then asked the godown-keeper, Mr. Cummins, to allow him to take out more goods than what were actually mentioned in the catalogue of sale, the profits to be divided among them in the proportion of 6 to 10; Cummins mentioned this to Mr. Moncrieff, who represented the owners, and with his permission he assented to the first defendant's proposal; the plan was finally matured at Cummins's house on the 24th of August; on the 4th of September the first defendant came accompanied by the second and third defendants, who were purchasers, and, pursuant to the agreement between the first defendant and Cummins, goods in excess of those mentioned in the catalogue were removed, but the police, who had been communicated with, were on the watch, and immediately arrested the defendants. It was also proved that it was a frequent practice in the trade for the purchasers to take excess goods by giving a receipt to Mackenzie, Lyall's Baboo (in this case the first defendant), who on his part gave a receipt to Mackinnon, Mackenzie, and Co., and that the purchaser had no concern whatever with the seller's firm. There being absolutely no legal evidence of guilty knowledge as against the purchaser-defendants, I have discharged them. With reference to the first defendant, I have held that, inasmuch as he removed the articles with the express or implied consent of the owners, his act did not amount to theft: expl. 5 to s. 378 of the Indian Penal Code, *Reg. v. Dolan*,² *Reg. v. Hancock*.³ I have held, further, that the first defendant is liable to a conviction under s. 116, as expl. 4 to s. 108 appeared

¹ Criminal Reference, No. 335 of 1878, from an order made by Mr. Syud Ameer Ali, Officiating Chief Magistrate of Police, Calcutta, dated the 28th of October 1878.

² 6 Cox's Cr. C. 449.

³ 14 Cox's Cr. C. 119.

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to me to show that, though the offence of theft might not have been committed, yet, as the accused instigated Cummins to abet him in the commission of the theft, he is guilty under the section referred to. As, however, I entertain some doubts, I solicit the opinion of the High Court on both these points—*vis.*, (1) whether, in view of the fact that the goods were removed with the consent of the owners, the act of the defendant amounts to theft; and (2) whether the defendant, under the circumstances, is liable to a conviction under s. 116. I have passed judgment subject to the decision of the Hon'ble Court, but have reserved sentence for a fortnight. I have remanded the prisoner to custody subject to any order the Hon'ble Court may be pleased to make with reference to bail."

The *Standing Counsel* (Mr. J. D. Bell) for the Crown.

The following judgments were delivered:—

JACKSON, J.—It appears to me that, under expl. 4 of the 108th section of the Indian Penal Code, the abetment of an abetment being an offence, and the prisoner having instigated Cummins to do that which, if committed, would have been an offence, he has himself thereby committed an offence, and inasmuch as by expl. 2, to constitute the offence of abetment it is not necessary that the act abetted should be committed, therefore the circumstance—that owing to the property being removed with the knowledge of the owner, the technical offence of theft had not been committed—does not save the prisoner from the consequence of the abetment which he has been guilty of, and therefore he has been properly convicted.

The prisoner will be brought up before the Magistrate for sentence.

WHITE, J.—I agree in thinking that, upon the facts found by the Magistrate, the prisoner may be properly convicted of the offence of abetting an offence.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

LAL DAS v. NEKUNJO BHAISHIANI.¹

1878.
Dec. 4.
4 Cal. 374.

Maintenance ordered by Magistrate—Criminal Procedure Code (Act X. of 1872), Ch. XLI.—Custody of Illegitimate Child.

In determining questions under Ch. XLI. of Act X. of 1872, as to the maintenance of wives and families in certain cases, a Magistrate has no power to enter into any question as to the lawful guardianship of a child.

There is nothing in the Code which would warrant a Magistrate in ordering a mother to surrender her illegitimate child to its father, although such child be of the age of maturity. A refusal by the mother to make over the custody of the child in such a case would be no ground for stopping an allowance previously ordered.

THE facts of this reference were, that a Hindu, the father of an illegitimate son, had been sued by the boy's mother for maintenance, and ordered by the Magistrate to pay a certain sum to the mother monthly.

In January 1878 the father applied to the Magistrate for the custody of the child, who was then eight years old. The Magistrate declared that he was entitled to the custody of the child; the mother, however, did not surrender the child,

¹ Criminal Reference, No. Z-1110 of 1878, from an order made by A. J. R. Bainbridge, Esq., Sessions Judge of Moorshedabad, dated the 25th of November 1878.

but applied to the successor of the Magistrate who had passed the last order to enforce arrears of maintenance since accrued. On the 4th November 1878 the Magistrate made an order in favour of the mother, overruling the father's objection that he was not bound to pay maintenance until the order giving him the custody of the child had been complied with.

On the case coming up before the Sessions Judge of Moorshedabad in November 1878, he considered that the order of the Magistrate, dated the 4th November 1878, was wrong, inasmuch as the father was the rightful guardian of the child, and because the Magistrate had no power to set aside the order passed by his predecessor; he therefore sent a report of the proceedings for the orders of the High Court under s. 296 of the Code of Criminal Procedure.

No one appeared at the reference, and the order of the Court was delivered by

AINSLIE, J.—We decline to interfere with the order of the Magistrate. It is not for a Magistrate to determine the question who is the lawful guardian of a child. The provisions of Ch. XLI. of the Criminal Procedure Code only enable him to make an order for the maintenance of his wife or child on its appearing to the satisfaction of the Court that he has neglected or refused to do so, although in the possession of sufficient means.

The child in this case is an illegitimate one in the custody of its mother, and there is nothing in the Code which warrants the Magistrate making an order for her surrendering it to the father. Her refusal to surrender it is no ground for stopping the allowance previously ordered. The father's right to the custody of the child, if any, must be determined elsewhere, and not in the Magistrate's Court.

Order upheld

Before Mr. Justice Ainslie and Mr. Justice Broughton.

IN THE MATTER OF THE PETITION OF MODUN MOHUN.¹

Penal Code (Act XLV. of 1860), cl. 9, s. 21 & s. 161—Illegal Gratification—Public Servant.

The manager of a Court of Wards' Estate paid into a Bank, carrying on the treasury business of the Government, a sum of money on behalf of Government. B, a poddar in the Bank, demanded and took a reward for his trouble in receiving the money. On B being prosecuted and charged under s. 161 of the Indian Penal Code, *held* that, although the money might have been paid on account of Government, it was on behalf of the Bank, and not on behalf of the Government, that the money was received by the accused; and that the poddar was a servant of the Bank only, and not a public servant within the meaning of cl. 9, s. 21 of the Penal Code.

This was an application to the High Court for revision under s. 297 of the Criminal Procedure Code.

It appeared that, in June 1875, one Kasi Chunder sent, under an escort of his own men, a sum of Rs. 1,901, to be deposited with the Decca Branch of the Bank of Bengal, on account of a certain estate of which he had been appointed manager by Government. This branch of the Bank of Bengal was made use of by Government, the Bank being in the habit of receiving monies paid on behalf of Government; and it was also used as the Government Treasury.

¹ Criminal Motion, No. 202 of 1878, against the order of C. B. Garrett, Esq., Sessions Judge of Zilla Dacca, dated the 24th of August 1878.

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On the money above-mentioned arriving at the Bank for the purpose of being deposited, one Modun poddar, a servant of the bank, refused to receive it unless he previously was paid a sum of Rs. 5 for his trouble. Eventually one rupee was paid to the poddar by one Govinda Chunder Gangooli, one of the servants in charge of the money.

The Manager of the estate complained to the Collector of the district, who directed him to lodge a complaint against the poddar for receiving money, other than a legal gratification, for doing an official act, he being at the time a poddar of the Government Treasury at the Bank, and, as such, a "public servant." On the case coming on for hearing, the Deputy Magistrate found that the accused was guilty of the offence specified in the charge under s. 161 of the Penal Code, and directed that he should be fined 80 rupees, or, in default, should undergo rigorous imprisonment for one month.

The poddar appealed to the Sessions Judge, who, however, dismissed the appeal, holding that a poddar of the Dacca Branch of the Bank of Bengal was a public servant, and, as such, having received an illegal gratification, he had been rightly convicted by the Magistrate.

The poddar thereupon applied to the High Court under s. 297 of the Criminal Procedure Code to have the sentence and conviction set aside.

Baboo *Jugesh Chunder Dey* and Baboo *Hurri Mohun Chuckerbutty* for the petitioner contended that the poddar was one of several poddars in the Bank, all of whom were appointed exclusively by the Khazanchi of the Bank; that no separate poddars were appointed to receive Government remittances; and that, under these circumstances, the lower Courts were wrong in holding him to be a public servant as defined by cl. 9, s. 21 of the Penal Code.

The *Junior Government Pleader*, Baboo *Juggadanund Mookerjee*, for Government.

The decision of the Court was delivered by

AINSLIE, J.—We are of opinion that the conviction of the petitioner under s. 161, Penal Code, is bad in law. The Magistrate takes it for granted that a poddar of the Bank of Bengal is a public servant within the meaning of cl. 9, s. 21 of the Penal Code. The Sessions Judge has given certain reasons for coming to the same conclusion, but neither Court appears to have thought it necessary to consider the point with reference to any evidence bearing thereon, and the learned Junior Government Pleader, who has appeared to support the conviction, is unable to show that there is any.

The Sessions Judge has fallen into error by varying the words of the Act. He says it was the duty of the prisoner to take money paid in on account of Government. The definition of a public servant, which, if any, is applicable to this case, runs "every officer whose duty it is as such officer to take on behalf of Government."

It may be that the money was paid by the Court of Wards' manager on account of Government; but it was on behalf of the Bank, and not on behalf of the Government, that it was taken by the accused. He was the servant of the Bank, and if he had in any way failed in his duty, any consequent loss would have fallen upon the Bank, and not upon the Government, which, in making this deposit, was dealing with the Bank as any other constituent might have done.

The conviction and sentence are set aside. The fine, if paid, is to be refunded.

Conviction set aside.

Before Mr. Justice Jackson and Mr. Justice McDonell.

IN THE MATTER OF THE PETITION OF MACKENZIE v. SHERE
BAHADOOR SAHI.¹

1878.
Nov. 28.

Possession—Butwara Proceedings—Possession given by Ameen, Effect of—Criminal Procedure Code (Act X. of 1872), s. 530.

4 Cal. 378.

The possession given by an ameen in a butwara proceeding is simply one of ownership and not of occupancy. Such possession cannot, therefore, in proceedings under s. 530 of the Code of Criminal Procedure, be held to oust tenants occupying lands previous to such delivery of possession.

THE petitioner in this case had obtained leases of two respective plots of land, part of the joint and undivided estate of the respondent and certain other co-proprietors. A partition was afterwards effected between these proprietors, and a portion of the land comprised in each of the two leases, together with other lands, fell to the share of the respondent, who received formal possession of the same from the Court ameen deputed for the purpose. Disputes having arisen, the petitioner, alleging the apprehension of a breach of the peace, applied to the Criminal Court to be retained in possession of the disputed lands under s. 530 of the Code of Criminal Procedure. The Criminal Court, being of opinion that the action taken by the ameen conferred actual possession of the lands on the respondent, refused the petitioner's application.

The petitioner thereupon applied to the High Court under s. 297 of the Criminal Procedure Code.

Mr. *Jackson* for the petitioner.

Mr. *Braunfeld* for the opposite party.

The judgment of the Court was delivered by

JACKSON, J.—We think it clear that the order of the Magistrate is erroneous. He seems to be under the impression that the effect of the butwara proceedings and the orders therein is to oust the tenants previously holding under parties either in joint-possession or holding separately by consent. That clearly is not so. The injustice would be monstrous if it were so.

The possession given by the butwara ameen to Shere Bahadoor in this case was possession as owner, not possession as occupier. The Magistrate's order, therefore, must be set aside. The Magistrate will enquire into the fact of actual possession by the complainant, Mr. Jackson's client, and, if he be found to be in actual possession, will maintain him in it.

Order set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF MOHESH CHUNDER KHAN.²

1878.
Aug. 7.

Ouster without authority of Civil Court—Peaceful Possession—Criminal Procedure Code (Act X. of 1872), s. 530.

4 Cal. 417.

Ouster by one person of another lawfully in possession of property confers no rights on the former which can be recognized in proceedings taken under s. 530 of the Code of Criminal Procedure. The Court should refer back to a time previous to the quarrel when such possession was peacefully enjoyed by one or other of the disputants.

¹ Criminal Motion, No. 108 of 1878, against the orders of C. F. Worsley, Esq., Magistrate of Muzafferpore, dated the 18th September 1878.

² Criminal Motion, No. 112 of 1878, against the order of Baboo Mohindra Nath Bose, Deputy Magistrate of Rajshahye, dated 21st May 1878.

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Mr. A. Bose (with him Baboo Grija Sunker Mazoomdar and Baboo Doorga Mohun Dass) for the petitioner.

Baboo Rashbehary Ghose and Baboo Kishori Mohun Roy for the opposite party.

The facts of the case appear sufficiently in the judgment, which was delivered by

AINSLIE, J. (MACLEAN, J., concurring).—One Promothonath Sandyal, a minor, died on the 12th of Pous last, corresponding with the 1st of January of the current year. During his lifetime, Bholanath Khan was one of his guardians, and, to use the language of the Deputy Magistrate, "it is admitted that Bholanath Khan was the sole surviving trustee of the late Promothonath Sandyal at the time of his death, and that the property was vested in him." Khethernath Chuckerbutty, on behalf of his son Shibnath Chuckerbutty, claimed the estate of the late Promothonath Sandyal. He obtained an order for a certificate under Act XXVII. of 1860 on the 28th of February last, and subsequently took out the certificate. He then proceeded to the villages, and on the strength of this certificate he induced a number of ryots to give him kabuliats. The Deputy Magistrate was informed by the police that there was likely to be a breach of the peace, and he instituted proceedings under s. 530 of the Criminal Procedure Code, calling upon Khethernath Chuckerbutty on one side, and Mohesh Chunder Khan and Bholanath Khan on the other, to establish, if they could, their possession of the property. The Deputy Magistrate says that "it was alleged on both sides that they held possession of the estates by receiving rent from the ryots in occupation since the death of the deceased, which happened on the 12th of Pous last, which may fairly be assumed as the date when the dispute first commenced. It is, however, clear from the evidence that Khethernath Chuckerbutty, in proceeding to assert his possession under the authority of the certificate which he obtained from the Judge's Court, could not obtain access to the dwelling-house and the zemindary cutcherry at Aulanga. He remained in the bazar, where ryots came to him, and to whom he explained the authority which the certificate conveyed, and the position of his son in respect to the estate which the deceased Promothonath Sandyal left, and he caused bamboos to be posted in all directions as a symbol of the acquisition of the estates; and the ryots came, and, acknowledging their tenancy, gave the rents due, which established the relation of landlord and tenant."

The Deputy Magistrate has, therefore, come to the conclusion that Khethernath Chuckerbutty has got into possession, which, in whatever way it may have been acquired, must be taken to have become a peaceful possession of the property; and he has accordingly made an order confirming him in possession of the villages, and the other side in possession of the zemindary cutcherry at Aulanga.

In dealing with the allegations of the other side, the Deputy Magistrate seems entirely to have overlooked the position of Bholanath. Bholanath has stated that he is the trustee to the estate of the late Promothonath Sandyal, minor, his mother acting with him, but that she died in Bhadar, and that in Pous last his ward having died, Mohesh Chunder Khan, the brother of the maternal grandfather of the deceased minor, entered into possession as his sole legal heir. It is evident from what the Deputy Magistrate has said as to the position of Bholanath, and from what he recites as the statement made by Bholanath himself, that the question of disposing of the property at the time of the death of Promothonath rested entirely with Bholanath who was responsible for

the manner in which he disposed of it; and until there has been a yielding up of possession by Bholanath or the person to whom he chose to make over the property, anybody coming forward to take it without the sanction of the Civil Court is, as far as the Magistrate is concerned with him, in the position of a trespasser.

It is perfectly clear that there has never been any yielding up of possession in this case. The whole of the evidence which the Deputy Magistrate has commented upon goes to show that since Promothonath's death there has been a struggle by Khethernath to assert his son's rights as against Mohesh Chunder, who was supported by Bholanath, the party in legal possession during Promothonath's lifetime.

It is very possible that a breach of the peace was imminent, but, in order to prevent that breach of the peace, the proper course was to bind Khethernath in heavy recognizances to maintain the peace, and not to oust the person whose possession was undoubted.

The Deputy Magistrate seems to think that, if two parties come forward—one being lawfully in possession, and the other struggling for possession—and the latter succeeds in ousting the former, he is to recognize the stronger and successful party as the one to be maintained in possession under s. 530, although such possession has never been acquiesced in, and the struggle for it is in fact that which caused him to interfere. This is an error. The Magistrate must look to possession which may be termed peaceful. He must go back to the time when the present dispute originated, and not to the result of the dispute itself.

The Magistrate's course in this case was a very simple one, but unfortunately he has misapplied the power given by the law, and given support to a deliberate attempt by Khethernath to enforce his own claims by the high hand.

The order of the Deputy Magistrate must be set aside.

Order set aside.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Jackson, Mr. Justice Markby, Mr. Justice Ainslie, and Mr. Justice McDonell.

THE EMPRESS v. ASHOOTOSH CHUCKERBUTTY AND OTHERS.¹

Evidence Act (I. of 1872), s. 30—Confession of one Prisoner implicating himself and another, Effect of.

Under s. 30 of the Evidence Act, the confession of a prisoner affecting himself and another person charged with the same offence is, when duly proved, admissible as evidence against both, but such second person cannot, when it is uncorroborated as against him, be legally convicted on it.

Per GARTH, C.J.—Such evidence must be dealt with by the Court in the same manner as any other evidence. The weight, however, to be attached to such evidence, and the question, whether taken by itself it is sufficient in point of law to justify a conviction, is a question for the Judge. Unsupported by other evidence, it, however, should be taken as evidence of the very weakest kind, being simply a statement of a third person not made upon oath or

¹ Criminal Full Bench Reference, No. 312 of 1878, from the order made by Mr. Justice McDonell and Mr. Justice Broughton, dated the 8th July 1878, in the Appeals, Nos. 306, 307, and 308 of 1878, against the order of *H. Beverley, Esq.*, Additional Sessions Judge of 24-Parganas, dated the 7th June 1878.

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affirmation. If such confession is corroborated by other evidence, it is immaterial whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession.

Per JACKSON, J. (McDONELL, J., concurring).—Such evidence is not sufficient to support a conviction, even if corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction.

Per Curiam.—The word 'Court,' in s. 30 of the Evidence Act, means, not only the Judge in a trial by a Judge with a jury, but includes both Judge and jury.

THREE prisoners, Ashootosh, Akbar, and Baneswar, were charged with the murder of a certain woman. Ashootosh, when arrested, made a complete confession of his crime before the Magistrate, implicating the two other prisoners. Akbar and Baneswar, on being arrested, made also certain admissions before the Magistrate. Akbar admitted that he conspired with others to murder the deceased, though, he said, he refused to take part in the murder. Baneswar admitted that he had seen Ashootosh and Akbar carrying the body past his house on the night when the murder was committed.

On the case coming up before the Additional Sessions Judge of Alipore, the result of the evidence against the prisoners was summed up by the Judge in the following words: "Against Ashootosh you have a complete chain of circumstantial evidence, which leaves very little doubt that he was one of the persons concerned in the murder; you have also his own complete confession before the Magistrate, and his partial confession in this Court. Against Baneswar and Akbar you have the admissions made by them to the Magistrate; you have certain suspicious circumstances in their surroundings and subsequent conduct; and you have, lastly, the confession of Ashootosh, which, though the confession of an accomplice, and therefore to be received with the greatest caution, is nevertheless corroborated both by the chain of circumstantial evidence, and by its remarkable and undesigned agreement with the confession of the prisoner Akbar." The jury were unanimous in finding that the prisoners were guilty of the offence charged against them, and the Sessions Judge passed sentence of death upon them. The case was referred to the High Court, under s. 287 of the Criminal Procedure Code, for confirmation of the sentence; and the prisoners appealed.

Baboo Bhyrub Chunder Banerjee, Baboo Prannath Pundit, and Baboo Girija Sunker Mozoomdar for the prisoners.

After hearing the case, McDonell and Broughton, JJ., referred the case with the following remarks and questions for the consideration of a Full Bench:—

The three prisoners have been convicted by the Additional Sessions Judge of the 24-Parganas of murder, and have been sentenced to death; and the proceedings have been sent up to this Court for confirmation of the sentence, under s. 287 of the Criminal Procedure Code. The prisoners have likewise appealed. With reference to the prisoners Baneswar and Akbar, it was argued before us that the evidence on the record was not legally sufficient to convict them of the offence charged; that the so-called confession and statement of Ashootosh was not legally admissible as evidence against the other two; and that the Judge had erred in law, and had misdirected the jury, when he put before them Ashootosh's confession, and told them they might take it into consideration as against the other two prisoners.

Various rulings on s. 30 of Act I. of 1872 have been pointed out to us. In these decisions—*Reg. v. Malapa bin Kapana*,¹ *The Queen v. Mohesh Bis-*

¹ 11 Bom. H. C. 196.

was,¹ *The Queen v. Jaffir Ali*;² *The Queen v. Belat Ali Moonshee*,³ *The Queen v. Sadhu Mundul*,⁴ *The Queen v. Naga*,⁵ *The Queen v. Chunder Bhattacharjee*,⁶ *The Queen v. Keshub Bhoonia*,⁷ *The Queen v. Baijoo Chowdhree*,⁸ and *The Queen v. Narain Tel*,⁹ decided by Markby and Morris, JJ., on the 27th May 1875—it has been held that such confessions are of little weight unless they are corroborated by other testimony; that they have all the infirmity that attaches to the evidence of an accomplice; in fact, that they are of less weight, as they are not given on oath, and the party making them is not subject to cross-examination. It has further been held in *The Queen v. Chunder Bhattacharjee*⁶ that they cannot be used as the basis of a case, but merely as corroborative of other independent evidence. In some of the decisions—*The Queen v. Naga*,⁵ *The Queen v. Chunder Bhattacharjee*,⁶ and in *The Queen v. Narain Tel*,⁹ decided by Markby and Morris, JJ., 27th May 1875—it has been pointed out that the legislature have avoided calling the statement “evidence;” and finally it has been held in the case of *Narain Tel*⁹ that the statement (in a case tried by a jury) should not be put before the jury; that the word “Court” in s. 30 means only the Judge and not the jury; and that not being “evidence” as defined in s. 3 of the Evidence Act, the jury ought not to be allowed to take into consideration the confession of one prisoner as against his fellow-prisoners. With the last decision, as at present advised, we do not agree.

We think that, if a confession is to be used at all, it must be used by the tribunal which is to deal with the case; that is to say, by the Judge and jury when the trial is by Judge and jury, and by Judge and Assessors, where that mode of trial is adopted; and that the word “Court” must, therefore, mean the tribunal, whatever that tribunal may be. Again, if it is to be used at all, it cannot, we think, be used as anything else but as evidence. We agree, however, in thinking with the learned Judges, who have decided the other cases, that it is material of the very lowest order, and of far less force than the evidence of an accomplice, which itself ought to be accepted only under most exceptional circumstances without corroboration, inasmuch as the confession is made without oath or affirmation, and the person making it is not subject to cross-examination.

It appears to us that there is some conflict of opinion as to whether such confessions, when used against others, only stand in need of corroboration, or whether, as ruled in *The Queen v. Chunder Bhattacharjee*⁶ (with which decision we concur, differing, as it seems to us that it does, from the course taken in others of the cases we have referred to), that such confession cannot be used as the basis of a case, but merely as corroborative of other independent evidence.

The questions we would wish the Full Bench to consider are :—

(1.)—Whether a confession made by one person, who is being jointly tried with others for the same offence, and affecting himself and some other such person (and which is proved), is to be treated as “evidence” against such other person under s. 30 of Act I. of 1872; or whether the words “the Court may take into consideration such confession, etc.,” to the end of the section, mean that such confession is to be treated, not as “evidence,” but in some other manner; and, if so, in what manner should such confession be treated?

(2.)—Whether the word “Court” as used in that section means the Judge only in a trial by a Judge with a jury, or includes both Judge and jury?

¹ 19 W. R. 16.

² 19 W. R. 57.

³ 19 W. R. 67.

⁴ 21 W. R. 69.

⁵ 23 W. R. 24.

⁶ 24 W. R. 42.

⁷ 25 W. R. 8.

⁸ 25 W. R. 43.

⁹ Unreported.

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(3.)—Whether such a confession made by one such person may be used as the basis of proof of the offence charged as against the other, and, if corroborated, may sustain a conviction; or whether it is necessary, in order to sustain a conviction, to use such confession only as itself corroborative of other independent evidence?

Baboo Bhyrub Chunder Bannerjee for the appellants.—As to the first question to be considered. S. 30 of the Evidence Act lays down that such a confession as was made in this case may be taken into consideration as against another person implicated by the confession. It would, of course, be "evidence" as against the person confessing, but, as against another person tried with him, the words, "the Court may take it into consideration," leave it to be inferred that there are certain circumstances under which it may be so taken into consideration, and certain circumstances under which it ought not to be so taken. The decisions quoted in the judgment of Mr. Justice McDonnell all state that such confessions are of little weight unless they are corroborated by other testimony. Moreover, such confession is not given on oath, nor is the person making it subject to cross-examination. Such a statement or confession was not considered to be "evidence" in the case of *The Queen v. Naga*¹ and in the case of *The Queen v. Chunder Bhuttacharjee*.² The word "evidence" is defined in the 3rd section of Act I. of 1872 as meaning and including—(i) all statements which the Court permits or requires to be made before it by witnesses; and (ii) all documents produced for the inspection of the Court. The statement or confession in this case was merely taken down and recorded before the Court, and was not given on oath, and was therefore not the testimony of a witness examined by the Court. [GARTH, C.J.—The word "prove" in s. 30 must refer to a confession made beforehand.]

Then as to whether the word "Court" signifies the Judge alone, or the Judge and jury. S. 3 of the Evidence Act defines the word "Court" to be certain persons who are legally authorized to take evidence. Now Judges, and not the jury, are so authorized; it cannot be the province of a jury to take evidence. [JACKSON, J.—In that section the words used are, the Court "includes" such persons as are there mentioned; in the next paragraph, in defining the word "fact," the words used are, a fact "means and includes," &c.; therefore the first definition is not meant to be exhaustive.] The Criminal Procedure Code, Act X. of 1872, Ch. XIX., distinguishes the words "Court" and "jury." Ss. 231, 243, 251, 253, 255, 256, 262, and 265, all show that the word "Court" means the Judge alone. [AINSLIE, J.—In s. 253 the word "Court" in the 1st part means the Judge, but in the 2nd part, the Court-house.] In s. 249 of Act X. of 1872, it is stated that the judgment of a higher Court may be "grounded" on the evidence given before a Magistrate; if it is only "to be founded" there must be something further, before a judgment can be finally given on such evidence. S. 30 of the Evidence Act should be read with s. 249.

As to whether a confession made against another can sustain a conviction, we must assume it is "evidence," and then we have to consider the effect of such evidence. The cases of *The Queen v. Naga*¹ and *The Queen v. Chunder Bhuttacharjee*² lay down that such confession cannot be the basis of a case, but there must be some other independent material evidence. The meaning of s. 30 of the Evidence Act is clearly given in the case of *The Queen v. Jaffir*

¹ 23 W. R. 24.² 24 W. R. 42.

Ali,¹ *The Queen v. Belat Ali Moonshee*,² *The Queen v. Sadhu Mundul*,³ *The Queen v. Keshub Bhoonia*,⁴ *The Queen v. Baijoo Chowdhree*,⁵ *Reg. v. Malapa bin Kapana*,⁶ *Reg. v. Budhu Nanku*,⁷ and *Reg. v. Ambigara Hulagu*.⁸ [JACKSON, J.—The Bombay decision is opposed to s. 133. I don't think such evidence stands as high as the evidence of an accomplice.]

The *Junior Legal Remembrancer* (Mr. Kilby) for the Crown.—It is submitted that the meaning put on the word "evidence" should be that given by Mr. Justice McDonell in the judgment of the High Court in this case, and generally given in the cases cited.

The definition given in *Best on Evidence*, p. 10, is "Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact;" and further, in the foot-note to that page, it is described "as signifying generally any proof, be it testimony of men, records, or writings."

In the Evidence Act, the word is restricted to all statements made by witnesses in relation to matters of fact under enquiry. But the word "admission" is defined in s. 17. In Criminal Courts "a confession" would be included in the word "admission," and it is on such admission or confession that a Court is to infer guilt or innocence. A "confession," when proved under s. 30, becomes a statement which the Court requires to be proved, and is strictly within s. 30. If, therefore, evidence is to be defined as a relevant fact on which guilt or innocence is to be inferred, then s. 30 is rightly worded.

As to the meaning of the word "Court," it must have the meaning of the Judge and jury, because a Judge must act on the opinion of the jury, unless he disapproves of it. The meaning of the word "Court" is shown in the definition of the word "proved," s. 3, and it must mean then the Judge and jury, because the Judge does not act alone in criminal cases. [JACKSON, J.—I should say that the word "Court" in ss. 24 and 28 refer clearly to the Court in which the confession is made.]

The following judgments were delivered by the Full Bench:—

GARTH, C.J.—I am of opinion that under s. 30 the confession of a prisoner which affects himself and some other prisoner charged with the same offence becomes, when duly proved, admissible in evidence as against both prisoners, and must be so dealt with by the Court. When this confession has been duly proved, it may, by the express language of the section, be taken into consideration against either prisoner; and I do not see in what other way it can be taken into consideration than as evidence. There is no provision in the section by which the confession is to be receivable against one prisoner in one way, and against the other prisoner in another way. But, although the section does, in my opinion, make the confession admissible in evidence against either prisoner, the weight which ought to be attached to such evidence, and the question whether, taken by itself, it is sufficient, in point of law, to justify a conviction, is a question for the Judge who tries the case.

A confession by prisoner A, which involves the guilt of prisoner B, is of itself, unsupported by other testimony, evidence of the weakest possible kind against B. It is simply the statement of a third person, not made upon oath or

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¹ 19 W. R. 57, 60.² *Ibid.* 67.³ 21 W. R. 69.⁴ 25 W. R. 8.⁵ *Ibid.* 43.⁶ 11 Bom. 196.⁷ I. L. R., 1 Bom. 475.⁸ I. L. R., 1 Mad. 163.

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affirmation ; and I am of opinion that, no Court ought to convict prisoner B upon such evidence.

1. I consider, moreover, that, if a prisoner were convicted upon such evidence, whether by a jury or otherwise, and were to appeal to this Court, the conviction ought to be set aside ; and, further, that any Sessions Judge trying such a case before a jury ought to direct them to acquit the prisoner. How far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend upon the circumstances of each particular case.

2. I consider that the word "Court" must mean the Court before which the trial of the prisoner is to be held ; and in a jury trial must mean the Judge and jury. I cannot think that the word "Court" is intended to mean "the Judge and jury" as regards one portion of the confession, and the Judge only, exclusive of the jury, as regards the other portion.

3. If the confession is corroborated by other evidence, I do not think it matters whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession. The course of proof in each case is a question of convenience for the prosecution ; and they have a right to bring forward the evidence in any order they may think fit.

JACKSON, J.—In my opinion the confession spoken of in s. 30 of the Evidence Act, to put the intention of the legislature into a common English legal phrase, "is evidence." I also think it evidence for a jury at a Sessions trial in India ; but I think at the same time it is not singly sufficient to support a conviction, that is to say, an accused person other than he who has confessed cannot lawfully be convicted upon such confession alone, nor in my opinion ought he to be convicted on the ground of such confession corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction.

In considering such questions as these, it appears to me that embarrassment and difficulty will be greatly lessened, if, instead of assuming the English Law of Evidence, and then inquiring what changes the Evidence Act has made in it, we regard, as I think we are bound to do, the Act itself as containing the scheme of the law, the principles, and the application of these principles to the cases of most frequent occurrence.

It may be that, as observed by Mr. Norton in his Preface (Law of Evidence, 8th Edition), the framer of the Act over-estimated what had been done, when he claimed to have reproduced within the compass of his 167 sections the whole of Taylor's Work that was applicable to India, and there can be no doubt that cases must arise for which no positive solution can be found in the Act itself, and in such cases we shall probably be justified, and shall always be safe, in adopting English rules, in so far as they follow or are in accord with the general tenor of the Act. But in respect of matters expressly provided for in the Act, we must, so to say, start from the Act, and not deal with it as a mere modification of the Law of Evidence prevailing in England.

The legislature, in my opinion, has not avoided calling the confession of an accused person "evidence" against a co-prisoner. It has not so called it, because that is not the phraseology of the Act. What its framers appear to have had chiefly in view, and what they have expressed in the way which they considered most suitable, was—*1st*, what facts are relevant and what irrelevant for the purpose of producing a given belief ; and, *2nd*, in what manner such facts as are relevant are to be proved.

The following definition or explanation of the expression "proved" is, "a fact is said to be proved when, after considering the circumstances before it, the Court either believes it to exist, etc."

It seems to follow, therefore, that, if a relevant fact is proved, and the law expressly authorizes its being taken into consideration, that is, considered for a certain purpose, or against persons in a certain situation, the fact in question is "evidence" for that purpose, or against such persons, although the result has not been expressed in those words by the legislature; and being "evidence," it must be used in the same way as everything else that is "evidence."

What the legislature intended to denote whenever the word "evidence" is used in the Act is carefully explained in the interpretation-clause.

A confession is an admission, and by s. 21 admissions are relevant. Ordinarily such admissions can only be proved against the person making them, and therefore, if the prosecutor, at a trial before the Court of Session, proved a confession made by a person then under trial, the Court would be obliged to hold that it was relevant, and could be considered only against the person making it; but the 30th section expressly says that such confession when proved may be considered as against other persons being jointly tried for the same offence who are affected by it. The first point, therefore, seems made out by the terms of the Act itself.

In truth it seems impossible to avoid in such cases producing an effect upon the mind, when a confession is read, extending to every person named in the confession; even the Judge, with the best balanced mind conceivable, if he spoke with absolute sincerity and self-examination, would probably admit that his mind was in some degree affected by the confession of one man criminating another, provided that he believed the confessing prisoner to be in the main veracious.

It may be, therefore, that the legislature did wisely in recognizing and taking under its control the impression thus unavoidable, which might actually do more harm if unrecognized.

The confession, being thus what is called "evidence," is, it seems to me, clearly matter for the jury to consider.

So far as I can call to mind, the only mention of a jury in the Evidence Act occurs in s. 166, which prescribes how questions may be put by jurors. But certainly neither in that Act, nor in the Code of Criminal Procedure, is there, so far as I am aware, any trace of an intention to separate evidence which may be considered by a jury from that which may be considered by a Court.

Nor, in my opinion, does the definition of the word "Court" in the Evidence Act exclude the jury. It runs thus: "Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence; but it does not, therefore, necessarily *exclude* a jury, for, when a definition is intended to be exclusive, it would seem the form of words (as in the next following definition) is "means and includes."

Besides, it appears to me that, for the purposes of the definition, the jury are authorized, with the Judge, to take evidence. They certainly hear it, and decide upon its value.

As to the language of s. 255, the word "evidence" there, is not, I think, used with reference to its definition in the Evidence Act, and even if it were, I do not consider that it would create any difficulty.

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It seems to me impossible to conceive that the legislature should have intended that confessions admitted to consideration under such circumstances should be used in any other way than by making them (to use the English term again) "evidence," or that, having made them "evidence," and having contemporaneously provided for the trial of a large class of offences by a jury invested with the power of determining questions of fact, they should have silently withdrawn such "evidence" from the consideration of the jury, permitting it to be considered by the Court, which has not the function of deciding on the facts.

There remains the question of the effect to be given to such confessions, and this point also appears to me not doubtful.

The confession clearly cannot stand higher as to probative force than the testimony of an accomplice, who is declared to be a competent witness against an accused person (s. 133), and the law does not say of the confession, as it says of such testimony, that "a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." That being so, I consider that we are free to lay down the rule, which would undoubtedly prevail in England, if it were possible that such matter could be admitted, and to hold that a conviction based upon such confession alone would be illegal; and not only so, but that such confession will not legally suffice, when corroborated by other facts of which evidence is offered, unless those facts are such that, if believed to exist, they would of themselves suffice to support a conviction.

I need hardly advert to the fact that the legislature, while declaring that a conviction is not illegal because it depends on the uncorroborated testimony of an accomplice, at the same time enumerates examples of facts which the Court may presume, mentioning prominently this one, that an accomplice is unworthy of credit unless he is corroborated in material particulars; and the facts afterwards instanced as fit to be considered for the purpose of limiting the application of this maxim, have reference, I conceive, only to the case of accomplice witnesses, as the *illus. (b)* itself has also.

I would answer the questions put as above stated.

MARKBY, J.—Upon a question of the construction of an Act of Legislature, it is very desirable that there should be no dissentient opinion. My learned brethren having come to the conclusion that a conviction by a jury, upon the uncorroborated confession of an accomplice, would, except as against the accused person who makes the statement, be illegal, I am content to abandon my own doubts, and to concur in their decision that the confession of an accomplice is, by the law of India, evidence against his fellow-prisoner.

AINSLIE, J.—Courts of Justice, in dealing with questions of fact, have to determine whether the alleged facts are proved, disproved, or not proved. They can only do this by considering the matters before them bearing upon the existence or non-existence of the alleged facts, and whatever goes to show the existence or non-existence of a fact is evidence in respect of that fact.

The Indian Evidence Act, in the 30th section, speaks of certain confessions by a prisoner as proper to be taken into consideration, not only as against the person by whom they are made, but also as against any other person who is being tried jointly for the same offence. Such confessions may legally go to make up the proof of the offence as against the latter, and, if so, it is impossible to describe them as anything but evidence. In the case of a confession proved by oral testimony, or previously reduced to writing by a Magistrate, and proved by the production of the record, the definition of evidence in s. 3 of the Evidence Act will

clearly include such proof. There can be no reason for holding that a confession made during a trial in the Court of Session in open Court is to be treated as something different; therefore I hold that all confessions which can legally be used under s. 30 are evidence.

In the case of trial by jury, it is specially the province of the jury to determine whether the evidence before it, adduced to prove the charges laid against the accused, is trustworthy. It is the duty of the Judge to exclude irrelevant evidence, but, as regards the evidence which is decided to be relevant, it is the duty of the jury to determine on its credibility, and generally its sufficiency.

If a case is left to go to a jury at all, the whole of the admissible evidence must go to the jury, and therefore the word "Court" in s. 30 must include the jurors who are to determine on the evidence.

But under s. 251, Criminal Procedure Code, a Sessions Judge is empowered to stop a case without referring the evidence to the jury when he thinks there are no grounds for proceeding, and to direct the jury to return a verdict of acquittal.

To a certain extent, therefore, the Judge is to determine on the sufficiency of the evidence, and he is empowered to direct a jury to return a verdict of acquittal when there is no evidence to go to it, except the uncorroborated statement of a confessing fellow-prisoner under trial at the same time.

I think that he is not only empowered, but bound, to exercise this power. The case does not come within the words of s. 133, taken strictly, and that section itself must be taken with *illus. (b)*, s. 114, which shows that it is reasonable to presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The material particulars, as has frequently been pointed out, are those which go to connect the accused with the offence, and not merely those which go to corroborate the general story of the crime. There is not, in my opinion, anything in the law inconsistent with the view that a Sessions Judge is bound to stop a trial when there is nothing against an accused person but an uncorroborated statement of a fellow-prisoner being jointly tried for the same offence, and that a failure to do this amounts to an error in law, which will vitiate a conviction by a jury arrived at under such circumstances.

MCDONELL, J.—On the first and second points I agree with my learned brethren. I took the same view when referring the case to the Full Bench. On the third point I entirely concur in the judgment of Mr. Justice Jackson.

APPELLATE CRIMINAL.

Before Mr. Justice Birch and Mr. Justice Mitter.

IN THE MATTER OF THE EMPRESS *v.* FUTTEH JYAB KHAN AND OTHERS.¹

Sessions Court, Jurisdiction of—Power to commit to itself Cases not triable exclusively by Court of Session—Criminal Procedure Code (Act X. of 1872), ss. 231, 471, and 472.

A Court of Session has no power to commit to itself for trial a case not triable exclusively by such Sessions Court.

The words "commit the case itself" in s. 471 of the Code of Criminal Procedure cannot (when read in connection with s. 231) be held to empower a Sessions Court to commit such a case to itself.

¹ Criminal Motion, No. 2 of 1879, against the order of C. D. Field, Esq., Sessions Judge of Burdwan, dated the 16th December 1878.

1878.

EMPRESS

S,

ASHOOTOSH

CHUCKER-

BUTTY,

4 Cal. 483.

1879.

Jan. 31.

4 Cal. 570.

1879.

IN THE
MATTER OF
THE
EMPRESS
v.
FUTTEH JYAB
KHAN,
4 Cal. 570.

THE accused in this case was charged, under s. 193 of the Indian Penal Code, with intentionally giving false evidence in a stage of a judicial proceeding held before the Sessions Court of Burdwan. The Judge, before whom the alleged false evidence had been given, held a preliminary enquiry, and committed the accused for trial to his own Court.

The accused applied to the High Court, under the revisional section of the Code of Criminal Procedure, to set aside the proceedings held under the preliminary enquiry and commitment, on the ground that such proceedings were made without jurisdiction.

Baboo *Gooroodass Banerjee* for the petitioner.

The judgment of the Court was delivered by

BIRCH, J.—In this case the Sessions Judge of Burdwan has committed the petitioner before us to take his trial before the Court of Session on a charge of having given false evidence in a stage of a judicial proceeding—*vis.*, a trial held in the Court of Session under s. 193 of the Indian Penal Code. The Sessions Judge had himself held the preliminary enquiry, and committed the case to the Court of Session.

We are asked to set aside this commitment as made in contravention of the provisions of the Code of Criminal Procedure.

The Sessions Judge, in the explanations which he has submitted, states that, in his opinion, s. 471 empowers him to commit this case, and that that power is not limited or restricted by the provisions of the following section (472).

We think that the learned Judge has taken an erroneous view of the law, and that the interpretation he would put upon these sections cannot be supported.

The offence with which Futteh Jyab Khan is charged is admittedly not one that is triable by the Court of Session exclusively. It is only in cases exclusively triable by the Court of Session that the Judge is empowered to commit or hold to bail and try an accused person charged with the offences mentioned in ss. 467, 468, and 469. In cases of a like nature, which are not triable by the Court of Session exclusively, all that the Judge is empowered to do is to send the case for enquiry to any Magistrate having power to try or commit for trial the accused person under s. 471.

The words "commit the case itself," occurring in s. 471, do not mean that the Court of Session may commit the case to itself as the Judge would interpret. If the section would bear this interpretation, it would be opposed to the distinct provisions of s. 231, which restricts and limits the action of the Court of Session as a Court of original criminal jurisdiction, save and except in the cases provided for by ss. 435 and 472.

We are of opinion that the procedure adopted by the Sessions Judge in this case is not warranted by law, and we, therefore, quash the commitment to the Court of Session, and direct the Sessions Judge to send the case for enquiry to the Magistrate, who will deal with it as he thinks fit.

This order will govern the application in the case of Dwarka Nath Banerjee, No. 1 of 1879.

APPELLATE CRIMINAL.

*Before Mr. Justice Markby and Mr. Justice Prinsep.*THE EMPRESS *v.* ACHIRAJ LALL AND ANOTHER (PETITIONERS).¹

1878.

Information to Police—Agent of Owner of Land—Criminal Procedure Code (Act X. of 1872), s. 90.

Aug. 13.

4 Cal. 603.

Per MARKBY, J.—A khazanchi is not an "agent" within the meaning of s. 90 of the Criminal Procedure Code. A dewan may be an "agent" if his master is absent, but the provisions of s. 90 do not apply to a dewan who is acting only under the orders of his resident master.

Per PRINSEP, J.—*Quære*.—Whether, according to s. 90, an agent is only responsible for giving information of the occurrence of any sudden or unnatural death.

Mr. Branson and Mr. Evans (with them Baboo Doorga Pershad Dass) for the petitioners.

The Assistant Legal Remembrancer (Mr. Kilby) for the Crown.

In this case the khazanchi and dewan of the zemindar of a certain village had been tried and convicted under s. 90 of the Criminal Procedure Code for not giving information to the police of a theft committed in the village.

The prisoners appealed to the High Court.

MARKBY, J. (after noticing certain irregularities in the Magistrate's procedure, continued as follows).—But I also think that neither of these two persons would come within s. 90 of the Code of Criminal Procedure. With regard to the person who appears to be really a khazanchi, although possibly he performs some other duties, I do not think that he would be an agent within the meaning of that section under any circumstance, unless we extend this section to all servants of zemindars, which I certainly should not feel disposed to do. With regard to the dewan, he might be an agent within the meaning of the Act if his master was absent. But it would be unreasonable to extend the operation of the Act to a dewan who was acting only under the orders of his resident master. The section is exceedingly vague in its language, and, unless strictly construed, might be made the instrument of great oppression.

The conviction and sentence must be set aside, and the petitioners released.

PRINSEP, J. (after noticing the irregularities referred to by Markby, J., proceeded as follows).—As regards s. 90, I think there is considerable force in the argument of Mr. Branson, that, although the commencement of that section refers to an agent of an owner or occupier of land responsible for giving information to a Magistrate, when it comes to declare the nature of that information, the terms of the first three clauses seem to exclude that class, referring only to the other classes. It would seem either that this was an accidental omission on the part of the legislature, or that the legislature expressly intended that an agent is responsible only for giving information regarding the last clause—that is, of the occurrence of any sudden or unnatural death. It is not on this ground, however, that I would set aside the conviction and sentence in this case, but I think it necessary to draw attention to the state of the law, so that, if there is any accidental omission, it may be rectified when the Code comes under amendment.

Conviction set aside.

¹ Criminal Motion, No. 129 of 1878, against the order of *J. B. Worgan, Esq.*, Sessions Judge of Gya, dated the 28th of June 1878.

APPELLATE CRIMINAL.

*Before Mr. Justice Ainslie and Mr. Justice Broughton.*THE EMPRESS *v.* SASHI BHUSAN CHUCKRABUTTY.

1878.

Dec. 17.

4 Cal. 623.

IN THE MATTER OF THE PETITION OF SASHI BHUSAN CHUCKRABUTTY.¹*Criminal Procedure Code (Act X. of 1872), s. 90—Omission to give information to Police of Offence.*

The provisions of s. 90 of the Criminal Procedure Code should not be put in force against one who has omitted to give information to the police of an offence having been committed in cases where the police have actually obtained such information from other sources.

THE accused, one of the gomashas of Mouza Moshoomda, was convicted under s. 176 of the Penal Code of omitting to give information of a theft of paddy belonging to Abir Sheikh, which, under s. 90 of the Criminal Procedure Code, he was, as one of the gomashas of the village, bound to do. On the evidence it appeared that information of the alleged offence had been furnished, within a short time after the occurrence, to the Deputy Magistrate by two other persons, one of whom was another of the gomashas of the village.

On conviction by the Deputy Magistrate the prisoner petitioned the High Court under s. 297 of the Criminal Procedure Code.

Baboo *Kishory Mohun Roy* for the petitioner.

No one appeared for the Crown.

The judgment of the Court was delivered by

AINSLIE, J. (BROUGHTON, J., concurring).—The provisions of s. 90 of the Criminal Procedure Code and s. 176 of the Indian Penal Code ought not to be used for purposes of vexation, but in order to secure due information to Magistrates and the police of offences committed within their jurisdiction: Provided that information is conveyed to the nearest Magistrate or police-officer by one of the parties bound to give such information; it is not reasonable that every other person who may possibly be bound to give information should be prosecuted for not having done so. A police-officer is not better off when he has half-a-dozen copies of the same report than when he has the first. In the present instance it appears, as a matter of fact, from the record which has come up to us, that the petitioner did not himself get any information regarding the theft until the fourth day after its occurrence, and that, in the meantime, an account of the theft had been duly reported to the police by another gomasha and a punch of the village. Under these circumstances, there was nothing to be gained by further information being given. All that the law intended to secure, namely, that these matters should not be concealed, had been secured. And in our opinion the present prosecution was unreasonable.

The Deputy Magistrate has passed a sentence, which s. 176 of the Penal Code does not admit of being passed. We, therefore, set aside the sentence passed, and we think that, under the circumstances of the case, it is not necessary to substitute any other for it. The accused will be discharged.

Conviction set aside.

¹ Criminal Motion, No. 213 of 1878, against an order passed by Baboo *Chundra Sekhar Banerjee*, Deputy Magistrate of Ranaghat (in the District Nuddea), dated the 21st November 1878.

APPELLATE CRIMINAL.

*Before Mr. Justice Ainslie and Mr. Justice Broughton.*IN THE MATTER OF THE PETITION OF DIJAHUR DUTT AND OTHERS.¹

1879.

Jan. 21.

Order of Discharge—Subsequent Order remanding Case to be retried—Criminal Procedure Code (Act X. of 1872), ss. 295, 297—Procedure.

4 Cal. 647.

A Magistrate has no power to remand a criminal case to a Subordinate Magistrate for retrial after the case has once been dismissed; the courses open to him are—(1) to accept a fresh complaint supported by fresh evidence which was not before the Court when the case was dismissed; or, (2) if there be no additional evidence to be procured, to report the case for the orders of the High Court under s. 296 of Act X. of 1872.

ONE Prosonno Coomar Mitter charged Dijahur Dutt and others under ss. 643 and 352 of the Penal Code in the Court of the Deputy Magistrate of Nuddea; the accused were, however, discharged by an order, dated 9th May 1878, the Magistrate finding that the complainant had caused the riot, and that the accused had acted only in self-defence.

Prosonno Coomar then applied to the Sessions Judge against this order, but the Sessions Judge refused to interfere with the order under s. 295 of Act X. of 1872, and advised that an application should be made to the Magistrate.

Prosonno Coomar then applied to the District Magistrate, who, by an order dated the 8th November 1878, ordered the case to be retried, on the grounds that a failure of justice had been come to, inasmuch as no charge had been framed against the accused; and, further, that the plea of right of defence of private property would not hold good as the police were on the spot, and the fight was not committed on the spot where the disturbance took place in order to save the property, but was simply a fight in revenge for the loss occasioned to both parties during the riot.

The accused applied to the High Court to have the order of the 8th November 1878 set aside.

Baboo Saroda Churn Mitter for the petitioner.—The order of the 8th November is illegal, because the Magistrate had no power to order the case to be retried; he ought to have referred the case to the High Court, under s. 296 of Act X. of 1872, for final orders. The case, being one under ss. 143 and 352 of the Penal Code, was triable by a Magistrate only; and the District Magistrate had not the power to direct the order of discharge to be re-opened—*Kistoram Mohara v. Anis*.² The mere fact that no charge was framed against the accused was no sufficient reason for setting aside the judgment.

Baboo Oppendro Chunder Bose and *Baboo Bipro Das Mokerjee* for Prosonno Coomar Mitter.

The judgment of the High Court, so far as is sufficient for the present report, was delivered by

AINSLIE, J. (BROUGHTON, J., concurring).—With reference to this order, the first thing to be remarked is, that the observation with which it opens is one which is difficult to understand. If Mr. Ricketts was satisfied, on consideration of the evidence, that there was no ground for framing a charge against the accused persons, it does not appear how the omission to frame a charge

¹ Criminal Motion, No. 231 of 1878, against the order of *W. V. G. Taylor, Esq.*, Magistrate of Nuddea, dated the 8th November 1878.

² 20 W. R., Cr. Rul., 47.

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4 Cal. 647.

could have caused a failure of justice. The only result of framing a charge would have been that a formal order of acquittal must have been recorded.

The further observations of the Magistrate are in the nature of comments by an Appellate Court on the judgment of a Court of first instance. Whether Mr. Ricketts came to a proper conclusion on the question of exercise of the rights of private defence of property, and also in respect of the value of the evidence, was not a point which was open to the Magistrate to consider, inasmuch as no appeal lay to him from the order of Mr. Ricketts. If he could do anything at all in this case, it must have been by way of hearing a fresh complaint on the grounds mentioned in the case of *Kistoram Mohara v. Anis*,¹ namely, of there being further evidence procurable which was not before the Court when the order of discharge was given, and on this ground only. But it is quite clear that the Magistrate did not satisfy himself that there really was any further evidence to be considered by the Court; and the form of his order would show that this was not the ground on which he proceeded. He did not accept a fresh complaint supported by fresh evidence, but directed a remand of the case for retrial. And this remand, but for the accident of Mr. Ricketts' illness at the time, would have been to that officer, who, as we understand, exercised the powers of a First-class Magistrate.

The case of *Kistoram Mohara v. Anis*,¹ referred to above, shows distinctly that the Magistrate had no power to make the order of remand. There is also a later case² in which the head-note is as follows: "An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners, who had been discharged under s. 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*. As the case was one of improper discharge, and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under s. 297, have directed a retrial."

We, therefore, quash the order of the Magistrate, dated the 8th November 1878, and direct that no proceedings be taken in it, and, if any proceedings have been taken, that they be forthwith stayed.

Order quashed.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

1878.

Dec. 18.

4 Cal. 650.

IN THE MATTER OF THE PETITION OF KUNUND NARAIN BHOOP.³

*Criminal Procedure Code (Act X. of 1872), s. 530, Powers of Magistrate under—
Notice to Parties to attend, Form of—Intervenor.*

The power given to a Magistrate to make a binding declaration as to the possession of any property is an exceptional one, and s. 530 of the Criminal Procedure Code limits the exercise of that power to cases in which the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists; it is this likelihood, with the consequent necessity for immediate action, which alone warrants action by the Magistrate. The grounds for his belief as to the existence of a likelihood of a breach of the peace must be recorded.

¹ 20 W. R., Cr. Rul., 47.

² *In re Mohesh Mistree*, 1 L. R., 1 Cal. 282.

³ Criminal Motion, No. 160 of 1878, against the order of *H. H. Metcalfe, Esq.*, Extra Assistant Commissioner of Goalpara, dated the 24th of June 1878.

Although no particular mode of giving notice, calling upon parties to attend under this section before the Magistrate, has been provided, yet the language of the section indicates that the notice shall be addressed to known individuals, and not be in the form of a public proclamation on citation.

There is no provision in the Criminal Procedure Code for allowing an intervenor to come in, in the middle of proceedings held by a Magistrate under this section.

On the 23rd March 1878 a charge having been brought against certain persons under ss. 147, 377, and 393 of the Penal Code, the Magistrate, after having held a local enquiry, ordered the discharge of the accused, on the ground that the matter seemed to him to be a dispute about some property, and, therefore, he was unable to indict the accused for riot; and with reference to the charge of their being members of an unlawful assembly armed with dangerous weapons, the evidence clearly showed that there had been no armed assembly; but, inasmuch as the "dispute regarding the land was one which might lead to some future quarrel or fray," he ordered an enquiry under s. 530 of the Criminal Procedure Code. The notice to the parties to appear was in the following words: "Let the lakirajdar, whose tenants the prosecutors are, be summoned as one party, and the Bissni landholder as the other parties, to put in their written statements on the 16th for trial."

Prior to the hearing, "the Bissni landholder," Rajah Kunund Narain Bhoop and one Puddo Kishore Burmah (the lakirajdar) came to an amicable settlement, the Rajah buying the land, concerning which there was a dispute, from Puddo.

Shortly before this settlement was effected, one Gopinath Chuckerbutty, on the 9th May, put forward a petition claiming possession of part of the land in question.

On the 24th June the Magistrate made an order declaring the Rajah to have been in possession by virtue of the amicable settlement, and also declaring Gopinath Chuckerbutty to have been in possession of the portion claimed by him.

Rajah Kunund Narain Bhoop applied to the High Court under s. 297 of the Criminal Procedure Code to have the order of the 24th June set aside.

Baboo Hem Chunder Banerjee and Baboo Issur Chunder Chuckerbutty for the petitioner.—The Magistrate should not have ordered an enquiry under s. 530 when it appeared from the proceedings recorded by him on the 23rd March that there was no riot, no unlawful assembly, and no armed tumult concerning the lands in dispute; further, he was wrong in ordering an enquiry under the section, on the ground "that the dispute was one which might lead to some future quarrel," there being no evidence to that effect.

Gopinath should not have been admitted a party to the proceedings, when he was not included in the notice issued by the Magistrate, and it nowhere appears that "a dispute likely to induce a breach of the peace" was existing between the Rajah and Gopinath. The order ought, therefore, to be quashed.

Baboo Gooroo Dass Banerjee and Baboo Umakally Mookerjee for the opposite party.

The judgment of the High Court was delivered by

AINSLIE, J.—On the 23rd February 1878 the Extra Assistant Commissioner of Goalpara, from proceedings before him, was led to the belief that there was a likelihood of a breach of the peace in consequence of a dispute about certain lands between Rajah Kunund Narain Bhoop on one side, and Puddo Kishore Burmah and another on the other side. He consequently directed

I. L. R., Cal. 25.

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that proceedings should be held under s. 530 of the Criminal Procedure Code, and, recording a proceeding reciting the existence of this dispute, he caused notice to be given to the parties above-named.

These persons in the end came to an amicable settlement of their dispute; but, in the meantime, shortly before this settlement was effected, another party, Gopinath Chuckerbutty, came in on 9th May, and put forward a claim to the possession of a portion of the land covered by the Magistrate's notice.

Eventually an order was made by the Magistrate on 24th June, declaring Gopinath to be the party in possession.

The Rajah has applied to this Court to quash this order as made without jurisdiction, and the only question we have to consider is this one of jurisdiction.

In many cases it has been held that a proceeding, such as is required by s. 530, is a *necessary preliminary*, and Mr. Justice *Norman*, in the case of *Kashi Kishor Roy v. Tarini Kant Lahori*,¹ points out that one object of this is to prevent a Magistrate from rashly interfering with questions of possession which should ordinarily be decided by the Civil Courts, except in cases where a breach of the peace is apprehended, and where it is necessary, for the preservation of public order, that steps be taken in the Criminal Court.

The power given to a Magistrate to make a binding declaration as to the possession of property is an exceptional one, and is conferred in a Chapter (XL.) forming a portion of Part XI. of the Code, which is entitled "Preventive Jurisdiction of Magistrate." S. 530 limits the exercise of this power to cases in which the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists, and it is this likelihood with the consequent necessity for immediate action which alone warrants action by the Magistrate under Ch. XL., and the Magistrate is obliged to certify the grounds on which he believes in the existence of a likelihood of a breach of the peace by recording them in a proceeding.

The practice under s. 318 of the Code of 1861, and s. 530 of the present Code, has, as we believe, been uniformly to issue notice to certain parties indicated in the information on which the Magistrate's action is based. The law does not provide for a public notice or proclamation calling upon all parties concerned to attend the Magistrate's Court. It is true that by the words "shall call upon all parties concerned in such dispute" no particular mode of giving notice is expressly prescribed, but, nevertheless, we are of opinion that the language of the section indicates that the notice shall be to known individuals. The Magistrate must be satisfied that there is a dispute serious enough to be likely to lead to a breach of the peace. Although the explanation in no way restricts him in reference to the character of the information upon which he proposes to take action, yet it is obvious that the information must at least indicate the disputing parties. If the Magistrate is unable to point to any one or some persons on one side as said to be engaged in a dispute with one or more persons on the other, it is difficult to understand how he can reasonably declare himself satisfied of the existence of a dispute, and it is only when satisfied of the existence of a dispute that he is to call upon all parties concerned in such dispute: this clearly shows that the call is addressed to individuals, and not to the public.

Baboo *Gooroo Dass Banerjee* relied upon the words "shall call upon all persons concerned" as showing that the law contemplated something in the way

¹ 3 B. L. R., Cr. 76.

of a general citation, and supported this view by referring to the last words of the section "forbidding all disturbance of possession until such time;" but, in the absence of any specific declaration that the procedure is to be by a public citation, we think the latter words can only be taken as applying to the parties of whose dispute the Magistrate has knowledge.

This view is confirmed by the language of s. 531: "If such Magistrate decides that neither of the parties is in possession, or is unable," &c. Had it been intended that the declaration should operate as universally binding, the words would have been "that no party is in possession." The section as it stands shows that the Magistrate's order is to be directed to those persons actually before him (or who, having been called upon, have failed to appear).

In this view of the law it seems to us that the proceedings taken after the compromise were not properly taken. There is no provision in the Criminal Procedure Code for allowing an "intervenor" to come in in the middle of proceedings held by a Magistrate under s. 530. As to such third party the Magistrate has no information of any dispute likely to lead to a breach of the peace between him and any one else, and, therefore, the only ground upon which he can enter upon an enquiry as to the possession of such third party at the date of the commencement of the pending proceedings is wanting. As to anything of later date, he may take such steps in a separate proceeding as circumstances call for, and the law allows.

The order of the Extra Assistant Commissioner, made on the 24th June 1878 in favour of Gopinath Chuckerbutty, is set aside, and the whole proceedings as regards him are quashed. As regards the original parties before the Magistrate, no order is requisite, inasmuch as the dispute between them is at an end.

Order quashed.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson, Offg. Chief Justice, and Mr. Justice McDonell.

NAZIR KHAN *v.* PROLADH DUTTA AND OTHERS.¹

Gambling—Beng. Act II. of 1867, s. 5—Unauthorized Entry and Arrest—Evidence.

Where a police-officer, unauthorized by a Magistrate or District Superintendent of Police, enters and searches an alleged gaming-house, and arrests persons found therein, a Magistrate is justified in convicting such persons, if it is proved, without resorting to the presumption created by Beng. Act II. of 1867, s. 6, that the house is a gaming-house,

*Sreram Chundra Lerkan v. Bipin Dass*² distinguished.

REFERENCE to the High Court under s. 296 of Act X. of 1872, and Circular Order of the High Court, dated 5th July 1863, No. 18.

It appeared that a head-constable, of his own accord, and without any instruction from a Magistrate or District Superintendent of Police, took upon himself to enter a house where gambling was alleged to be going on, and arrested certain persons whom he found there, and, on their being taken before a Magistrate, the latter, on the evidence of the police-officer and one Hurri Krishna Gosswami, to the effect that the house was a gaming-house, and belonged to the persons arrested, convicted the accused under Beng. Act II. of 1867, and fined them.

¹ Criminal Reference, No. 149 of 1878, from an order made by *P. Dickens, Esq.*, Sessions Judge of Nuddea, dated Krishnaghur, the 19th November 1878.

² 2nd February 1877.

1878.

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NARAIN
BHOOP,
4 Cal. 650.

1878.

Nov. 29.

4 Cal. 659.

1878.

NAZIR KHAN

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PROLADH

DUTTA,

4 Cal. 699.

On the record coming up before the Sessions Judge, he was of opinion that, having regard to ss. 5 and 6 of Beng. Act II. of 1867, and the notification at p. 1181 of the *Calcutta Gazette* of the 24th June 1868, the proceedings were irregular; and on the authority of the case of *Sreram Chundra Lerkam v. Bepin Dass*,¹ decided on the 2nd February 1877, that the case ought to be sent up to the High Court in order that the conviction might be quashed.

No one appeared to argue the case.

The opinion of the High Court was given by

JACKSON, C.J.—This case is not on all fours with the one referred to by the Sessions Judge.

In that case a Division Bench of this Court, finding no independent evidence on the record that the house which was entered and searched was a gaming-house within the meaning of the Act, held that it could not be presumed to be so under s. 6 of the Act, because that presumption only arises when the proceedings are authorized by the preceding section, which, for the reasons stated in the judgment, was held not to be the case.

In the case under reference there is the direct evidence of the witness Hurri Krishna Gosswami to show that the house of Kangali Dhoni was a gaming-house. Therefore, although the action of the police may have been illegal, this would not exculpate the accused, or prevent the Magistrate convicting them on other independent evidence.

We, therefore, decline to interfere with the order of the Deputy Magistrate.

Conviction affirmed.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, and Mr. Justice McDonell.

1878.

Dec. 12.

4 Cal. 667.

THE EMPRESS v. TSIT OOE.²

Jurisdiction—Special Court at Rangoon—Case Transferred—Criminal Procedure Code (Act X. of 1872), s. 64—Burma Courts Act (XVII. of 1875), s. 35.

The Special Court of British Burma has power to entertain an appeal from a sentence of death or other sentence passed by the Judicial Commissioner, in a case transferred by him to his own Court from that of the Sessions Judge, under the powers conferred by s. 64 of the Code of Criminal Procedure, and s. 35 of Act XVII. of 1875 (the Burma Courts Act), the hearing subsequent to the transfer being an exercise of original jurisdiction on the part of the Judicial Commissioner.

THIS was a reference made to the High Court of Calcutta, under s. 80 (cl. 6) of the Burma Courts Act (XVII. of 1875), in consequence of a difference of opinion between the two members of the Special Court at Rangoon in a criminal case.

The question referred was, whether, from a conviction and sentence of the Judicial Commissioner, in a case which he has transferred to his own Court, professedly in the exercise of the powers described in s. 64 of the Code of Criminal Procedure, an appeal lies to the Special Court.

¹ Not reported.

² Criminal Reference, No. C. A./31 of 1878, from an order made by John Jardine, Esq., Judicial Commissioner of British Burma, dated 29th of August 1878.

A Chinese, named Tsit Ooe, with several others, was committed for trial by the Deputy Commissioner of Mergui to the Sessions Judge (being the Commissioner of the Tenasserim Division) on various heads of charge, one of which was murder.

The Judicial Commissioner, of his own motion, and for reasons given at the commencement of his judgment at the trial, transferred the case to his own Court, and sat for the purpose of trying it at Mergui. It appears that the function of prosecution was performed by the Superintendent of Police, Major Munro; that the trial was held with the aid of three assessors, of whom only two sat till the end of the proceedings; that the Court adjourned on three occasions, once on the 8th for the purpose of viewing certain places mentioned, and twice on the 14th, "in order to have the places identified," and again, "to look at the neighbourhood;" that the trial lasted from the 7th to the 17th of August; and that on that day the Judicial Commissioner delivered his judgment, whereby he convicted Tsit Ooe, differing from both assessors, and sentenced him to suffer death.

Two questions were raised before him:—*first*, whether such sentence was subject to confirmation by the Special Court; and, *secondly*, whether an appeal lay to that Court from his judgment?

The Judicial Commissioner himself decided the first question in the negative, but, as the matter was one of life or death, he suspended execution of his sentence, pending an appeal to the Special Court.

The members of the latter Court have differed in opinion as to whether an appeal lies to the Special Court under such circumstances.

No one appeared before the High Court; and the opinion of the High Court (after stating the facts as above set out) was delivered by

GARTH, C.J.—After fully considering the judgments of the Special Court upon this point, we have no doubt that the conviction and sentence passed by the Judicial Commissioner is subject to appeal to that Court.

We entirely agree with the learned Recorder that the words "any original jurisdiction" must bear the ordinary natural signification which he puts upon them, and we think it clear that, whenever the Judicial Commissioner exercises original jurisdiction, from whatever source derived, in criminal cases, an appeal lies to the Special Court from his decision.

Were the law otherwise, we consider that the fair administration of criminal justice might be seriously imperilled, and that the case would call for the immediate interference of the legislature. The Judicial Commissioner would then have the power, by transferring any case to his own Court, for any reason which might seem sufficient to himself, to exercise an entire control over the proceedings, and to deprive the prisoner of his right of appeal, however unjust or erroneous his decision might be.

In fact, we find in this very case a forcible illustration of the danger of such a state of things, because, upon looking at the sections under which the Judicial Commissioner assumed a jurisdiction to try the prisoner, we entertain grave doubts whether he had any power to do so; and, unless his jurisdiction could be inquired into by a Court of Appeal, it is by no means clear that the law has provided any other mode of raising the question.

We are of opinion, therefore, that, upon the point referred to us, an appeal does lie from the Judicial Commissioner to the Special Court.

1878.

EMPRESS

v.

TSIT OOE,
4 Cal. 667.

APPELLATE CRIMINAL.

*Before Mr. Justice Morris and Mr. Justice White.*IN RE EMPRESS *v.* MANNOO TAMOOLEE.¹

1879.

Feb. 19.

4 Cal. 696.

Evidence—Admissibility of Secondary Evidence of Confession—Confession not taken in accordance with s. 346 of Criminal Procedure Code (Act X. of 1872).

When the confession of a prisoner, under s. 122 of the Criminal Procedure Code, was not taken in the manner provided by s. 346, and was, therefore, defective, held that the evidence of the Recording Officer, that such confession was actually made, was inadmissible to remedy the defect.

*Reg. v. Bai Ratan*² followed.

THIS case was submitted to the High Court under the provisions of s. 263 of the Criminal Procedure Code. The prisoner was charged with the murder of a woman named Bojya, and, on being arrested, he made a confession of his guilt before the Deputy Magistrate. On his trial before the Sessions Judge, he was found guilty on that confession, and sentenced to death; three of the jury acquitting him, and the other two agreeing in convicting him. At the trial, however, an objection was taken on behalf of the prisoner that there had been irregularities committed in the manner in which the confession had been recorded. It being admitted that the prisoner did not affix his mark thereto; that the confession was not recorded in the vernacular; and that there was no proper certificate attached to it in accordance with s. 346 of the Criminal Procedure Code, the only certificate being one under s. 122, it was, therefore, contended that the confession could not be received in evidence, and that, by a ruling of the Bombay High Court in the case of *Reg. v. Bai Ratan*,¹ the evidence of the Magistrate as to the confession was not admissible, and, therefore, the prisoner was entitled to an acquittal. This objection was overruled, and the prisoner was convicted and sentenced to death.

On the case coming before the High Court, the *Legal Remembrancer* (Mr. O'Kinealy) appeared for the Crown.

Baboo Omerendro Nath Chatterjee for the prisoner.

The following judgments were delivered:—

MORRIS, J.—The confession made by the prisoner on the 17th November 1878 must, I think, be treated as a confession recorded under the provisions of s. 122 of the Criminal Procedure Code. The prisoner was arrested by the police on the afternoon of the 16th, and carried early the next morning before the Deputy Magistrate, Mr. White, who was then at a place (Bankipore) outside the limits of the division of which he had charge. Mr. White recorded the prisoner's confession, and attached to it the certificate required by s. 122. It is clear from this that Mr. White considered himself to be acting under the terms of that section. Subsequently, Mr. White returned to Barh within the limits of his own division, and, having power to do so, took up the case against the prisoner, conducted the preliminary enquiry, examined the prisoner, as prescribed by s. 346, and finally, on the same date, the 20th November, committed him for trial before the Court of Session.

The confession of the 17th November is undoubtedly defective, inasmuch as it does not bear the proper certificate, and it is not signed or attested by the

¹ Criminal Reference, No. 53 of 1879, from an order made by J. F. Browne, Esq., Officiating Sessions Judge of Patna, dated 28th January 1879.

² 10 Bom. H. C. Rep. 166.

mark of the prisoner. In these respects, the confession was not taken in the manner provided in s. 346 as prescribed by s. 122. The question, therefore, arises, whether these omissions can be rectified under the authority contained in the last clause of s. 346, by taking the evidence of the Recording Officer that the prisoner duly made the statement recorded. As at present advised, I think I ought to follow the ruling of the Full Bench of the Bombay High Court on this point as given in the case of *Reg. v. Bai Ratan*,¹ and hold that the imperfect record of the confession, taken under the terms of s. 122, cannot be repaired by secondary evidence. The special and express provision made to meet the case of an imperfect record of examination of a prisoner, in the course of a preliminary enquiry, cannot, in my opinion, be made applicable to the case of an imperfect record of a confession made before any Magistrate whilst the prisoner is still in the hands of the police, simply because such confession has to be taken "in the manner" provided in s. 346. In this view, therefore, the confession of the 17th November is not admissible in evidence, and must be excluded from consideration altogether.

It remains to consider whether, setting this confession aside, there is sufficient evidence on the record to convict the prisoner. (The learned Judge then went into the rest of the evidence, and held it sufficient to convict the prisoner.)

WHITE, J.—I am of the same opinion. I agree that the statement made by the prisoner on the 17th November, and which is alleged to amount to a confession, is inadmissible in evidence. It was clearly taken under s. 122 of the Criminal Procedure Code. The prisoner was brought before Mr. White simply for the purpose of having his alleged confession recorded, and there are no grounds for saying that, when Mr. White took down the prisoner's statement, he was examining the prisoner in the course of a preliminary enquiry, or that he intended to do so. The circumstance that Mr. White was also the committing Magistrate furnishes no reason, in my opinion, why, upon Mr. White's proceedings on the 17th of November, a construction should be put which is contradicted by the facts. The alleged confession of the 17th November is defective for the reasons stated by my brother, Mr. Justice Morris; and upon the authority of the case in *Reg. v. Bai Ratan*,¹ the defects cannot be remedied by examining Mr. White.

We are not at liberty, therefore, to look at the alleged confession of the 17th November. It appears to me, however, that independently and irrespective of it, there is no reasonable doubt upon the evidence that the prisoner is guilty of the offence with which he is charged. (The learned Judge then went through the rest of the evidence, and agreed in convicting the prisoner.)

Conviction affirmed.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice McDonell.

SRERAM CHANDRA LERKAN v. BIPINDASS AND OTHERS.²

Gambling—Beng. Act II. of 1867, ss. 5 and 6—Unauthorized Entry and Seizure.

A Deputy Inspector of Police is not authorized to enter and search an alleged gaming-house, unless he receives authority so to do from a Magistrate or a District Superintendent of Police.

1879.

EMPRESS

7.

MANNOO

TAMMOOLEE,

4 Cal. 696.

1879.

Feb. 2.

4 Cal. 710.

¹ 10 Bom. H. C. Rep. 166.

² Criminal Reference, No. 191 of 1877, from an order made by H. C. Richardson, Esq., Sessions Judge of Nuddea, dated Krishnaghur, the 6th January 1877.

1879.

SREERAM

CHANDRA

LAKKAN

v.

BIPINDASS,

4 Cal. 710.

Where such an unauthorized entry and subsequent arrest of persons in a gaming-house takes place, there being no other evidence of an offence under s. 5 of Act II. of 1867, a Magistrate has no evidence before him on which he can convict.

The evidence required cannot be presumed under s. 6 of the Act, because that presumption only arises when the proceedings are authorized by s. 5.

THIS was a case referred to the High Court under s. 296 of Act X. of 1872.

It appeared that a Sub-Inspector of Police, of his own accord, and without any instructions from a Magistrate, took upon himself to enter a house where gambling was said to be going on, and arrested certain persons whom he found there, and, on their being taken before a Magistrate, the latter convicted them under Beng. Act II. of 1867, and inflicted on them a fine.

On the record coming before the Sessions Judge, he was of opinion that, having regard to s. 5 of Beng. Act II. of 1867, and the Notification at p. 1181 of the *Calcutta Gazette* of the 24th June 1868, the proceedings taken were entirely irregular; and he, therefore, sent the record up to the High Court in order that the Magistrate's order should be set aside.

The aforesaid Notification was dated the 17th of June 1868, and was as follows: "Under s. 5, Act II. of 1867, 'an Act to provide for the punishment of public gambling and the keeping of common gaming-houses in the territories subject to the Lieutenant-Governor of Bengal,' it is hereby declared that only police-officers of or above the rank of Sub-Inspector are authorized to exercise the powers described in that section."

No one appeared to argue the case.

The opinion of the High Court was given by

MITTER, J.—We concur with the Judge that the order of the Deputy Magistrate of Ranaghat, dated the 7th September 1876, in the above-mentioned case, is illegal, and must be quashed.

One of the questions raised before the Judge was, that Beng. Act II. of 1867 has not been extended to Ranaghat in accordance with the provision of s. 11 of that Act. Upon this point the Judge has expressed no opinion, and we have before us no materials from which we can say it has been extended to Ranaghat. But, taking it for granted that it is applicable to Ranaghat, we still think the conviction in this case cannot stand.

It is clear that proceedings were commenced by an act on the part of a police-officer, who, under s. 5 of the Act, was not authorized to do it. The Notification referred to in the explanation of the Deputy Magistrate submitted to the Judge would make the deputation of a Sub-Inspector of Police for entering and searching an alleged gaming-house legal, but he must receive his authority for that purpose from a Magistrate of a District or a District Superintendent of Police. In this case such authority was not given.

This being so, we cannot say that there is any evidence on the record that the house which was entered and searched was a gaming-house within the meaning of the Act. We have gone through the record, and we find no evidence bearing upon this matter. It cannot, we think, be presumed under s. 6 of the Act, because that presumption only arises when the proceedings are authorized by the preceding section, which, as we have observed before, was not the case here.

The order of the Deputy Magistrate, therefore, must be quashed; the fines, if realized, must be refunded; and the properties, which have been declared to be forfeited to Government, must be restored to the parties from whose possession they were taken.

Conviction set aside.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

THE EMPRESS *v.* NIPCHA AND ANOTHER.¹

1878.

Dec. 2.

Sanction to Prosecute—Power of District Magistrate to proceed where Prosecutor has not availed himself of the sanction—Amendment of Charge—Criminal Procedure Code (Act X. of 1872), ss. 450, 470.

4 Cal. 712.

Where sanction has been given under s. 468 of Act X. of 1872 by a Deputy Magistrate to a person to prosecute another for bringing a false charge, and such sanction is not proceeded under, it is open to the District Magistrate to take up the case under s. 142 without complaint.

REFERENCE to the High Court under s. 296 of the Criminal Procedure Code (Act X. of 1872).

One Hanif had been charged before a Deputy Magistrate with theft on the evidence of two chowkidars. He was, however, acquitted, and the Deputy Magistrate gave the accused permission to prosecute the chowkidars under s. 211 of the Indian Penal Code, and security was taken from the chowkidars for their attendance next day before the Magistrate. Hanif did not complain, but the Magistrate of the District took up the case on the report of the police, and, thinking that s. 192 of the Penal Code was more applicable to the case than s. 211, he committed the prisoners under that section.

On the case coming before the Sessions Judge, he was of opinion that the Magistrate was not competent to take up the case without a complaint, and, although he authorized Hanif to prefer a complaint, Hanif did not do so, and that, therefore, the Magistrate was not competent to create a charge of his own against the accused. He further found that, even supposing the proceedings to be legal, there was not sufficient evidence to justify a conviction of the accused.

No one appeared to argue the case.

The opinion of the High Court was delivered by

TOTTENHAM, J. (JACKSON, J., concurring).—It seems to me that the Judge is wrong in his law throughout.

The Deputy Magistrate did expressly sanction a complaint under s. 211, and even took bail for the appearance of the accused. The sanction was none the less valid, because the person to whom it was given did not avail himself of it, and sanction having been given, the Magistrate of the District was competent, under s. 142, Code of Criminal Procedure, to take up the case without a complaint.

As to the change from s. 211 to s. 192, the sanction in respect of one offence covers also one under the other on the same facts (ss. 470 and 450, Code of Criminal Procedure).

But after all it would appear that the Judge would acquit the prisoners on the merits also. It will be sufficient, therefore, to point out to the Judge that his view of the law is erroneous.

His attention should also be called to the fact that he has omitted to sign the depositions recorded by him as required by para. 2, s. 335, Code of Criminal Procedure.

¹ Criminal Statement, No. 714 of 1878, from an order made by H. Beveridge, Esq., Sessions Judge of Rungpore, dated the 21st November 1878.

APPELLATE CRIMINAL.

*Before Mr. Justice Ainslie and Mr. Justice Broughton.*THE EMPRESS *v.* KETABDI MUNDUL.¹

1879.

Feb. 26.

4 Cal. 764.

Culpable Homicide—Rashness, Negligence—Penal Code, ss. 304, 304A, 336, 337, and 338—Enhancement of Sentence.

S. 304A of the Penal Code does not apply to a case in which there has been the voluntary commission of an offence against the person.

If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result; and if such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under s. 336, 337, 338, or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender, and placed in their appropriate place in the class of offences of the same character.

*Nidamarti Nagabhushanam*² cited and approved.

THIS was a reference to the High Court under s. 287 of Act X. of 1872.

It appeared that a female child of eight or nine years of age, who had not arrived at puberty, was the wife of the prisoner. She was brought by her father to the prisoner's house for the purpose of being left there. But, in consequence of her distress, her father remained for the night. At night the child and the accused went inside the house; the fathers of both the child and the accused remaining outside in the verandah. After midnight, the child leaving the house, apparently with the intention of going home to her father's house, got into a canoe, which sank, and left her in the water; from which she was rescued by the prisoner's father, and brought back to the house by the prisoner. The prisoner, having pulled her into the house, kicked her on the back with his bare foot, from which kick the child fell down, and died almost immediately.

From the medical evidence it appeared that the girl was quite healthy, and that she had died from rupture of the anterior coat of the stomach caused by external violence, which might have resulted from a violent kick with a bare foot; there was also a slight wound on the head, and a bruise on the back of the neck; and it was stated by the medical officer that the child had not had connection with a man. The prisoner was committed on the charge of culpable homicide. The Sessions Judge was of opinion that the case did not amount to culpable homicide, inasmuch as the prisoner had no intention to cause death, and had not the knowledge that the act was likely to cause death. He, therefore, convicted the prisoner under s. 304A, and sentenced him to one year's rigorous imprisonment, because the prisoner, in carrying out his intention to cause hurt, committed a rash act, which, even if he did not know it to be likely to cause death, was of a nature not altogether unlikely to lead to that result.

On the case coming up before the High Court, a rule was issued calling upon the prisoner to show cause why the conviction should not be modified and the sentence enhanced.

¹ Criminal Statement or Reference, No. $\frac{P}{8}$ of 1879, by A. C. Brett, Esq., Sessions Judge of Jessore, dated the 22nd November 1878.

² 7 Mad. H. C. R. 119.

No one appeared either for the prisoner or the Crown.

The opinion of the High Court was given by

AINSLIE, J. (BROUGHTON, J., concurring).—We do not concur in the view of the law taken by the Sessions Judge. In the case of *Khiran Nomiya*,¹ this Court, on 3rd September 1877, held that s. 304A does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under s. 336, 337, 338, or 304A, if done without due care to guard against the dangerous consequences. Acts, which are offences in themselves, must be judged with regard to the knowledge, or means of knowledge, of the offender, and placed in their appropriate place in the class of offences of the same character.

There is a judgment of the Madras Court—*Nidamarti Nagabhushanam*²—in which Mr. Justice Holloway explains the use of the words 'rashness' and 'negligence' in the Penal Code, and this judgment has been recently approved by the Chief Court of the Punjab, and reproduced in a Circular issued by it to all Civil Courts.

Mr. Justice Holloway says : " Culpable rashness is acting with consciousness that mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening.

" The imputability arises from acting despite of the consciousness.

" Culpable negligence is acting without the consciousness that illegal or mischievous effects will follow, but in circumstances which show that the actor has not exercised the caution incumbent on him, and that, if he had, he would have had the consciousness.

" The imputability arises from the neglect of the civil duty of circumspection.

" It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts themselves intended which are the producers of death."

We, therefore, set aside the conviction under s. 304A.

The facts set out above appear to us to require that the accused should be convicted under s. 304.

In judging of knowledge had by the accused, we must consider the circumstances : the blow that to one person, or under ordinary circumstances, may not, in the ordinary course of nature, be likely to cause death, may yet be imminently dangerous to another, or under special circumstances.

¹ Unreported.

² 7 Mad. H. C. R. 119.

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 ENGLISH
 9.
 KIRAN
 NOMIYA,
 4 Cal. 964.

1879.

EMPRESS

v.

KETABDI

MUNDUL,

4 Cal. 764.

To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character that no reasonable man could be ignorant of the likelihood of its causing death.

We, therefore, convict the prisoner Ketabdi under the latter part of s. 304, Indian Penal Code, and sentence him to five years' rigorous imprisonment, to run from the date of his original sentence.

Conviction modified, and sentence enhanced.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice White.

THE EMPRESS v. SAFATULLA AND ANOTHER.¹

1879.

March 31.

4 Cal. 815.

Penal Code, s. 304A—Doing Rash and Negligent Act—Direction to Jury.

Where an accused was charged with culpable homicide, and the evidence showed that the deceased had an enlarged spleen, and that his death was caused by rupture of the spleen occasioned by blows inflicted by the accused on the body of the deceased,—

Held that it was not sufficient, in order to find the accused guilty of a rash act under s. 304A of the Penal Code, that the jury should be satisfied only of the prevalence of the disease of enlargement of the spleen in the district, and infer therefrom criminal rashness in beating the deceased; but that they should also be satisfied that the accused was aware of the prevalence of such disease in the district, and also aware of the risk to life involved in striking a person afflicted with that disease.

THE facts are sufficiently stated in the judgment of the Court delivered by

WHITE, J.—The prisoners in this case were acquitted by the jury of culpable homicide, and convicted, under s. 304A of the Indian Penal Code, of causing the death of one Alim Koregar by a rash act not amounting to culpable homicide.

The evidence showed that the deceased had had an enlarged spleen for several years; that his death was caused by rupture of the spleen; and that the rupture was occasioned by blows of the hands inflicted by the prisoners upon the trunk of the deceased's body whilst he was alive.

The Judge charged the jury with reference to s. 304A in the following terms: "If you do not think that the act amounted to culpable homicide, but that the circumstances of this district in respect of the prevalence of disease of the spleen are such as to render any beating on the trunk of the body an act of criminal rashness, you will be justified in convicting the accused under s. 304A."

It appears to us that the Judge has not put the matter before the jury with sufficient precision. The mere circumstance of the prevalence of the disease of spleen in the district in which the deceased resided is not sufficient to warrant a conviction under this section. The jury should further have been told that they must be satisfied that the accused was aware of the prevalence in the district of such diseases, and also aware of the risk to life involved in the striking on the trunk of the body of a person who might be suffering from disease of the spleen.

As the prisoners, however, were upon the evidence clearly guilty of voluntarily causing hurt, and the sentence is such as might have been passed for such an offence, it is unnecessary for us to interfere with the conviction.

¹ Criminal Reference, No. 413 of 1877, from an order made by C. D. Field, Esq., LL.D., Sessions Judge of Burdwan, dated the 1st March 1879.

APPELLATE CRIMINAL.

*Before Mr. Justice Birch and Mr. Justice Mitter.*IN THE MATTER OF THE PETITION OF CHUNDER NARAIN *v.* J. G. FARQUHARSON.¹1879.
March 28.*Criminal Trespass.*

4 Cal. 837.

A, who had been warned off the lands of B, subsequently, having shot a deer near the boundary of B's land, and the deer having run on to B's land, followed it on to such land for the purpose of killing it. Held that his doing so was not a criminal trespass.

THE petitioner in this case had been warned by the complainant, who was the manager of a tea-garden, not to come shooting over his garden without permission. Shortly after receiving this notice, the petitioner having shot a deer in another garden adjoining that of the complainant, followed the wounded animal on to the land of the complainant, for the purpose of killing it. Upon this the petitioner was charged by the complainant with criminal trespass, and was convicted under s. 447, Indian Penal Code, and fined Rs. 50 by the Assistant Commissioner of Kamroop. The case was brought before the High Court by an application under s. 297 of the Criminal Procedure Code.

Baboo *Boikunto Nath Dass* for petitioner.

The judgments of the Court were as follows :—

MITTER, J.—This is an application by one Chunder Narain against the order of the Assistant Commissioner of Kamroop, dated 8th August 1878, convicting him of the offence of 'criminal trespass' under s. 447, Indian Penal Code, and imposing upon him a fine of Rs. 50.

The application is under s. 297 of the Criminal Procedure Code. The facts found by the lower Court are, that the applicant "entered into or upon property in possession of" the complainant; but it is also found that his object was to kill a deer, the pursuit of which was commenced by him from a spot outside the garden in possession of the complainant. The definition of 'criminal trespass' is given in s. 441, Indian Penal Code. The conviction is therefore illegal, and must be quashed.

We accordingly set it aside, and direct that the fine, if realized, be refunded.

BIRCH, J.—The petitioner has been convicted of criminal trespass under s. 447, and fined Rs. 50. The case was tried summarily, but the evidence was taken down, and the finding upon that evidence was, that the act committed by the petitioner "was sufficiently annoying to fulfil the definition of criminal trespass." From the finding it appears that there is some doubt as to where the boundary line of the grant is. The petitioner and his companion followed up a deer, of which they were in pursuit, to a tank which the tea-planter says is within his boundary, and there they killed the deer. The Assistant Commissioner infers an intention to annoy, from the fact that the petitioner had been asked by Mr. Farquharson not to come upon his tea-garden to shoot. But under the circumstances disclosed in the finding, we think that the offence of criminal trespass has not been committed. We quash the proceedings, and direct that the fine be refunded.

¹ Criminal Motion, No. 22 of 1879, against the order of *G. E. McLeod, Esq.*, Assistant Commissioner of Kamroop, dated the 8th August 1878.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Ainslie, and Mr. Justice Birch.

THE EMPRESS *v.* NOBIN CHUNDER DUTT.¹

1879.

March 26.

4 Cal. 865.

Evidence—Proceedings on Forfeiture of Recognizance—Criminal Procedure Code (Act X. of 1872), s. 502.

A Magistrate is not justified in forfeiting a recognizance under s. 502 of Act X. of 1872, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses, upon whose evidence the rule to show cause why the recognizance should not be forfeited has been issued.

On the 27th September 1877, the Deputy Magistrate of Moonsheegunge passed an order binding over Nobin Chunder Dutt and Krishna Coomar Dutt to keep the peace for one year, under two separate recognizance-bonds to the amount of Rs. 500 each.

Before the expiration of the year, certain persons were charged with, and convicted of, an assault before the Deputy Magistrate, who, upon the evidence before him, decided that Nobin, though he had not been personally concerned in the offence, had caused the breach of the peace to be committed. He, therefore, issued a notice to Nobin, calling on him to show cause why his recognizances should not be forfeited. Nobin appeared to show cause; but the Magistrate, without taking further evidence against Nobin than that which was recorded in the case above-mentioned, used that evidence against him, and, without hearing any evidence on Nobin's side, ordered that his recognizances should be forfeited under s. 502 of the Criminal Procedure Code.

The Sessions Judge was of opinion, on the case coming up before him, that the Magistrate had proceeded improperly,—*firstly*, because no breach of the conditions of the recognizance-bond had been proved by any evidence against Nobin; and, *secondly*, because, although notice was issued on him to show cause, the Deputy Magistrate forfeited the recognizances without summoning the witnesses whom Nobin wished to call in his defence, and he, therefore, sent up the case for orders to the High Court.

On the case coming up before the High Court, Mr. Justice Ainslie and Mr. Justice Broughton referred the case to a Full Bench with the following remarks:—

The evidence, by which it is sought to charge Nobin Chunder Dutt with having done an act whereby he was liable to a forfeiture of the recognizance to keep the peace entered into by him, was not taken in his presence, and he, therefore, had no opportunity of cross-examining any of the persons whose testimony constituted the proof on which the Magistrate relies. In the case of *Kalikant Roy Chowdhry*² the Court held—under s. 293 of the former Criminal Procedure Code, the words of which are substantially the same as those of s. 502 of the Code of 1872—that, before a Magistrate can declare that recognizances to keep the peace have been forfeited, there must be a regular judicial trial and legal enquiry before the punishment can be inflicted.

The circumstances of that case appear to be the same as those of the present.

¹ Reference No. 1486 of 1878 to the High Court by *C. B. Garrett, Esq.*, Sessions Judge of Dacca, with a view to the reversal of the order of Baboo Trailokya Nath Sen, Deputy Magistrate of Moonsheegunge.

² 3 B. L. R., App., 155.

Looking to the words of the law, we think it doubtful whether this view is strictly correct, though the course prescribed is one, the principle of which we approve.

The section says: "Whenever it is proved before the Magistrate that any recognizance has been forfeited, he shall record the grounds of such proof, and call upon the person bound by such recognizance to pay the penalty thereof, or show cause why it should not be paid;" and the following clause provides for the Magistrate proceeding by warrant to levy the amount, if sufficient cause be not shown, and the penalty be not paid; so that, if the person called upon should not appear at all to show cause, the Magistrate may act upon the proof recorded before he ever had any chance of hearing any proceedings against him being on foot.

The procedure prescribed in this section is an exception to the general rule—"that a man charged with an offence can only be convicted on evidence taken in his presence."

It may be that the person charged with an act involving forfeiture of his recognizances is entitled to have any witnesses, on whom the Magistrate relies, recalled for cross-examination, but it would appear that under the words of the law the Magistrate is not otherwise legally bound to examine such witnesses in the presence of the person charged, as in ordinary trials.

We think this point of such importance that it should be determined by a Full Bench, and we, therefore, refer the question—Whether a Magistrate is bound in law to record the proof, on which he proposes to forfeit a recognizance to keep the peace, in the presence of the person bound by such recognizance?

We agree with the Sessions Judge on the second point that Nobin Chunder was entitled to have his witnesses examined when he appeared to show cause. We defer making any final order until the reference to the Full Bench shall be disposed of.

No one appeared for either party.

The judgment of the Full Bench was delivered by

GARTH, C.J.—We find that, in the case referred to us, Nobin Chunder Dutt was bound to keep the peace for the term of one year in his personal recognizance for the sum of Rs. 500. Within this term, certain other persons were charged with a breach of the peace before the Deputy Magistrate, who thereupon convicted Krishna Tappadar and others of an assault; and, although Nobin was not personally concerned in the offence, and was not made a defendant at the trial, the Magistrate decided upon the evidence that he (Nobin) had, by the agency of the convicted persons, caused that breach of the peace to be committed, and he thereupon called upon him to show cause why his recognizances should not be forfeited; and on his appearance in Court, he, upon no further evidence than that which was recorded on the prosecution of Krishna Tappadar and others, declared the recognizances forfeited.

The course prescribed by s. 502 of the Criminal Procedure Code (and by s. 293 of the former Code) takes the place of the cumbrous proceeding by *scire facias*, which is in most cases necessary in England before estreating recognizances to keep the peace.

In this proceeding the defendant, who has entered into the recognizance, has an opportunity of pleading to the *scire facias*, and of thus raising the question—Whether he had been guilty of the assault or no: and upon the issue raised by that plea, a trial takes place, at which evidence is gone into precisely as in a civil suit.

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We think that, according to the fair construction of s. 502, a Magistrate is not justified in forfeiting a recognizance under that section, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause had been issued.

That opportunity may arise either upon the prosecution of the accused person before the Magistrate for a breach of the peace, or any other offence : in which case the accused, being the defendant, would, of course, have the right to cross-examine the witnesses for the prosecution ; or it may arise upon a substantive application made to the Magistrate to forfeit the recognizance ; in which case the witnesses, upon whose evidence the rule is granted, ought to be present, and subject to be cross-examined by the accused, upon the occasion when cause is shown against the rule.

If no cause is shown, or if the accused declines to cross-examine the witnesses, the Magistrate may, of course, proceed to dispose of the case upon the evidence as it stands. It is obviously sufficient for the purposes of justice that the accused has had the opportunity of cross-examination.

Order reversed.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

THE EMPRESS v. IRAD ALLY, ACCUSED.¹

1879.

April 3.

4 Cal. 869.

Sanction to prosecution under ss. 182 and 211 of the Penal Code—Power of Deputy Magistrate to question sanction.

A Deputy Magistrate has no power to question an order made by his superior, sanctioning a prosecution under ss. 182 and 211 of the Penal Code.

Whether such sanction has been rightly or wrongly given, is a question for the accused to raise before a competent Court.

THIS was a reference under s. 296 of the Criminal Procedure Code.

It appeared that one Irad Ally preferred a charge of theft against one Nasseebunnissa before the police. On an examination into the charge, the police reported it to be false. Prior, however, to the delivery of the police-report, Irad Ally repeated the accusation in a complaint before the Magistrate, who, without summoning the accused, made over the matter to the Sub-Deputy Magistrate for report ; that officer was of opinion that the charge was false, and directed the police to enter it as such ; but it appeared that he did not formally dismiss the case.

Nasseebunnissa then applied to the Magistrate for leave to prosecute Irad Ally under ss. 182 and 211 of the Penal Code for bringing a false charge ; leave was granted by the Magistrate, who, after directing a summons to issue against the accused, sent the case to a Deputy Magistrate for trial.

The Deputy Magistrate discharged the accused on the following grounds, *vis.* :—

(1) That the sanction to the prosecution under ss. 182 and 211 was illegal, as there was no judicial investigation into the charge of theft originally made by the accused.

¹ Criminal Reference, No. 647 of 1879, from an order made by J. C. Price, Esq., Officiating Magistrate of Howrah, dated the 24th of March 1879.

(2) That the Magistrate did not pass a formal order of dismissal on the petition of Irad Ally.

(3) That the Sub-Deputy Magistrate did not hear all the witnesses produced by Irad Ally as he should have done before pronouncing his complaint to be a false one.

The Magistrate, objecting to the proceeding of the Deputy Magistrate, referred the case to the High Court.

No one appeared to argue the points.

The opinion of the High Court was delivered by

AINSLIE, J. (BROUGHTON, J., concurring).—We think the Deputy Magistrate was wrong to question the sanction given by the Magistrate. It was an order made by a superior Court, purporting to be made under a particular provision of law. Whether it was rightly or wrongly made was not for the subordinate Court to enquire into. The Deputy Magistrate was not sitting as a Court of appeal or revision to examine the mode in which the Magistrate of the district had dealt with the case in which he had sanctioned a prosecution under s. 211 of the Penal Code. He was bound to accept the sanction as valid, and leave the accused to question it before a competent Court, if so advised.

We cancel the order of the Deputy Magistrate, and direct him to try the accused on the charges before him.

Order cancelled.

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VOLUME V.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

THE EMPRESS *v.* ROHIMUDDIN (No. 1), NAZIR MAHOMED
(No. 2), AND SOMIRUDDIN (No. 3).¹

1879.
April 22.

5 Cal. 31.

Murder—Culpable Homicide—Indian Penal Code, s. 300 (exceps. 4 and 5).

Excep. 5 to s. 300 refers to cases where a man consents to the doing of some particular act, either knowing that it will certainly cause death, or that death will be the likely result; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated.

Per Broughton, J.—Excep. 5 to s. 300 is not applicable to the case of a premeditated fight, but points to a case of a different character, such as *suttee*.

CRIMINAL appeal from the order of the Sessions Judge of Backergunge.

It appeared that a dispute had arisen between Abdool Lashkur and Abdool Khoondkar concerning a piece of land; and that, on the 16th April 1878, Abdool Lashkur came with a band of fifty or sixty men, armed with spears and lathis, and commenced ploughing the land in dispute; that the men of Khoondkar, being also armed in like manner, endeavoured to prevent them, and a riot ensued, which, however, was put a stop to by the intervention of certain men of position, who induced Abdool Lashkur to withdraw his men. These men afterwards, on being provoked again, returned; and in the *melée* that followed, Assuruddin, one of Abdool Khoondkar's party, received a wound, from which he died.

Three men belonging to the party of Abdool Lashkur were arrested, *viz.*, Rohimuddin, Nazir Mahomed, and Somiruddin, and charged under ss. 302, 148, and 149 of the Indian Penal Code.

The Sessions Judge considered that the prisoners could not be found, under the circumstances, guilty of murder, but at most of culpable homicide not amounting to murder. The evidence clearly established that Assuruddin was present at the riot as a professional lathial under the leadership of one Naziruddin; and that the deceased and the men with whom he was siding, being also professional spearmen, brought on the fight intentionally, and that they entered into it willingly and with pre-consent, being well aware of the risk they ran by so doing. The Sessions Judge therefore found that the case fell under excep. 5 of s. 300 of the Penal Code, by which it is declared that "culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death, with his own consent;" he, therefore, concurring with the assessors, convicted Rohimuddin, Nazir Mahomed, and Somiruddin under ss. 304 and 149 of the Penal Code, and sentenced the two first prisoners to ten years, and the third prisoner to five years' rigorous imprisonment.

The prisoners appealed to the High Court.

No one appeared to argue the case.

¹ Criminal Appeal, No. 191 of 1879, against the order of *W. Verner, Esq.*, Officiating Sessions Judge of Backergunge, dated the 3rd February 1879.

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5 Cal. 31.

The judgments of the Court were as follows:—

AINSLIE, J.—The Judge and assessors have concurred in finding the prisoners guilty of culpable homicide not amounting to murder committed in the course of a riot, and they have been sentenced under s. 304 of the Indian Penal Code read with s. 149. Other persons had been previously tried and convicted on account of the same matter. They were convicted of murder under s. 302 read with s. 149, and the conviction and sentence were affirmed by this Court on the 12th November 1878. In the present trial, the Officiating Judge has held that the case comes under the 5th exception of s. 300 of the Penal Code—“Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death, with his own consent.” He says that, if “one of a body of professional lattials armed with deadly weapons is killed in a fight which these lattials have voluntarily entered into and provoked, his death cannot be murder.” And in a previous passage he says: “They were not obliged to fight for the defence of person or property, but they provoked the fight, and entered upon it willingly and with pre-consent. They were professional lattials armed with spears, and their adversaries were also armed with spears. They were well aware of the risk they ran, and by their conduct showed that they took that risk willingly.” The facts are briefly these, that certain persons, who may be called Lashkur’s party, to which the prisoners belonged, went armed with spears and latties to plough lands claimed by one Abdool Rohim Khoondkar. The latter gathered men, and there was a disturbance, and clods were thrown, but by the mediation of some by-standers a separation was effected. Lashkur’s party began to withdraw, whereon Khoondkar’s party taunted them, and some violence was used towards one Hurri, who was removing his plough. On this Lashkur’s party returned. Some of Khoondkar’s men prepared themselves for fighting, and a fight occurred, in which Assuruddin, one of Khoondkar’s party, was killed by several spear wounds, and another man was wounded. The evidence shows that these men made deliberate preparations to meet the attack of Lashkur’s men, and that the case cannot come under excep. 4 as a sudden fight in the heat of passion upon a sudden quarrel. The assailants in the first instance had gone out armed with deadly weapons, and at the later stage at which the fight occurred, fighting was deliberately intended by both parties. I cannot concur in the view taken by the Judge that when persons of full age voluntarily engage in a fight with deadly weapons they take the risk of death with their own consent, and that, as a consequence, culpable homicide occurring in such a fight is not murder. If this view is correct, the 4th exception would be superfluous. If culpable homicide in a premeditated fight with deadly weapons is not murder, *a fortiori* unpremeditated culpable homicide in a sudden fight in the heat of passion upon a sudden quarrel would not be murder. It seems to me that the 4th exception clearly indicates that culpable homicide in a fight is murder, unless the fight is unpremeditated, and is such as is therein described, sudden in the heat of passion and on a sudden quarrel: a fight is not *per se* a palliating circumstance, only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent. I do not think the 5th exception has any application to such a case. I understand that exception to apply to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to

be anticipated. The extract from the report of the Indian Law Commissioners, given in Morgan and Macpherson's edition of the Penal Code at p. 265, contains instances to which the exception applies, and in my opinion cases of this character only are properly to be dealt with under it. The Judge ought to have convicted the prisoners under s. 302 read with s. 149, Penal Code, and sentenced them accordingly. We annul the sentence and conviction passed by the Officiating Sessions Judge of Backergunge, and convict the prisoners Rohimuddin, Nazir Mahomed, and Somiruddin of the murder of Assuruddin, an offence punishable under s. 302 of the Indian Penal Code, and sentence them to transportation for life.

BROUGHTON, J.—I also think that the prisoners ought to have been convicted of murder under s. 302 coupled with s. 149 of the Indian Penal Code. The common object of the men assembled may have been in the first instance merely the ejection of the other party from the land, but they had retired, and at the instance of mediators had given up that object. Afterwards the other party challenged them to come on again, and the deceased man and another armed with spears put themselves in a fighting position, and awaited the return of the prisoner's party. They returned, some of them also being armed with spears, and accepted the challenge. The object of those who returned, and among them were the prisoners, was not then to eject the others from the land, but to engage in a deadly fight with spears. A man may be a member of an unlawful assembly as defined in s. 141, and if armed with a deadly weapon may be punishable under s. 144, although no force has been used. If any force is used, he may be punishable under s. 148, and if he be a member of a band of dacoits, and murder is committed, he may be punished under s. 396; and in this case there may be no deadly weapon used; if a deadly weapon is used, he may be punished under s. 398. All these instances show that the common object or intention of the assembly may be various, and that it must be judged from the proved circumstances of the case. In the present case the common object or intention of the assembly was clearly to fight in such a way that the weapons they used would be likely to cause, and probably would cause, the death of one of their number, or of one of their opponents. It is said by the Sessions Judge that the man who was slain invited or ran the risk of death, and that this brought the case within excep. 5 of s. 300 of the Indian Penal Code. But if that exception applies to the case, there appears to be no reason for excep. 4. Where there is a fight between two contending parties, it is necessary, in order to apply excep. 4, that the fight should have been sudden and without premeditation, and a fight under any circumstances comprehends the kind of consent to which the Sessions Judge alludes. Here there was a certain time between the challenge and the fight, a short time it may be, but still some time for reflection; the parties were at a distance from each other when the challenge was given, and consequently had time to consider whether they would engage in the fight with deadly weapons or not. They determined to fight, and the death of one of the men was the result. Excep. 5 appears to me to apply to circumstances of a different character, as for instance to a case of *suttee*, not to a premeditated fight. The prisoners have appealed; they say the evidence is not conclusive; and Nazir Mahomed says he had witnesses to prove an *alibi*. Witnesses were examined for the defence, and it does not appear that any were excluded. These witnesses support the case for the prosecution, which is, moreover, proved by the testimony of wholly independent witnesses, namely, by the men who offered to mediate, and did, in fact, effect a cessation of hostilities between the contending parties. The Sessions Judge rightly says that the facts are clearly proved by the witnesses on both sides.

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But on the question whether the offence was murder, or culpable homicide not amounting to murder, I agree in thinking that the Sessions Judge was mistaken. The case, in my opinion, is a case of murder, and, that being so, the prisoners must be sentenced under the circumstances to transportation for life.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice White.

THE EMPRESS v. CHUNDER NATH DUTT.¹

1879.
 May 14.
 5 Cal. 121.

Presidency Magistrates' Act (IV. of 1877), ss. 82, 86, and 87, expl. 2—"Revival of a prosecution"—Examination of Witnesses.

A "revival of a prosecution," as mentioned in expl. 2 of s. 87 of Act IV. of 1877, is *not* a continuation of the original prosecution from which the accused has been discharged. On the revival of the prosecution, all the witnesses, on whose evidence the prosecution intend to rely, must be examined before the Magistrate; and if any of them were examined at the time of the original prosecution, they must be examined *de novo*.

This case was referred to the High Court in the following terms:—

"The defendant in this case surrendered, on the 30th of July 1878, to a warrant issued by this Court for his arrest on the 26th July 1878, on a charge of stealing and fraudulently appropriating two unregistered letters containing currency notes and a hoondree. He was arraigned before me on the 30th July 1878. The prosecution cited certain witnesses, whose evidence was recorded for the commitment of the case to the Sessions; but in spite of a warrant which was obtained under s. 135 of the Presidency Magistrates' Act, they failed to produce the material witness whose testimony, it was stated, would clench the fact of theft. In the absence, therefore, of any evidence to connect the accused with the offence, and after every possible opportunity had been given to the prosecution to produce the absent witness, he was discharged on the 14th September 1878, under s. 87 of Act IV. of 1877. On the 8th April 1879, this witness, Gopal Chunder Ghose, was apprehended. Upon a statement made by him, an application was made by the Officiating Government Prosecutor to revive the charge against the defendant Chunder Nath Dutt, and a fresh warrant was applied for and obtained. The defendant was accordingly placed before this Court on the 29th April 1879, when the evidence of Gopal Chunder Ghose was recorded in his presence. The Government Prosecutor does not propose now to examine any further witnesses, and applies that the case may be committed to the Sessions, upon the evidence taken on the previous occasion, before the defendant was discharged, plus the evidence taken after his re-arrest. He contends that the word "revival" in expl. 2, s. 87 of Act IV. of 1877, implies that the proceeding against an accused discharged under this section may be revived at any time, and the point where it was left off should form the starting point for the proceeding which might be instituted in the second instance. I do not, however, agree with this view. I think when a prisoner is discharged for want of evidence, the former proceeding is at an end; and when a prosecution is revived, it is a fresh proceeding, requiring the evidence to be gone into *de novo*.

¹ Criminal Reference, No. 113 of 1879, from an order made by *Syud Ameer Ali, Esq.*, Officiating Chief Magistrate of Calcutta, Northern Division, dated the 5th May 1879.

I hardly think the Legislature could have meant that a discharge under s. 87 should be a remand *sine die*. Arguments have been drawn from the use of the word "revival," but these arguments appear to me to be fallacious. If the words had been revival of the prosecution, instead of revival of a prosecution, there might have been some force in the contention. I take it that the explanation to s. 87 simply debars the defendant in certain cases from taking the plea of *autre fois acquit*; but creates no special procedure such as is contended for. For the reasons above stated, I am inclined to hold that no commitment can be made; and that, as the Government Prosecutor does not propose to call witnesses to prove the material facts of the case, and to enable the defendant to cross-examine them with reference to the new evidence, the prosecution must fail.

The question referred was—

"Whether a prosecution revived under expl. 2 to s. 87 of Act IV. of 1877 is a continuation of the old proceeding; and whether evidence of the "revival" should or should not be taken *de novo*." Pending the opinion of the High Court, the defendant was enlarged on bail, to appear on the 20th instant.

The opinion of the High Court was delivered by

WHITE, J. (MORRIS, J., concurring).—The question raised by the reference of the Officiating Chief Magistrate is as to the procedure to be adopted in cases under ch. 8 of the Presidency Magistrates' Act, when an accused person, who has been discharged by the Magistrate under s. 87 of that Act, because there are no sufficient grounds for committing the prisoner to take his trial, is at some subsequent time again prosecuted before a Magistrate for the same offence. The Act, in s. 82, states specifically the procedure to be applied when an accused person is brought before the Magistrate under ch. 8, and no distinction is made between the cases of a first and that of a second prosecution for the same offence. The argument that on a second prosecution the witnesses who were examined on the first prosecution need not be examined again, but may be considered as giving evidence in support of the second prosecution, is based solely and entirely upon the circumstance that the Legislature, in expl. 2 of s. 87, has described the second prosecution as the "revival of a prosecution." I think the argument is not sound, and has no sufficient foundation. The argument is, in fact, an inference from the use of the word "revival." The object of expl. 2 of s. 87 is to negative the supposition that a discharge would be a bar to a second prosecution for the same offence. The explanation does not deal with the procedure which is to be adopted, if such second prosecution should take place. The fact that the Legislature has described the second prosecution as the "revival of a prosecution," does not, in my opinion, warrant the inference either that the evidence upon which the first prosecution is based is also revived, or that the procedure upon the second prosecution is to be different from that pointed out in s. 82. A further reason for this view is to be found in the provision for adjournment, which is contained in the same chapter of the Act. Under s. 86 a Magistrate has large powers of adjourning an enquiry for reasonable cause, but no adjournment can be for longer than fifteen days at a time. If, upon a second prosecution after a discharge, the Magistrate is to treat the evidence that was given in the first prosecution as evidence upon the second prosecution, or as it is called in the reference before us—"take up the case for the prosecution where it was left when the prisoner was discharged"—the Magistrate would, in effect, be acting as if he had adjourned the enquiry *sine die*, which he has no power to do. It cannot be supposed that the Legislature intended by the mere use of the word "revival of a prosecution" in expl. 2, s. 87, to give the Magistrate such a power, after it had carefully made pro-

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vision by s. 82 against unlimited adjournments. In my opinion the proper reply to the question of the Officiating Chief Magistrate is, that a "revival of a prosecution," as mentioned in expl. 2 of s. 87, is not a continuation of the original prosecution from which the accused has been discharged; and that, upon the revival of the prosecution, all the witnesses on whose evidence the prosecutor intends to rely as justifying the committal of the accused must be examined before the Magistrate; and if any of them were examined at the time of the original prosecution, they must be examined *de novo*.

Before Mr. Justice Morris and Mr. Justice White.

THE EMPRESS v. MAGUIRE.¹

1879.
May 14.
5 Cal. 124.

Mutiny Act, s. 101—Jurisdiction of Civil (as opposed to Military) Courts—Offence committed by British Soldier.

S. 101 of the Mutiny Act does not deprive the Civil (as opposed to Military) Courts of jurisdiction over British soldiers committing offences within the territorial limits of those Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief. The section is merely permissive of a military trial being held.

In this case the prisoner, who was a European British subject, and a private in the army, was charged with the offence of theft, and was committed by the First Assistant Superintendent for trial to the Sessions Judge and Judicial Commissioner of the Andaman and Nicobar Islands. That officer referred the case to the High Court under s. 296 of Act X. of 1872 and s. 13 of the Andaman and Nicobar Islands Regulation of 1876, on the ground that the commitment had been made without regard to the provisions of s. 101 of the Mutiny Act, 1878, which provides in such cases for a trial of the prisoner by court-martial, and without any communication on the subject having been made to the Commander-in-Chief. He was therefore of opinion that he had no power to try the case.

The opinion of the Court was delivered by

WHITE, J.—We have referred to the 101st section of the Mutiny Act (41 Vic., c. 10, A.D. 1878), and are of opinion that that section (which is also to be found in the Mutiny Acts between 1873 and 1878) does not deprive the Civil Courts of jurisdiction over British soldiers committing offences within the territorial limits of those Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief. The 101st section simply provides that, as regards civil offences committed by British soldiers serving in India or its dependencies, and at a distance of more than 120 miles from the Presidency-town, the offenders may be tried by a general court-martial, the appointment of which rests with the Commander-in-Chief. It appears to us that the section is merely permissive of a military trial being held. In this case the Court has got possession of the investigation of the offence, and the military authorities have not availed themselves of the alternative procedure of trying the offender by a general court-martial. Under these circumstances, we think that the Court of the First Assistant Superintendent was a competent Court to commit the accused for trial on a charge of theft, and that the Court of the Sessions Judge and Chief Commissioner is a competent Court to deal with the case so committed, and we accordingly direct the latter Court to dispose of the case.

¹ Criminal Reference, No. G ⁶¹/₈₄ of 1879, from an order made by Lieutenant-General C. A. Barwell, C.B., Sessions Judge and Chief Commissioner of Andaman and Nicobar Islands, dated the 24th April 1879.

APPELLATE CRIMINAL.

*Before Mr. Justice Ainslie and Mr. Justice Broughton.*IN THE MATTER OF ABDOOL AND OTHERS (PETITIONERS) *v.* LUCKY NARAIN
MUNDUL AND OTHERS (OPPOSITE PARTY).¹1879.
April 21.*Order under s. 518 of Act X. of 1872—Limit of Order.*

5 Cal. 132.

Per AINSLIE, J.—In dealing with the civil rights of a subject under s. 518 of the Criminal Procedure Code, it is incumbent on the Magistrate to limit the operation of his order to such reasonable time as may be necessary to enable him to hold a full and sufficient enquiry, as to whether the act prohibited as likely to cause a breach of the peace is within, or is in excess of, the legal right of the person forbidden to do it; and, if necessary, to deal with the case under the other provisions of the Criminal Procedure Code, which enable him to meet cases of probable breach of the peace.

Per BROUGHTON, J.—Where an order on the face of it appears to have been made without jurisdiction, no subsequent explanation can make it good.

FOUR Mahomedan residents in a Hindu village applied to the Deputy Magistrate of Midnapore for an order restraining the Hindu inhabitants of the village from obstructing them in the slaughter of cattle in the village, and also for an order preventing a breach of the peace.

The Magistrate ordered the police to report on the case, and they recommended that the cattle should be slaughtered at a place four miles distant from the village. On this report the Deputy Magistrate, on the 10th June 1877, ordered "that the application to slaughter kine in the said village be rejected."

The Mahomedans then applied to the Sessions Judge under s. 295 of the Criminal Procedure Code; and he, on the 20th September 1877, rejected the application, on the ground that, until there was any actual disturbance on the part of the Hindus, the police could not interfere on behalf of the Mahomedans.

The Mahomedans, subsequently to this, continued to slaughter cattle, and on their so doing, one of them was charged under s. 188 of the Penal Code with disobeying the Deputy Magistrate's order, prohibiting the slaughter of kine in the village, and was sentenced to one month's imprisonment and a fine of Rs. 20.

On appeal from this conviction, the Judge, on the 19th March 1878, set aside the order, holding that there was no legal prohibition existing by virtue of any order made by the Deputy Magistrate forbidding the slaughter of kine.

From that time the Mahomedans continued to slaughter cattle as they had formerly done up to the 11th November 1878, when a Hindu inspector of police reported to the Magistrate that the Hindus and Mahomedans had agreed by *ikrarnama* to use a certain place, four miles off, for the purpose of slaughtering kine. On this report the Magistrate passed an order *ex parte* on the 21st November 1878, in these words: "Kine may be slaughtered on the land specified in the *ikrarnama*, and in no other place, and that to the above effect a public notification be issued."

Against this order the Mahomedans appealed, and after certain correspondence between the Judge and the Joint-Magistrate as regarded the jurisdiction of the Joint-Magistrate, the appeal was rejected.

The Mahomedans applied to the High Court under s. 296 of the Criminal Procedure Code to have the order set aside.

Moonshee *Mahomed Yusuf* and Moulvie *Serajul Islam* for the petitioners.—The Magistrate had no power to issue the order under s. 518 of the Criminal

¹ Criminal Motion, No. 75 of 1879, against the order of *T. D. Beighton, Esq.*, Joint-Magistrate of Midnapore, dated the 21st of November 1878.

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Procedure Code, no action having been taken before the cattle were slaughtered, so as to give jurisdiction to the Magistrate to direct the Mahomedans to abstain from slaughtering cattle. No breach of the peace was imminent, and it is only under cases of emergency that the Magistrate has power to pass an order under s. 518; at all events, he had no jurisdiction to pass an order under that section, that we should not slaughter cattle except in one particular spot.

Baboo *Mohiny Mohun Roy* and Baboo *Bhobany Churn Dutt* for the opposite party.

The judgments of the Court were as follows:—

AINSLIE, J.—The order of the Magistrate complained of is dated the 21st November 1878, and is in the following terms: "Kine may be slaughtered in the place named in the ikrarnama. They cannot be slaughtered in any other place. A notice to this effect will be issued by beat of drum."

This order does not, on its face, purport to be made under s. 518; nor does it determine that there was any emergency, which made it necessary for the Magistrate to resort to the provisions of that section. It is either an order under s. 518, or it is not. If it is not under that section, it does not appear that there is any law which authorized the Magistrate to make it, and no prosecution under s. 188 of the Penal Code could be maintained for disobedience of it. If it is taken to be made under s. 518, the order is bad, inasmuch as it deals with the civil rights of persons without any limitation of time.

The object of s. 518 is to enable a Magistrate, in cases of emergency, to make an immediate order for the purpose of preventing an imminent breach of the peace, &c.; but it is not intended to relieve him of the duty of making a proper enquiry into the circumstances which make it likely that such breach of the peace, &c., will occur. It is, therefore, incumbent on him to limit the operation of his order to such reasonable time as may be necessary to enable him to hold a full and sufficient enquiry, and, if necessary, to deal with the case under the other provisions of the Criminal Procedure Code, which enable him to meet cases of probable breach of the peace, &c. An order made under s. 518 is not bad, simply because it interferes with the legal rights of individuals; but when such interference is necessary, it is the duty of the Magistrate to limit it as much as possible; and for the purpose he should afterwards hold an enquiry into the circumstances, and determine whether, as a matter of fact, the act prohibited as likely to lead to a breach of the peace, &c., is within, or in excess of, the legal right of the person forbidden to do it. If it is found that a man is doing that which he is legally entitled to do, and that his neighbour chooses to take offence thereat, and to create a disturbance in consequence, it is clear that the duty of the Magistrate is, not to continue to deprive the first of the exercise of his legal right, but to restrain the second from illegally interfering with that exercise of legal rights.

I think, therefore, that, in the present instance, the order of the 21st November 1878 must be set aside as being either in excess of the power given by s. 518, or as being altogether in excess of the jurisdiction of the Magistrate.

BROUGHTON, J.—I entirely concur in what has fallen from my learned colleague. I would only add a word with reference to the objection raised, namely, that the subsequent correspondence of the Magistrate would have explained the nature of his order. It appears to me that, if the order does not, on the face of it, show that it was made with jurisdiction, no subsequent correspondence or explanation would make it a good order.

Order set aside.

APPELLATE CRIMINAL.

*Before Mr. Justice Ainslie and Mr. Justice Broughton.*IN THE MATTER OF DURJAN MAHTON AND OTHERS *v.* WAJID HOSSEIN
AND OTHERS.¹1879.
April 23.*Beng. Act VIII. of 1869, s. 53—Ejectment—Right to Standing Crops on land.*

5 Cal. 135.

The effect of an order of ejectment under s. 53 of the Rent Act is to dispossess the ryots, not only of the land, but also of the crop standing thereon, the object of such an ejectment being to terminate completely the connection between the parties as landlord and tenant.

IN September 1878, one Wajid Hossein and others obtained a decree for arrears of rent against Durjan Mahton and others, the decree containing a provision under s. 52 of the Rent Act for the ejectment of the tenants, in case of non-payment of the rent within fifteen days from the date of the decree. On the 7th November 1878 a writ of ejectment was issued, and on the 10th the decree-holders were put into possession. The ryots refused to allow the decree-holders to remove the crop, and the decree-holders therefore made an application to the Magistrate, stating in their petition that they were entitled to divide the crop with the ryots. The Deputy Magistrate, on the 12th December, without taking any evidence or issuing any notice to the ryots, directed the police to cut the crop and store it for "the persons who might be entitled to it." On the 28th December 1878 the decree-holders amended their petition and claimed the whole of the crop, and asked that proceedings might be taken against the ryots under s. 530 of the Criminal Procedure Code. The Magistrate cancelled his order of the 12th December, and ordered the police to see that no breach of the peace occurred. The crop had, however, been cut previously to the latter order. In January 1879 the ryots represented to the Deputy Magistrate that the decree referred to the land and not to the crop; and on this the Magistrate referred the matter to the police to enquire and report whether the decree for possession included the crop. The police reported their opinion that, when the land was decreed, the crop must go with it, and the Deputy Magistrate ordered the crop to be made over to the decree-holders.

The Sessions Judge, on the case coming up before him, was of opinion that the order of the Deputy Magistrate was illegal, inasmuch as, without taking evidence or issuing any notice, he had ordered the police to cut the crop, and made it over to the decree-holders on a report of the police; and he therefore referred the case to the High Court under s. 296 of the Criminal Procedure Code.

Moonshee *Mahomed Yusu*f appeared for Wajid Hossein.

No one appeared on the other side.

The opinion of the Court was delivered by

AINSLIE, J. (BROUGHTON, J., concurring), who, after stating the facts, continued:—The proceedings of the Deputy Magistrate have, no doubt, been very irregular, but it appears to us that the result arrived at is that which he must have arrived at if he had acted according to the law.

The dispute in this case arose in respect of certain property which admittedly was in the possession of the ryots up to a certain date; and which was claimed by Wajid Hossein and others as having been transferred to them by

¹ Criminal Reference, No. 137 of 1878, dated the 3rd April 1879, made by *J. M. Lewis, Esq., C.S.*, Sessions Judge of Bhagalpore.

1879.

IN THE
MATTER OF
BURJAN
MAHTON
v.
WAJID
HOSSEIN,
5 Cal. 135.

the execution of a decree for ejectment under the Rent Law on the 18th of November 1878. Both the parties refer to the same decree, one as showing his right to both crop and land, and the other as showing that the zemindars were entitled to the land only, and not to the crop. When, therefore, it became necessary for the Deputy Magistrate to consider what steps he should take to prevent any breach of the peace, it clearly was necessary for him to come to some determination as to the effect of the Munsif's decree, which both parties put forward as conclusively establishing their respective rights. If he was of opinion that the evidence before him showed that a breach of the peace was likely to occur, he would have to give effect to his decision in regard to the effect of the execution under the decree, by binding over the party whom he considered to be wrongfully putting forward a claim to the property, in recognizances not to commit a breach of the peace. The practical effect of the recognizance would, no doubt, have been, to give the crop to one or other of the contending parties.

Instead of making the order in this form, he unfortunately allowed the police to interfere with the cutting and carrying away of the crop, and having got it into his own custody it became necessary for him to get rid of it.

The order to cut the crop, and subsequently to make it over to one of the parties, was not an order warranted by the Code of Criminal Procedure, but the effect of it was the same as if he had bound down the ryots under s. 491, or restrained them from interfering with the crop under s. 518.

The Judge is of opinion that in this case the Deputy Magistrate has encroached upon the functions of the Civil Courts, and that he has, instead of allowing the Civil Court to execute its own decree, proceeded to execute it after consulting with the police. This, in our opinion, is not quite a correct statement of what occurred. However irregular the proceedings of the Deputy Magistrate may have been in form, it clearly was necessary for him to come to a decision as to the effect of the decree of the Civil Court. The steps he took for arriving at that decision were, however, improper. If he had any doubt as to the intention of the Court executing the decree, the proper course for him was to consult the Court itself, and not to make enquiries as to the effect of the execution of the decree from the police. But, although his mode of arriving at that conclusion was not correct, it appears to us that the conclusion arrived at, so far as we are able to come to any determination on the point in the exercise of criminal jurisdiction, was correct. We are not aware that the question as to the effect of an ejectment order under s. 53 of the Rent Law has yet been considered on the civil side of the Court. But, looking at the provisions of the Act itself, it seems to us that the conclusion arrived at by the Deputy Magistrate, that the effect of an ejectment under the Rent Law is to dispossess the ryot not only of the land but also of the crop standing thereon, was a reasonable one. The object of that ejectment is to completely terminate the connection between the parties as landlord and tenant. The ejectment is in itself by way of penalty for non-payment of the rent of previous years, and the provisions of s. 54 of the Rent Law are extremely stringent.

That section does not allow the Court executing the decree to entertain any application for stay of execution, and it does not allow any person evicted under an ejectment order to be restored to possession at all unless the decree shall be reversed.

We are, therefore, of opinion that the conclusion at which the Deputy Magistrate arrived, as to the effect of the ejectment order, was a correct one; and that he would have been perfectly justified in taking steps, under the provisions

of the Criminal Procedure Code, for protecting the decree-holders from violence, when they proceeded to enforce their claim to the crop standing on the land from which the ryots had been ejected.

With reference to the explanation of the Deputy Magistrate, dated the 3rd of April 1879, in which he says that he is not aware that there is any particular section of the law applicable to his action, we would observe that, if the law did not allow him to act in the way in which he did, his action clearly was illegal. He was bound to follow the provisions of the law, which, properly applied, are sufficient for providing against a breach of the peace. In support of his view, that, in the absence of any special law, he was justified in acting on his own discretion, Mr. Hampton says that "there is no section of the law authorizing return of stolen property recovered to the man robbed, yet it is in reason that the property should be so returned." Mr. Hampton has apparently overlooked the provisions of s. 418 of the Code. That section clearly provides for the case which he supposes to be left not provided for.

1879.

IN THE
MATTER OF
DURJAN
MANTON
vs.
WAJID
HOSSEIN,
5 Cal. 135.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

BHOKTERAM (COMPLAINANT) v. HEERA KOLITA (ACCUSED).¹

Penal Code (Act XLV. of 1860), ss. 182, 211—Preliminary Enquiry—Act X. of 1872, s. 471.

1879.

April 26.

5 Cal. 184.

An offence under s. 211 of the Penal Code includes an offence under s. 182; it is, therefore, open to a Magistrate to proceed under either section, although, in cases of a more serious nature, it may be that the proper course is to proceed under s. 211; see *Ruffee Mahomed v. Abbas Khan*.²

REFERENCE to the High Court under s. 296 of Act X. of 1872.

One Heera brought a charge of theft against Bhokteram at the police-thanna. The police, after investigation, reported the case to be false. Thereupon Bhokteram instituted before the Assistant Commissioner a charge against Heera under s. 211 of the Penal Code.

The Assistant Commissioner, without first giving Heera an opportunity of proving his case against Bhokteram in Court, if he wished to do so, placed him on his trial on a charge under s. 182; and after a summary trial convicted him, and sentenced him to three months' rigorous imprisonment. The District Judge, on the case coming up before him, at the request of the prisoner, referred the case to the High Court, there being no appeal from the Assistant Commissioner's decision. He was of opinion that the proceedings of the Assistant Commissioner should be quashed, inasmuch as the prisoner had been tried summarily on a charge different from that which the complainant had brought against him; and because, it was, in his opinion, illegal to put the prisoner on his trial without giving him an opportunity of proving that Bhokteram had in reality committed the theft charged against him.

No one appeared to argue the case.

The opinion of the Court was delivered by

AINSLIE, J., (BROUGHTON, J., concurring).—The prisoner in this case laid information at the police-thanna against Sadheram, Bhokteram, and two

¹ Criminal Reference, No. 16 of 1879, made by *W. E. Ward, Esq., C.S.*, Judge of the Assam Valley Districts, dated the 10th April 1879.

² 8 W. R. Crim. 67.

1879. others, stating that he suspected them of committing a robbery in his house. The police-officer investigated the case, and, being of opinion that the information was false, so reported to the Assistant Commissioner. The Assistant Commissioner on the report passed an order of dismissal, purporting to do so under s. 147 of the Criminal Procedure Code. This the Assistant Commissioner should not have done; no complaint had been made to him by the present prisoner, nor could the report of the police-officer be regarded as a complaint for this purpose, for he had reported that the information was false. Bhokteram then applied to the Assistant Commissioner for leave to prosecute the prisoner under s. 211 of the Indian Penal Code.

BHOKTERAM
v.
HEERA
KOLITA,
5 Cal. 184.

No such leave or sanction was necessary: the offence, if there was one, was not committed before any Court; see s. 468 of the Criminal Procedure Code, and the case of the *Government of Bengal v. Gokool Chunder Chowdry*,¹ and *Ram Runjan Bhandari v. Madhub Ghose*.² The Assistant Commissioner did not accord or withhold sanction, but referred the case to the Deputy Commissioner, a course equally unnecessary for a prosecution under s. 211.

The Deputy Commissioner said that "If the Assistant Commissioner is satisfied that Heera gave false information to the police, intending to injure Bhokteram, he can, on Bhokteram's application, try the case under s. 182, Penal Code."

As no authority from the Deputy Commissioner was required in order that the prosecution might proceed under s. 211, this must be regarded either as a mere piece of advice, which, however, the Assistant Commissioner was right to ask if he felt any difficulty, and the Deputy Commissioner was right to give, or as a sanction under s. 467, which requires the sanction of the official superior of the public servant, against whom an offence under s. 182 has been committed. The document may be read in two ways. Either that the application of Bhokteram for sanction to prosecute was sufficient to enable the Assistant Commissioner to proceed and try the case under s. 182, Penal Code, or that, if Bhokteram made another application, *i.e.*, a complaint, the Assistant Commissioner might safely proceed to try the case under that section.

The Assistant Commissioner seems to have read it in the former sense. He issued a summons to Heera to take his trial under s. 182, Penal Code, and directed the police to produce the necessary evidence. Bhokteram appeared and gave evidence, and the prisoner was convicted and sentenced to three months' rigorous imprisonment under s. 182, Penal Code.

Bhokteram does not complain now that he was not allowed to go on with his prosecution under s. 211. But the prisoner, there being no appeal, applied to the Sessions Judge to refer the case to the High Court on two grounds: (i) that he ought to have been tried under s. 211, and not under s. 182, Penal Code; (ii) because it was illegal to put him on his trial without giving him an opportunity of proving his case,—*i.e.*, that there really was a theft in his house, and that Bhokteram and Shadiram and the others were *bond fide* suspected of the theft; and the Sessions Judge thinks that there ought to have been a preliminary enquiry.

With regard to the first question, the offence under s. 211 includes an offence under s. 182, and there was no reason why, in a case of this nature, proceedings should not be taken under either section, although it may be that in cases of a more serious nature the proper course would be to proceed under s. 211.

¹ 24 W. R. Crim. 41.

² 25 W. R. Crim. 33.

The case of *Raffae Mahomed v. Abbas Khan*¹ was such a case ; it could not be dealt with by a Magistrate.

With regard to the second objection, s. 471 directs that there shall be a preliminary enquiry before any person can be committed for trial by the Court itself, or sent by the Court to a Magistrate, the object of such an enquiry being that the Court may be satisfied that there are good grounds for believing that the offence has been committed. When the prosecution is not undertaken by the Court itself, the power entrusted to the Court, or to the superior officer of the public servant, is intended to be used for the purpose of preventing persons having business before Courts or public officers, from being harassed by vexatious and groundless prosecutions ; and that power is to be exercised by giving or withholding sanction. Here the superior officer has given sanction to the prosecution, and although the " Court " and the superior officer to the public servant may be in some cases one and the same person, it is only when the case arises out of proceedings before him sitting as a Court, civil or criminal, that s. 471 can apply.

It follows, therefore, that we do not think that we ought to interfere on the ground put forward by the Sessions Judge. But as we have the record before us, and observe that the prisoner Heera has been convicted, on what appears to us to be no evidence whatever, except the bare statement of the person originally accused, we think that the conviction ought to be set aside on that ground under the provisions of s. 297 of the Criminal Procedure Code.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

IN THE MATTER OF THE MAHARAJA OF BURDWAN (PETITIONER) v. THE
CHAIRMAN OF THE DARJEELING MUNICIPALITY
(OPPOSITE PARTY).²

1879.

April 17.

5 Cal. 194.

Right of Way—Criminal Procedure Code (Act X. of 1872), s. 532.

Gates having been placed at one end of a private road by a person claiming to be its sole proprietor, with the intention of preventing the use of such private road by the public between the hours of sunset and sunrise, and the Deputy Commissioner of Darjeeling, acting for the public, having obtained from the Magistrate an order under s. 532 of the Criminal Procedure Code " that possession of the private road be not taken by the person claiming to be proprietor to the exclusion of the public . . . until he shall have obtained the decision of a competent Civil Court adjudging him to be entitled to exclusive possession : "

Held that, there being no evidence of any one having exercised or claimed to exercise the right of passing over the road between sunset and sunrise, there was no dispute under s. 532 of the Criminal Procedure Code ; and that the order of the Magistrate was made without authority, and must be set aside.

S. 532 does not enable a Magistrate to make a purely declaratory order. It only enables him to prevent arbitrary interruptions by any person of rights actually enjoyed, which have been exercised by the public or a person or class of persons.

Mr. Woodroffe (with him Mr. Sale) and Baboo Bhowany Churn Bose for the petitioner.

Mr. Phillips (Standing Counsel) and Baboo Romesh Chunder Mitter for the opposite party.

¹ 8 W. R. Crim. 67.

² Criminal Motion, No. 73 of 1879, against the order of L. C. Abbott, Esq., Magistrate of Darjeeling, dated the 20th January 1879.

1879.

IN THE
MATTER OF
THE
MAHARAJA
OF
BURDWAN
v.
THE
CHAIRMAN
OF THE
DARJEELING
MUNICI-
PALITY,
5 Cal. 194.

THE facts of this case sufficiently appear from the judgment of the Court, which was delivered by

JACKSON, J. (McDONELL, J., concurring).—This case comes before us upon a petition of the Maharaja of Burdwan. He complains of an order passed by Mr. Abbott, Assistant Commissioner, with powers of a Magistrate, at Darjeeling, under s. 532 of the Code of Criminal Procedure. The subject to which this order related was a road, which apparently passes over the ground of the Maharaja, and is claimed by the Maharaja as being his private road, and is not shown to have been in any sense belonging to or maintained by the public; but it is one over which it may be said the public have a limited right of way.

It seems that Major Lewis, who was the Deputy Commissioner of Darjeeling, in the course of his inspection of the station-roads, observed this road with gates or gate-posts at one end of it, and it struck him that the road was, or ought to be, a public thoroughfare. He, thereupon, consulted with the Municipal Commissioners, and the result was that they authorized him to move in the matter, and, if necessary, take proceedings to establish the supposed right of way. Thereupon, Major Lewis, in his capacity of Deputy Commissioner, instituted proceedings, and referred them for hearing and trial to Mr. Abbott; and Mr. Abbott passed the order which is now complained of, *viz.*, that "possession of the road running along the Jhara from the block gates on the cart road to the block gates on Victoria road, and lying between these gates, be not taken by the Maharaja of Burdwan to the exclusion of the public and inhabitants of the Darjeeling Municipality, until he shall have obtained the decision of a competent Civil Court adjudging him to be entitled to exclusive possession."

When this rule was obtained, our attention was called to the fact that the Magistrate, who decided the case, was himself the Vice-Chairman of the Municipality, and some comment was made on the position which he and Major Lewis occupied, being in part that of prosecutors and in part Judges in the matter. But we find that, irrespective of the necessity for such plurality of offices, which, no doubt, occasionally arises, and which leads to Magistrates' occupying a somewhat anomalous position in such proceedings, there really was no valid objection to Mr. Abbott's deciding this case, because it appears that he took no part in those deliberations of the Municipality out of which these proceedings arose.

But a more serious question remains as to the authority of the Magistrate to make such order, and the propriety of that order.

The terms of s. 532 do, no doubt, differ from those of s. 530 in that the dispute from which these proceedings are supposed to spring, is not described as a dispute likely to induce a breach of the peace, and the learned Standing Counsel, who argued this case with great fairness and ability for the Municipality, is in a manner forced to contend that the dispute described in s. 532 may mean a dispute of any kind, being simply a claim made and denied, or a claim resisted, and he is unable, upon a question put to him, to suggest any limit at which the authority of the Magistrate to enquire into such disputes should stop.

It appears to us that, without going so far as to say that the dispute, which enables Magistrates to interfere under this section, must be a dispute likely to induce a breach of the peace, it must, at any rate, be some substantial dispute necessitating the interference in some way or other of the criminal authorities. It would not be sufficient that there should be a mere discussion or verbal altercation between persons claiming rights of the kind described. There must be an actual dispute.

Now, in this case it is clear there was no dispute between the Maharaja and any person until the head of the Municipality, who was himself the Magistrate, *proprio motu*, and, I may say, in a purely speculative way, took up the question whether there ought, or ought not, to be a public thoroughfare over this road. The evidence shows that no person had ever been obstructed, no person ever set up any claim to pass over this road otherwise than every one had hitherto been allowed to pass unobstructed over it. Certain correspondence passed between the Magistrate and Mr. Miller, the Maharaja's agent, and the question which arose in the correspondence related to a right which, so far as the evidence goes, had never been exercised, and never in practice claimed, *viz.*, that of passing over the road during the hours between sunset and sunrise. Now, this not being a question of public thoroughfare, but a right of way, it is obvious that a right of a limited kind might very well grow up, and I think the owner of the ground over which such a right of way existed would be perfectly justified in taking, and would be wise to take, precautions that the existing right should not be enlarged. Therefore, this so-called dispute being merely of a speculative kind, even if the Maharaja, on being applied to, declared his intention to prevent the right of way going beyond the mode in which it had hitherto been exercised, that did not constitute any dispute such as the Magistrate was entitled to take action upon.

But, in addition to that, it appears to me that the case was not one in which the Magistrate had authority to make any order, because the section does not enable a Magistrate to make a purely declaratory order. It only enables him to prevent arbitrary interruption by any person of rights actually enjoyed, which have been exercised by the public or a person or class of persons. The only right in question here was, a right of using this road during the night. There is no evidence whatever to show that any person had ever exercised, or claimed to exercise, the right of passing over this road during the night. As I said before, it is quite conceivable that there should be a limited right of way—that is to say, a right of passing over the road by day and not by night, and the evidence shows that that restricted kind of right has never been interfered with. This was not, therefore, a case in which the Magistrate was entitled to interfere. I think his order in this case was made without authority, and must be set aside.

The Deputy Commissioner, when examined in this case, stated very ingeniously, as it seems to me, that the reason why proceedings were taken in this particular form was, that the result would be to throw upon the Maharaja the costs of being plaintiff in the civil suit, which it might be necessary to bring. That, of course, where the contending parties are both private individuals, is a very natural and justifiable course. But the propriety of it is not very clear where one of the parties is the Magistrate himself, in which case the conclusion in the Criminal Court may be said, without any imputation on the presiding officer, to have been somewhat of a foregone conclusion.

Order set aside.

1879.

IN THE
MATTER OF
THE
MAHARAJA
OF
BURDWAN
v.
THE
CHAIRMAN
OF THE
DARJEELING
MUNICI-
PALITY,
5 Cal. 194.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

1879.

ASHROF ALI AND ANOTHER (PRISONERS) *v.* THE EMPRESS (RESPONDENT).¹*June 24.**False Charge—Penal Code, ss. 211 & 109—Charge laid before Police-officer.*

5 Cal. 281.

There is nothing in s. 211 of the Penal Code which limits the penalty there imposed to cases in which attempts have been made to substantiate false charges in a Court of Justice.

A false charge made before the police is therefore punishable under this section.

On the 16th November 1878, one Ashrof Ali preferred a charge at the police-station, against one Batai, of stealing money from a box which belonged to him, but which had been placed in a room occupied by one Gulzar Khan. Gulzar Khan accompanied Ashrof Ali to the police-station, and the charge was made on the authority of what Gulzar told Ashrof. The case was enquired into and reported to the Joint-Magistrate, who on the report found that the charge was false, and ordered that Ashrof and Gulzar should be committed for concocting a false charge. This was done, and Ashrof and Gulzar were charged, the former under s. 211 of the Penal Code, and the latter with abetment of the same offence; and the result was that the Sessions Judge convicted Ashrof under s. 211 of the Penal Code, and Gulzar, under s. 109 of the Penal Code, for the abetment of an offence under s. 211, and sentenced them to three years' rigorous imprisonment.

The prisoners appealed to the High Court.

Mr. R. E. Twidale, for the appellants, contended that the conviction and sentence were bad, inasmuch as the original complaint made by Ashrof and Gulzar had not been tried, nor had any order of dismissal been recorded; and that in any case the sentence passed was too severe.

The judgment of the Court was delivered by

MITTER, J. (TOTTENHAM, J., concurring).—On behalf of the appellants a question of law has been raised before us. It has been contended that the whole proceedings in this case are illegal, because the appellants were allowed no opportunity to substantiate their charge in any Criminal Court. In support of this contention several decisions of this Court have been cited before us. These cases seem to us to be distinguishable. In all these cases proceedings were commenced by the accused person in a Court. It has been held in these cases that no sanction should have been given for a prosecution against him under s. 211 of the Indian Penal Code without giving him the full opportunity of substantiating his charge. In this case no formal complaint was made by the appellants before any Criminal Court. The charge of theft was made to a police-officer who reported it to be false. The appellants did not renew this charge before any Criminal Court. We do not think that there is any force in the contention raised before us, and that the decisions relied upon do not lend any support to it.

Nor is there anything in s. 211 of the Code limiting the penalty to cases in which attempts have been made to substantiate false charges in Courts of Justice. A false charge laid before the police, and never intended to be prosecuted in Court, may obviously subject the accused party to very substantial injury, as defined in s. 44 of the Penal Code.

¹ Criminal Appeals, Nos. 326 and 304 of 1879, against the order of J. B. Worgan, Esq., Sessions Judge of Sarun, dated the 22nd of April 1879.

We therefore affirm the conviction of both the prisoners; but, considering that the sentence of three years' rigorous imprisonment is, under the circumstances, unnecessarily severe, we reduce the term to eighteen months in the case of each of the appellants.

Appeal dismissed.

1879.
ASHROF ALI
v.
EMPRESS,
5 Cal. 281.

APPELLATE CRIMINAL.

Before Mr. Justice McDonell and Mr. Justice Broughton.

THE EMPRESS v. GONESH DOOLEY AND GOPI DOOLEY (ACCUSED).¹

Indian Penal Code, ss. 304, 304A—Culpable Homicide—Causing Death by Negligence.

1879.
July 28.
5 Cal. 351.

A snake-charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted; and to show his own skill and dexterity, but without any intention to cause harm to any one, placed the snake on the head of one of the spectators; the spectator tried to push off the snake, was bitten, and died in consequence.

Held, the snake-charmer was guilty, under s. 304 of the Penal Code, of culpable homicide not amounting to murder, and not merely of causing death by negligence, an offence punishable under s. 304A.

*The Queen v. Poonai Fattemah*² distinguished.

IN this case, Gonesh and Gopi, two snake-charmers, having caught a venomous snake, a cobra, proceeded, a few days afterwards, to exhibit it in a public place, before a crowd, among whom was a boy named Brojo. Gonesh appears to have selected Brojo as a suitable person to help him in showing off his dexterity with the snake, whose fangs had not been extracted. In the course of the exhibition, Gonesh put the snake on the boy's head. The boy took fright, either because the snake fell upon his shoulder, or for some other reason, and, in trying to push away the snake, was bitten in the hand, and died shortly afterwards. Under these circumstances, both Gonesh and Gopi were charged with murder, culpable homicide not amounting to murder, and with causing death by negligence, offences punishable under ss. 302, 304, and 304A of the Indian Penal Code.

The jury were of opinion that exhibitions of this description by snake-charmers were warranted by custom; that there was no intention on the part of the prisoners or either of them to kill the boy; and that his death was purely the result of an accident, and accordingly acquitted the prisoners.

The Sessions Judge, differing from the jury, thought that the case fell under s. 304A, as the accused persons, being by profession snake-charmers, were perfectly well aware of the deadly nature of the snake, and that it was, therefore, an act of the grossest negligence on their part to expose the boy and the spectators to the risk which was necessarily incurred by every one near whom a poisonous snake was set at large.

On the case being referred to the High Court under s. 263 of the Criminal Procedure Code, the following order was made by

MCDONELL, J.—The Officiating Additional Judge of the 24-Parganas, differing from the jury, has referred this case to the High Court under s. 263

¹ Criminal Reference, No. 204 of 1879, from an order made by *W. H. Verner, Esq.*, Officiating Additional Sessions Judge of the 24-Parganas, dated the 28th June 1879.

² 12 W. R., Crim. Rul., 7.

1879.

EMERSON

?

GONESH

DOOLEY

AND GOPI

DOOLEY,

5 Cal. 351.

of the Code of Criminal Procedure. (His Lordship stated the facts of the case and continued): We think that the offence committed by the prisoner Gonesh was an offence under s. 304 of the Indian Penal Code. He did not intentionally cause the boy's death; nor did he, knowing that the act was "so imminently dangerous that it must, in all probability, cause death," put the snake upon the boy.

The case of *The Queen v. Poonai Fattemah*,¹ put by the prosecution, and referred to by the Judge in the charge, was one in which the prisoner actually caused the snake to bite the person who was killed. It differs, as the Judge remarks, materially from the present case, because then there was clearly the knowledge of imminent danger that must in all probability cause death.

The Judge, in referring the case, was of opinion that the prisoner should be punished under s. 304A, but this section does not apply to the present case, in that, for the reasons stated above, we consider that the "rash act" did amount to culpable homicide.

We think it may be said in this case that Gonesh did not think that the snake would bite the boy. But we think that the act was done with the knowledge that it was likely to cause death, but without the intention of causing death. We think Gonesh should be sentenced to three years' rigorous imprisonment. Gopi, we think, abetted Gonesh, and is punishable under ss. 114 and 304, Indian Penal Code; but, as he took a less active part in the matter, he should be rigorously imprisoned for one year only. We sentence the prisoners accordingly.

Verdict set aside.

REVISIONAL CRIMINAL.

Before Mr. Justice Wilson.

IN THE MATTER OF TOKEE BIBEE v. ABDPOOL KHAN.

1879.

Nov. 27,
& Dec. 18.

5 Cal. 536.

Insolvent Act (11 and 12 Vic., cap. 11), s. 12—Arrears of Maintenance—"Debt or Liability"—Protection Order—Arrest of Insolvent—Presidency Magistrates' Act (Act IV. of 1877), s. 234.

Arrears of maintenance, included in the schedule filed by an insolvent, are a debt or liability within the meaning of s. 13 of the Insolvent Act (11 and 12 Vic., cap. 21); and an insolvent, who has obtained a protection-order, is not liable for arrest or imprisonment in respect of such.

Quære.—Whether the protection-order protects the insolvent from proceedings in respect of any maintenance accruing subsequently to the filing of the schedule?

IN 1878, Tokee Bibee, the wife of Abdool Khan, instituted proceedings against him for maintenance under the Presidency Magistrates' Act (IV. of 1877), and by an order of the 5th June 1878 he was ordered to pay her Rs. 15 a month. On the 10th May 1879, Abdool Khan filed his petition in insolvency, and the usual vesting order was made. On the 10th June, he filed his schedule. At that time there were arrears of maintenance due, including the amounts payable in April and May, and these arrears were inserted in the schedule. On the 1st July, the insolvent applied for *ad interim* protection, and the hearing was adjourned till the 12th August, with protection in the meantime. On the 12th August, he applied for his personal discharge, and the hearing

¹ 12 W. R., Crim. Rul., 7.

was adjourned for six months, with protection in the meantime. On the 3rd July, the wife commenced proceedings before the Magistrate, under s. 234 of the Presidency Magistrates' Act, to enforce payment of the April and May arrears of maintenance. The insolvency proceedings were brought before the Magistrate. He was of opinion that they were not a bar to his making an order under the section just mentioned, and, on the 27th August, he made an order that Abdool Khan should deposit in Court the April and May arrears, or undergo rigorous imprisonment for a fortnight in default. This was the order complained of. A rule was obtained by the insolvent calling upon the Magistrate to show cause why the proceedings should not be removed into the High Court, and the order complained of quashed.

The *Advocate-General* (the Hon'ble G. C. Paul), with him Mr. J. D. Ball, showed cause.

Mr. Trevelyan in support of the rule.

The *Advocate-General*.—It is contended that, under the Insolvent Act, the prisoner is precluded from arrest in respect of this debt. S. 13 gives the Court power to grant an *ad interim* order for protection of an insolvent from arrest, and any such *interim* order may apply, either to all the debts or liabilities mentioned in his schedule, or to any of them, and it protects the person to whom it is given from being arrested or detained in prison for any debt or liability to which such order applies. In order to determine what is meant by the words "debt or liability" in the section, it is necessary to consider ss. 47, 61, and 62. S. 47 enables the Court to give an insolvent his personal discharge, and he is then protected from arrest in respect of all "demands" inserted in his schedule. It also enables the Court to remand the insolvent to prison for any "debt or demand." S. 61 gives the Court power to stay proceedings in respect of any "debt, claim, or demand" from which the insolvent shall have been discharged; and s. 62 excepts debts due to the sovereign, fines, penalties, or forfeitures from the operation of the Act. Ss. 13, 47, and 61, refer only to what may be called "civil liabilities," and the order of the Magistrate is not one in respect of a "debt or liability" within the meaning of those sections. This is such a default in the payment of money as would render a person liable to imprisonment in England. By the English Debtors' Act, 32 and 33 Vic., cap. 62, s. 4, any person may be imprisoned for making default in payment of any sum recoverable summarily before a Justice or Justices of the Peace. The prisoner has disobeyed the order of a competent Court, and is liable to imprisonment—*Harvey v. Hall*.¹ That was a case under the English Debtors' Act. In *Hewitt v. Sherwin*,² James, L. J., said: "It seems to me that, where a Court of competent jurisdiction has ordered a man to pay a sum of money, whether in the shape of costs, or anything else, that is a debt due from him in pursuance of an order or judgment of the Court which is a competent Court to make the order. It seems to me to be a play upon words to say that a debt arising *ex contractu*, and a debt arising in respect of costs, differ in any way from one another. There is an order of the Court directing a sum of money to be paid, and that is a debt under the order. I was first struck by Mr. Fry's suggestion, that 'default in payment' was put in contradistinction to 'debt' in the Act; but that suggestion seems excluded by the language I find in the very same section in another sub-division of it. The words there are, 'may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may, from time to time, vary or re-

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¹ L. R., 11 Eq. 31.

² L. R., 10 Eq. 53.

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scind such order.' In that case it is clear that debt is spoken of as a debt, which becomes due from a person by reason of an order or judgment of the Court. It seems to me to be clearly within the Act, and I see no good reason why it should not be." Taking s. 13 of the Insolvent Act by itself, the words "debt or liability" are wide enough to include such an order as this, but the other sections clearly refer to civil liabilities only. An order to pay money in a criminal case is in the nature of a penalty, not of a debt, and non-payment of the money is a contempt of Court—*Martin v. Lawrence*.¹ It is against the policy of the insolvent law to allow the prisoner to be discharged in such a case as this, and the Court should uphold the Magistrate's order.

Mr. Trevelyan.—The cases in England respecting alimony, when the husband is an uncertificated bankrupt, or an insolvent debtor, are analogous to this—*Browne on Divorce*, 134. A bankrupt, who has obtained an order of discharge under the Bankruptcy Act, 1861,² is thereby protected from any proceeding to enforce the payment of alimony for the non-payment of which he has been attached before the order of discharge; and a sequestration against his estate for such alimony will not, therefore, be granted—*Dickens v. Dickens*.³ This is merely a civil process for compelling the payment of money, exercised by the Police Court for the sake of convenience. No offence has been committed. This is not the case of a fine due to the Crown so as to be excepted under s. 62 of the Insolvent Act—*Egginton's case*,⁴ the question in which arose under the Lord's Day Act. 29 Car. II., cap. 7, s. 6, shows the difference between a civil and a criminal process. The process for recovering arrears of maintenance under the Presidency Magistrates' Act is really an action. The wife cannot sue in this Court or in the Small Cause Court, but the legislature provides a special means for recovering arrears due to her. The question is, whether the non-payment is a criminal offence. No fine is inflicted. The Act provides that a certain sum ordered to be paid shall be levied in a particular way. The Magistrate merely orders the payment of a sum already ordered to be paid. The case is like that of proceedings for non-payment of poor-rates in England. There it has been held that the liability to pay poor-rates is a civil and not a criminal liability—*Reg. v. The Governor of Whitecross Street Prison*,⁵ see also Archbald on Bankruptcy, Edn. 1860, Vol. II., p. 207. [WILSON, J.—It has been decided in England that bastardy proceedings are civil, not criminal, proceedings—*Reg. v. Fletcher*.⁶] The case of *Bancroft v. Mitchell*⁷ is apparently an authority against me; but there the Court had a power to inflict a penalty for non-payment; here there is no such power.

WILSON, J.—This was an application under s. 147 of the High Courts' Criminal Procedure Act⁸ to transfer to this Court a proceeding before a Presidency Magistrate for the purpose of quashing an order made therein. (His Lordship then stated the facts of the case as above, and proceeded as follows):—The section under which maintenance may be ordered (s. 234 of the Presidency Magistrates' Act) is as follows:—

"If any person, having sufficient means, neglects or refuses to maintain his wife, or legitimate or illegitimate child unable to maintain itself, a Presidency Magistrate may, upon due proof thereof by evidence, order such person to make a monthly allowance for the maintenance of his said wife, or child, or

¹ 1 L. R., 4 Cal. 655.

² 24 & 25 Vic., c. 134.

³ 31 L. J., P., and M., 183.

⁴ 2 E. and B. 717.

⁵ 6 B. and S. 376, 391.

⁶ L. R., 1 C. C. R. 320.

⁷ L. R., 2 Q. B. 549.

⁸ Act X. of 1875.

both, at such monthly rate, not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

"Such allowance shall be payable from the date of the order.

"If any person so ordered wilfully neglects to comply with the order, a Presidency Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines; and may sentence such person, for each month's allowance remaining unpaid, to imprisonment for any term not exceeding one month.

"Provided that, if such person offers to maintain his wife on condition of her being with him, and his wife refuses to live with him, such Magistrate may consider any grounds of refusal stated by such wife, and may make the order allowed by the section notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

"No wife shall be entitled to receive an allowance from her husband under the section, if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

The section under which *ad interim* protection is granted is s. 13 of the Insolvent Act (11 and 12 Vic., cap. 21). It is as follows:—

"And be it enacted that in any case when a petition shall have been presented by an insolvent debtor as aforesaid, or an act of insolvency shall have been adjudged to have been committed as aforesaid, it shall be lawful for the said Court, after the filing of the schedule required by this Act, if under the circumstances it shall appear proper, to make an *interim* order for the protection of the insolvent from arrest, and any such *interim* order may apply either to all the debts or liabilities mentioned in the schedule, or to any of them, as the Court may think proper, and may commence and take effect at such time as the Court shall direct; and any such order may be recalled and may be renewed as to the Court may appear proper; and any such order, when so made, shall protect the person to whom it shall be given from being arrested or detained in prison for any debt or liability to which such order shall apply within the limits of the Town of Calcutta, Madras, and Bombay, respectively, or any other place within the territories under the Government of the East India Company; and any person arrested or detained, contrary to the tenor and effect of any such order, shall be entitled to his discharge out of custody upon application to any Court or Judge which or who shall have power to set at large any person illegally detained in custody under the process by virtue of which such person shall have been arrested or be so detained: Provided always that no such order shall operate as a release or satisfaction of the debt or demand of any creditor, nor prejudice the right of any such creditor to arrest the insolvent, whether he shall or not have been previously arrested for the same debt or demand, in case the order shall be recalled or shall fall by reason of the petition of the insolvent being dismissed or the adjudication being reversed."

The Advocate-General argued that, in determining what is a "debt or liability" under this section, we must look forward to the later sections dealing with final discharge, namely:—s. 47, which, instead of "debt or liability," uses the words "demand" and "debt or demand;" s. 61, which again changes that

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phrase to "debt, claim, or demand;" and s. 62, which excepts certain matters from the operation of the Act.

It could hardly be seriously contended that s. 62 applies; maintenance ordered to be paid is not a fine, penalty, or forfeiture.

But it was said the language of ss. 13, 47, and 61, points to matters purely civil, not to anything of a criminal character, and the liability now in question is a criminal liability. Two grounds were given for saying that the liability is a criminal one:—*first*, because the whole proceedings are before a Criminal Court: *secondly*, because non-payment of maintenance may be punished with rigorous imprisonment. Now, the precise liability in question is the liability to pay sums of money which have become payable under an order for maintenance. That is *prima facie* a purely civil liability, and a debt or liability, or claim or demand, within the meaning of the Insolvent Act. The fact that the debt is created and may be enforced by a Criminal Court cannot affect the matter. Many purely civil rights are, for convenience' sake, made enforceable in Criminal Courts. Nor, in my opinion, does the fact that penal consequences have been attached to the non-payment of a debt make it less a debt.

Bastardy proceedings before Justices have been held in England to be civil, not criminal, proceedings—*Reg. v. Barry*; ¹*Reg. v. Fletcher*.² And this case is very similar.

I think that arrears of maintenance included in the schedule are a debt or liability within the meaning of s. 13 of the Insolvent Act; that the protection-order protected the insolvent from arrest or imprisonment in respect of it. The proceedings will, therefore, be removed into this Court, and the Magistrate's order quashed.

I say nothing as to the effect of the insolvency-proceedings upon any maintenance accruing subsequently to that in the schedule. And of course there is nothing in this decision to interfere with the Magistrate's discretion under s. 235 of the Presidency Magistrates' Act.

Rule absolute.

Attorneys for the Government: Messrs. Sanderson & Co.

Attorney for the Insolvent: Baboo G. C. Ghose.

CRIMINAL REFERENCE.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

1879.
Aug. 13.
5 Cal. 558.
ABDUR ROHOMAN AND OTHERS (PETITIONERS) v. SAKHINA AND OTHERS
(RESPONDENTS).³
SOBHAN v. SHUBRATON.
OSSUFF v. SHAMA.

Presidency Magistrates' Act (IV. of 1877), ss. 234, 235—Maintenance—Effect of Divorce on Maintenance Order.

A Presidency Magistrate is competent to stay an order for maintenance granted under s. 234 of Act IV. of 1877, and to refuse to issue his warrant under the 3rd clause of that

¹ 28 L. J., M. C., 86.

² L. R., 1 C. C. R. 320.

³ Criminal Reference, No. 178 of 1879, made by Messrs. Amir Ali and Anderson Solicitor, Officiating Chief and Officiating Presidency Magistrates of the Calcutta Police, dated the 30th July 1879.

section, and to try all questions raised before him which affect the right of a woman to receive maintenance. There can be no distinction raised between a dissolution of marriage obtained under the Indian Divorce Act and a dissolution obtained under the Mahomedan law. It is only on proof of the existence of the relationship of husband and wife that a Magistrate can make an order under s. 234 granting maintenance to a wife; but where proof has been given that such relationship has ceased to exist, he may stay an order already made under that section.

THIS was a reference made by the Presidency Magistrates of Calcutta under s. 240 of Act IV. of 1877.

It appeared that, on the 28th July 1879, the Presidency Magistrates of Calcutta (Mr. Amir Ali and Mr. A. Souttar), sitting together, passed an order dismissing certain applications to set aside orders of maintenance granted against certain Mahomedans in favour of their wives, the applications being grounded on the fact that the husbands in question had legally divorced their wives under the Mahomedan law.

Such order, however, was made subject to the opinion of the High Court on the points mentioned in the words of the order of reference, which ran as follows :—

“Several applications have been made to us recently for setting aside certain orders made by us under s. 234 of Act IV. of 1877 (The Presidency Magistrates’ Act), on the ground that, since the date of these orders, the petitioners have divorced their wives in whose favour such orders were made. The practice in these Courts has hitherto been to dismiss such applications summarily, but, in view of the importance of the question involved, we allowed the parties to argue the points before us. The applications are made under s. 235 of the Act, which provides ‘that, on proof of an alteration in the circumstances of the parties, the Magistrate may alter the amount ordered.’ Looking to the wording of this section, and taking it in connection with s. 30 of Beng. Act IV. of 1866, for which it is substituted, we have held that we had no power under that section to cancel our orders on the ground of divorce. It has been also contended before us that, as the Mahomedan law allowed a husband to divorce his wife at any time and for any reason, the Magistrates’ order cannot be enforced after the repudiation. In support of this contention two cases were cited—*Nepoor Aurut v. Furat*¹ and *In re Kasam Pirbhai*²—one of which, however, did not seem to us to decide the point definitely; and the ruling in *In re Kasam Pirbhai*³ appeared to us to contemplate a case where the divorce was admitted, or where it had received the sanction of a Court of competent jurisdiction as to its validity. Considering the infinite forms of divorce recognized by the Mahomedan law, each differing from the other in its legal consequences, and the difficulties which would arise if the Criminal Courts were to enter into such questions, we have held that we had no power to try the validity of a divorce, where the fact was disputed by the wife.

“As the question, however, is one of considerable importance, and as we think it a fit case to refer to the High Court, we solicit the opinion of the Hon’ble Court on the following points: (i) Whether the Presidency Magistrates have the power of cancelling, under s. 235, orders made under s. 234; and (ii) whether, when the fact of the divorce or its legality is disputed by the wife, the Criminal Courts have the power of trying the question.”

Munshi Mahomed Yusuf for the petitioners.

The opinion of the Court (AINSLIE and McDONELL, JJ.) was given by AINSLIE, J.—In our opinion a Magistrate is competent to stay the operation of an order for maintenance of a wife made under s. 234, Act IV. of 1877,

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5 Cal. 558.

¹ 19 W. R., Cr., 73.

² 8 Bom. H. C. Rep., C. C., 95.
I. L. R., Cal. 30.

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s Cal. 358.

and to refuse to issue his warrant under the 3rd clause of that section, although he cannot formally cancel the order, which must be taken to have been a legal and proper order when it was made, and he is competent to try all questions raised before him which affect the right of a woman to receive maintenance. This is the view taken by the Bombay High Court in the case cited in the reference [*In re Kasam Purbhai*]. The Court, in the exercise of its criminal jurisdiction, enquired into the fact and legality of the divorce then alleged, and, having found that there had been a legal divorce, it declared that the Magistrate ought not to issue an attachment upon or otherwise to execute the order, it being in fact *functus officio*.

The power of the Magistrate to act in this way does not, in our opinion, arise from the change in the provisions of s. 30, Beng. Act IV. of 1866, introduced by s. 235, Act IV., 1877, and does not depend upon the expression "may make such alteration in the allowance ordered as he thinks fit." These words, read with the proviso which immediately follows them—'provided the monthly rate of fifty be not exceeded,' and with the provisions of the earlier law, which only admitted of reduction of the amount ordered, and gave no authority to a Magistrate to increase such amount on proof of a favourable change of the circumstances of the person ordered to pay—seem to us to be intended only to vest in a Magistrate a power to revise any order of maintenance previously made on proof of change of circumstances with a view to alter the amount to that which may be appropriate under the new circumstances.

It is not, we think, doubted by the learned Magistrates who have made this reference, that an order of dissolution of marriage under the Indian Divorce Act would put an end to the operation of a Magistrate's order for maintenance; but they seem to draw a distinction between the case of persons subject to the Divorce Act, and Mahomedans who can exercise the power of divorce at their own pleasure and without the intervention of any Court. This distinction cannot, in our opinion, be maintained, whether the dissolution of the bond of marriage is capable of being effected in one way or in another; when once validly effected, it must operate to stop the operation of a Magistrate's order made in favour of a wife. With the cessation of the conjugal relation, the responsibilities attaching thereto cease. It is only on proof of the existence of this relation (we have not now to deal with the case of children) that a Magistrate can make any order at all, and any order made is to be for a monthly allowance for the maintenance of a wife, and it is as wife that the woman is to continue to receive an allowance; the last clause of s. 234, which is so worded as to apply either before or after an order for maintenance is made, shows that conduct inconsistent with her duties as wife will take away her right to receive it, even while the conjugal relation remains undissolved.

If a woman makes an application to a Magistrate for an order for maintenance against her husband, she must, if the relation of husband and wife is disputed, prove its existence. It may, perhaps, be admitted that there had been a marriage, but alleged that it had been dissolved. A Magistrate must, of necessity, enquire into the fact of marriage in the one case, and into the fact of dissolution of marriage in the other, and we find that, in one of the cases referred to, the learned Chief Magistrate did try the plea of divorce. Unless the woman making the application is a wife, he has no power to make an order of maintenance. In the case of alleged divorce, the divorce must be proved, whether the parties are Christian or Mahomedans; the means of proof are different, but

¹ 8 Bom. H. C. Rep., C. C., 95.

the mode of procedure, as far as the Magistrate is concerned, is the same: he is to determine on evidence whether the allegation of divorce is true. In the one case, the only possible mode of divorce is by a decree of a competent Court, and the decree is conclusive as evidence; in the other, recourse to a Court is wholly unnecessary, and, unless it should happen that the question has been already decided between the parties in a competent Court, the Magistrate must draw his own conclusions from the oral and other evidence put before him as best he may.

The fact that the power of divorce, given by the Mahomedan law, may be so exercised as to defeat the intention of the legislature as expressed in s. 234, Act IV. of 1877, and other similar enactments, may go to show that further legislation is required, but it cannot affect the law as it stands. It has been said by the learned pleader, who appeared before us on behalf of the petitioners to the Magistrate, that the right to exact payment of dower, immediately on dissolution of marriage, is a sufficient check to the abuse of that power: this, however, is not matter for present consideration.

In our opinion, it is, under the terms of s. 234, as essential to the continued operation, as to the original making of an order of maintenance, that the recipient of the allowance should be a wife at the time for which maintenance is claimed, and, consequently, for the purposes of Ch. XVIII. of the Presidency Magistrates' Act of 1877, a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce. If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice McDonell.

THE EMPRESS *v.* PITAMBUR SINGH.¹

Adultery—Evidence of Marriage—Evidence Act (I. of 1872), s. 50.

The provisions of s. 50 of the Evidence Act show that, where marriage is an ingredient in an offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved.

The Queen v. Wasira overruled.²

THIS was a case referred for the opinion of a Full Bench by Mr. Justice Wilson and Mr. Justice Tottenham. The order of reference was as follows:—

"In this case the prisoner has been convicted of adultery under s. 497 of the Indian Penal Code. The only evidence of the marriage of the woman is the statement of the prosecutor, 'she is my wife by marriage,' and the statement of the woman 'I am married to Somea' (the prosecutor).

"We desire to submit, for the opinion of a Full Bench, the question whether a conviction for adultery can be sustained upon such evidence of the marriage.

"Two decisions of this Court appear to be in conflict. In *The Queen v. Smith*,³ a conviction of adultery was set aside, on the ground (amongst others)

¹ Full Bench Reference in Criminal Appeal, No. 549 of 1879, referred by order of Mr. Justice Wilson and Mr. Justice Tottenham, against the order of Colonel H. Boddam, Officiating Judicial Commissioner of Chota Nagpore, dated the 27th June 1879.

² 8 B. L. R., App. 63.

³ 4 W. R., Cr. Rul., 31.

1879.

ABDUR
ROHMAN
v.
SAKHINA,
5 Cal. 356.

1879.

Dec. 8.

5 Cal. 566.

1879.

EMPRESS

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PITAMBUR

SINGH,

5 Cal. 566.

that there was no sufficient proof of the marriage, and it was laid down 'that, in proceedings founded on a charge of adultery, strict proof of the marriage is always required.'

"To the same effect is letter No. 1144 of 15th December 1865, issued by the Court.¹ In *The Queen v. Wazira*,² evidence of the same nature as that in the present case seems to have been held sufficient.

"It appears to us that, upon principle, such evidence must be held insufficient. The marriage of the woman is as essential an element of the crime charged as the illicit intercourse. And it ought, we think, to be proved like any other essential fact in the case, by the direct evidence of witnesses speaking to the facts said to constitute a marriage (Evidence Act, s. 60), so that the Court may determine whether what they state to have taken place did take place in fact; and, if so, whether it constitute a marriage in the point in law.

"The sections of the Evidence Act, which, in certain cases and for certain purposes, allow less strict proof of marriage, appear to be s. 32, which has no application here; and s. 50, which expressly excludes from its operation criminal charges of bigamy, adultery, and enticing of married women. This express exclusion seems to us strong to show that, in such cases, the Legislature intended the marriage to be proved by direct evidence.

"The Indian Divorce Act (IV. of 1869), which governs civil proceedings based upon adultery, confirms this view. It gives the form of a petition for divorce in which the marriage is alleged as a fact with time and place. If this is to be alleged, it is presumably because it ought to be proved, and it can hardly be supposed that greater strictness of proof is to be required in a civil proceeding than in a criminal proceeding founded upon the same facts.

"It appears to us that the framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English law. And in England there has never been any doubt that, in an indictment for bigamy, the first marriage, or in proceedings founded upon adultery, the marriage must be proved with the same strictness as any other material fact.

"We cannot see that any inconvenience is likely to follow from adopting the stricter rule. Amongst the large majority of the people of this country, marriage is accompanied with so much of ceremonial and publicity, that there can rarely be any difficulty in proving it. If there be any class of the community with whom it is otherwise, whose marriage notions and practices are so lax as to render many marriages of doubtful validity, this seems to us additional reason for requiring the actual facts to be brought properly before the Court, so that it may determine the validity or invalidity of the marriage in each case that comes before it."

No one appeared to argue the case.

The judgment of the Full Bench was delivered by

GARTH, C.J.—We think it clear that, in this case, the evidence of the marriage is not sufficient to justify a conviction for adultery.

The marriage of the woman, as observed by the learned Judges who referred the case, is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (s. 50) seem to point out very plainly that, where the marriage is an ingredient in the offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved in the regular way.

¹ See Vol. IV., Weekly Reporter, Criminal Letters, 10.

² 8 B. L. R., App., 63.

APPELLATE CRIMINAL.

*Before Mr. Justice Jackson and Mr. Justice Tottenham.*IN THE MATTER OF THE EMPRESS *v.* GRISH CHUNDER TALUKDAR.¹

1879.

Witness called by the Court—Right to cross-examine—Evidence Act (I. of 1872), s. 165.

Nov. 28.

5 Cal. 614.

Witnesses summoned on behalf of the prosecution, and not called, ought to be placed in the box for cross-examination, in order that the defence may have the opportunity of exercising this right, and, *a fortiori*, if such a witness is called and examined by the Court under s. 165 of the Evidence Act, the prisoner should be allowed to cross-examine.

A WITNESS for the prosecution, examined by the Magistrate in the enquiry which preceded the committal of this case to the Court of Session, was not called at the trial before the latter Court. The prosecution did not submit him for cross-examination, but at the close of the case for the defence the presiding Judge himself called and examined this witness, but refused to permit his cross-examination, on the ground that, under s. 165 of the Evidence Act, no cross-examination could follow upon a question put by the Court.

The accused appealed to the High Court.

Mr. H. Bell for the appellant.—The accused was entitled to cross-examine this witness, see *Meer Sujad Ali Khan v. Lalla Kashinath Dass*² and *Tarini Churn Chowdhry v. Saroda Sundari Dasi*.³

Baboo Ram Churn Mitter for the Crown.

JACKSON, J. (after dealing with the facts of the case, continued).—Then as to the alleged defect in the procedure of the Court of Session, we have no doubt that the Sessions Judge was wrong in refusing to permit the cross-examination of the witness called by the Court. The ordinary practice in properly constituted Courts is, that, where a witness for the prosecution is not called on the part of the Crown, he is placed in the witness-box in order that the defence may have an opportunity of cross-examining him; and certainly, where the Judge thought it necessary to call one of these witnesses for the purpose of eliciting some facts which he thought material for the prosecution, the prisoner ought to have been allowed an opportunity of putting any question that he thought necessary in cross-examination.

APPELLATE CRIMINAL.

*Before Mr. Justice Jackson and Mr. Justice Tottenham.*THE EMPRESS *v.* KHERODE CHUNDER MOZUMDAR AND OTHERS.⁴

1880.

Sessions Case—Fraudulent Use of Forged Document as Genuine—Penal Code (Act XLV. of 1860), ss. 196, 471.

March 2.

5 Cal. 717.

The offence imputed against an accused, who, in a civil suit, is alleged to have used, as genuine, a document which he knew to be a forged document, is one cognizable under s. 471 of the Penal Code. Such accused should, therefore, be charged under that section, and not under s. 196 of the Code.

¹ Criminal Appeal, No. 732 of 1879, against the order of T. T. Allen, Esq., Sessions Judge of Rajshahye, dated the 10th October 1879.

² 6 W. R. 181.

³ B. L. R., A. C., 145, 158.

⁴ Criminal Motion, No. 27 of 1880, against the order of F. H. McLaughlin, Esq., Sessions Judge of Noakhali, dated the 16th December 1879.

1880.

EMPRESS
v.
KHERODE
CHUNDER
MOZUMDAR,
5 Cal. 717.

THE facts alleged against the accused in this case were, that they, in a civil suit, instituted against one Kazi Lutful Huq. filed, as evidence in such suit, a letter of receipt purporting to have been given them by the defendant. The date of this document had, it was alleged, been fraudulently altered from 1281 B. S. to 1282 B. S. (1876 to 1877). It was also alleged that the names of two witnesses, purporting to attest such document, had also, with similar fraudulent intent, been subsequently added by the accused. The Magistrate enquiring into the case framed a charge under s. 196 of the Indian Penal Code, and himself tried, and on the facts convicted the accused.

In appeal before the Sessions Court, it was contended, *inter alia*, that the offence, if any, committed by the accused was one which came exclusively within s. 471 of the Penal Code, and as such was triable exclusively by a Court of Session; the Magistrate had, therefore, erred in framing his charge under s. 196, and trying the accused himself. The Sessions Court overruled this objection, and on the facts confirmed the sentence of the Magistrate. The case came before the High Court under the revisional sections of the Code of Criminal Procedure.

Mr. *Monomohun Ghose* (with him *Baboo Aukhil Chunder Sen*) for the petitioner.—Where the facts found by a Magistrate constitute an offence triable exclusively by the Court of Session, he has no power to bring the case within his own cognizance by trying the accused on a minor charge, and ignoring the graver one. In this case the Magistrate was moved to commit the accused to the Session.¹ In the unreported case of *Maher Ali*, referred to by the Judge, the prisoner had been convicted of an offence under s. 193, Penal Code, as he had given evidence in support of the forged document, and the Magistrate had jurisdiction to try a case under that section. In the present case the conviction is substantially for using as genuine a forged document. [JACKSON, J., referred to *Queen v. Oodun Lall*.²] The question did not arise in that case, as that was a trial by jury.

JACKSON, J.—It appears to us that this was properly a case cognizable under s. 471 of the Indian Penal Code, and not under s. 196: and that, consequently, the Magistrate had no jurisdiction to convict, but ought to have committed the prisoner for trial to the Court of Session. We observe that there is only one case—*Queen v. Oodun Lall*²—in which incidentally a conviction in a case somewhat resembling the present appears to have been held legal under s. 196; but there the conviction had taken place before a Sessions Judge with the aid of a jury, and the question of jurisdiction did not arise. We are not aware that that *dictum* has been followed in other cases, and that was a ruling by a single Judge. We think the conviction must be set aside, and that the Magistrate should commit the prisoner for trial.

Conviction set aside.

¹ See *Reg. v. Ram Tuhul Sing*, 5 W. R., Cr., 65; and *Reg. v. Hiramun Sing*, 8 W. R., Cr., 30.
² 3 W. R., Cr., 17.

APPELLATE CRIMINAL.

*Before Mr. Justice Morris and Mr. Justice Prinsep.*ROSHUN DOOSADH AND TWO OTHERS v. THE EMPRESS.¹*Previous Conviction—Irrelevant Evidence of Character—Quantum of Punishment—Evidence Act (I. of 1872), s. 54.*

1880.

Feb. 10.

5 Cal. 768.

In charging the jury upon the trial of a prisoner for being dishonestly in the possession of stolen goods, the Judge directed the jury to consider the proof of previous convictions for theft as evidence from which inference might fairly be drawn as to the character of the accused.

Held that this amounted to a misdirection; for, though s. 54 of the Evidence Act declares that "the fact that the accused person has been previously convicted of an offence is relevant," yet the same section also declares that "the fact that he has a bad character is irrelevant," and that the evidence was irrelevant and inadmissible.

Except under very special circumstances, the proper object of using previous convictions is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged.

THE facts of this case sufficiently appear from the judgment, which was delivered by

PRINSEP, J. (MORRIS, J., concurring).—We think that there must be a new trial in this case.

The three persons were charged, under s. 411 of the Indian Penal Code, with having dishonestly been in possession of certain articles claimed by the complainant, as property stolen from his house. A *dohur* and pugree were found with prisoner Roshun. The complainant and a friend identified these as the property of the former. Roshun, on the other hand, stated that they were his, but that statement was unsupported by any evidence. The Sessions Judge was quite correct in putting it to the jury, "to say whether there is any reason to believe that they (the complainant and his friend) have made any mistake," but he was clearly wrong in adding, "The fact that he (Roshun) has been twice imprisoned for theft is also not without its weight, and should be taken by you into consideration when deciding as to the credibility of the evidence of identification." S. 54 of the Evidence Act, though it declares that "the fact that the accused person has been previously convicted of an offence is relevant," also declares that "the fact that he has a bad character is irrelevant," except under certain circumstances, which do not exist in the present case. The evidence of the prisoner's previous convictions has been treated by the Sessions Judge as evidence of his character, which he has told the jury to consider in determining the value of his claim to the property found in his possession. In this respect the Sessions Judge has clearly misdirected the jury, because this evidence was irrelevant and inadmissible. He should have merely pointed out to the jury the conflicting claims to this property, and called upon them to determine which they believed, at the same time reminding them that the prisoner was entitled to the benefit of any reasonable doubt. We think that the prisoner Roshun has been prejudiced by this error, and that he ought to have a re-trial. Except under very special circumstances, none of which arise here, the proper object of using convictions is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged.

Re-trial ordered.

¹ Criminal Appeal, No. 795 of 1879, against the order of J. F. Browne, Esq., Sessions Judge of Patna, dated the 30th September 1879.

APPELLATE CRIMINAL.

*Before Mr. Justice Morris and Mr. Justice Prinsep.*THE EMPRESS *v.* VAIMBILEE.¹VAIMBILEE *v.* THE EMPRESS.

1880.

May 7.

5 Cal. 826.

Criminal Proceedings—Necessity for explaining Charge to Accused—Statement to Magistrate in foreign language—Criminal Procedure Code (Act X. of 1872), ss. 122, 237, 346.

When arraigning an accused, and before receiving his plea, the Court should be careful to insure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead.

It is not necessary that a statement made to a Court by an accused in a foreign language should be taken down in the words of that language. The language in which the statement is conveyed to the Court by the interpreter is the language in which it should be recorded.

Baboo Kallychurn Banerjee for the petitioner.

THE facts of this case sufficiently appear in the judgment of the Court (*Morris and Prinsep, JJ.*), which was delivered by

PRINSEP, J.—The prisoner Vaimbilee, a Madrassee, was charged, before the Additional Sessions Judge of the 24-Pargannas, with culpable homicide amounting to murder, by causing the deaths of Trevedee and Naga, and with having caused hurt to one Lazarus by a dangerous weapon, these three men being Madrassees employed with him in a tannery at Tengra.

As the prisoner was ignorant of any language except Tamil, an interpreter, Mr. S. A. Daniel, minister of the Madrassee Church, was sworn.

On the record of the trial the Additional Sessions Judge has recorded: "The prisoner, through the interpreter, Mr. Daniel, having been asked whether he pleaded guilty or claimed to be tried, pleaded *guilty* to the first charge, that of the murder of Trevedee." The Additional Sessions Judge thereupon convicted the prisoner on this charge, and sentenced him to death, subject to the confirmation of this Court.

Two days later, that is on 7th February, Mr. Daniel appeared before the Additional Sessions Judge, and made an affidavit that he failed to use the correct terms in Tamil to convey the full meaning of the word 'murder,' the word made use of indicating only the killing or being the cause of the death of Trevedee. The Additional Sessions Judge has himself recorded at considerable length what took place in his Court on the trial of the prisoner, and his statement is confirmed by an affidavit put in by the Government Pleader. The Additional Sessions Judge records that "the Government Pleader read out the charge of murder of Trevedee to the interpreter, who, having spoken to the prisoner, interpreted the latter's statement, 'Yes, I did kill Trevedee.' I thereupon at once said that that answer was insufficient, that he must distinctly ask the prisoner whether he pleaded *guilty to the charge of the murder of Trevedee or claimed to be tried*. He then spoke again to the prisoner, and rendered his statement, 'Yes, I am guilty.'"

We entirely accept this statement of what occurred at the trial, but we observe that s. 237 of the Code of Criminal Procedure requires that the charge

¹ Criminal Reference, No. 22 of 1880, and Appeal No. 243 of 1880, against the order of *F. J. G. Campbell, Esq.*, Officiating Additional Sessions Judge, 24-Pargannas, dated the 5th April 1880.

shall be read and *explained* to the accused person. The term 'murder' has a special meaning under the Indian Penal Code. The Judge should, therefore, have been careful to explain its meaning to the interpreter, in order that he might convey its full sense to the prisoner, and so enable the latter to understand thoroughly the nature of the charge to which he was asked to plead. Here manifestly, as described by Mr. Daniel, no sufficient explanation of the charge, such as the law contemplates, was made, upon which a plea of guilty could be properly accepted.

If the prisoner had denied that he killed Trevedee, it is obvious that it would have been unnecessary to proceed further in explanation of the charge. But in the case now before us, the prisoner's admission cannot properly be regarded as an admission of having committed the offence of murder as defined in the Indian Penal Code, because the mere killing or causing the death of Trevedee would not in itself constitute that offence. Before he was convicted on his own plea, he should have admitted that he intended to cause the death of Trevedee, or did so with a knowledge such as is described in s. 300 of the Penal Code. It was more especially necessary in the present case to obtain such an admission, because before the committing Magistrate the prisoner admitted that he had killed Trevedee, but added that he did so in a struggle arising from Trevedee having first attacked him. With this statement before him the Additional Sessions Judge should have ascertained from the prisoner whether he fully admitted the commission of the offence charged, or adhered to his former statement.

Under these circumstances, we are of opinion that the prisoner cannot be held to have pleaded guilty, and cannot therefore be convicted on his plea. We accordingly direct that a re-trial be held in the Sessions Court.

There are, moreover, circumstances in this case which should have induced the Additional Sessions Judge to have taken evidence instead of convicting the prisoner solely on his plea of guilty. The circumstances under which the offences are alleged to have been committed are very peculiar, and suggest a doubt regarding the prisoner's state of mind at the time. The committing Magistrate had evidently misgivings on this head, and specially examined the medical officer, Dr. Joubert, under whose special observation the prisoner had been since his admission to jail. That officer's evidence cannot be considered as by any means decisive on the point, and it is therefore somewhat surprising that the Magistrate should have omitted to put any questions to the witnesses, who were the prisoner's fellow-workmen, regarding his ordinary habits and behaviour, and his demeanour both before and immediately after the fatal occurrences. The Additional Sessions Judge would have exercised a wise discretion if he had examined the witnesses in Court, and taken the verdict of the jury on the fact of the soundness or unsoundness of the prisoner's mind. This was the more necessary, because, although it might be established that the prisoner, at the time when the acts were committed, was not, by reason of unsoundness of mind, incapable of knowing the nature of the acts charged, yet his physical and mental condition might be such as to cause a Judge to weigh carefully the measure of punishment to be inflicted.

We notice also that the Additional Sessions Judge in his judgment has expressed doubts regarding the admissibility in evidence of the statement made by the prisoner to the Magistrate, because it was not recorded in Tamil, the language used by the prisoner. On this we observe that, though the law requires that the whole of the statement made by a prisoner should be accurately recorded

I. L. R., Cal. 31.

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 Cal. 871.

as nearly as possible in the very words used by him, yet it does not require that it should be recorded in a foreign language unknown to the Court or Magistrate, the use of which makes it necessary to have recourse to an interpreter. The language in which that statement is conveyed to the Court by the interpreter is in our opinion the language in which it should be recorded. Unless this were so, the administration of justice in a case in which a foreigner was accused might be attended with great difficulty, and be seriously impeded.

Re-trial ordered.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1880.

May 20.

5 Cal. 871.

THE GOVERNMENT OF BENGAL *v.* MAHADDI AND ANOTHER.¹

Verdict on Offence proved though not independently charged—Unanimous Verdict—Dissent of Judge—Procedure in such cases—Code of Criminal Procedure (Act X. of 1872), ss. 263, 457—Penal Code (Act XLV. of 1860), ss. 149, 325.

The accused were charged under s. 149, coupled with s. 325, of the Penal Code, with, while being members of an unlawful assembly, committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly, but unanimously found two of the accused guilty of grievous hurt under s. 325.

Held that such verdict was, under s. 457 of the Code of Criminal Procedure, legally sustainable, although that offence did not form the subject of a separate charge. S. 457 enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence.

It is only in a case where the jury are not unanimous that a Court may require them to retire for further consideration. Where a verdict is unanimous, it must be received by the Judge, unless contrary to law.

Where a Judge dissents from the unanimous finding of a jury given in accordance with the law, the only procedure open to him to follow is that laid down in the fifth clause of s. 263 of the Code of Criminal Procedure.

THIS was an appeal directed by the Local Government under s. 272 of the Code of Criminal Procedure from a verdict of acquittal.

The *Deputy Legal Remembrancer* (Mr. G. C. Kilby) for the Government.

Baboo *Nundalal Pyne* for the accused.

The facts of the case appear sufficiently from the judgment of the Court (*Morris and Prinsep, JJ.*), which was delivered by

PRINSEP, J.—Mahaddi and Panchoo, together with others, were charged under s. 149 of the Penal Code, read alternately with ss. 302, 304, and 325 of the Penal Code, that is, with being members of an unlawful assembly at a time when (i) murder, or (ii) culpable homicide not amounting to murder, or (iii) grievous hurt, was caused by some members of that assembly in prosecution of its common object.

The jury absolutely acquitted all except Mahaddi and Panchoo, but with regard to these two men the jury unanimously found that they were guilty only under s. 325, Penal Code—*i.e.*, of having voluntarily caused grievous hurt without grave or sudden provocation. What then followed is thus recorded by the Sessions Judge: "The Court informed the jury that there was no charge under

¹ Criminal Appeal, No. 1 of 1880, against the order of R. F. Rampini, Esq., Officiating Sessions Judge of Dacca, dated the 15th October 1879.

this section, and requested the jury to re-consider their verdict. The jury accordingly retired for that purpose. They returned to Court at twelve minutes to four o'clock P.M. The foreman stated they were not unanimous in their verdict against the prisoners. The Court requested them to retire again, and consider their verdict. The jury returned at five minutes to four, and the foreman stated that the jury by a majority (the number being three to two) found all the accused not guilty of all the charges."

With regard to the verdict against Mahaddi and Panchoo, the Sessions Judge has further recorded his own opinion that he could not accept that verdict, because "(i) there was no charge against them under this section (325), and (ii) in his opinion there was no evidence under s. 325 against them."

An appeal has been made by Government against the acquittal of Mahaddi and Panchoo, on the ground that the Sessions Judge was bound to accept the unanimous verdict of the jury finding these prisoners guilty under s. 325, Penal Code; that he was not competent to direct them to re-consider their verdict; that that verdict was a good verdict, although the offence punishable under s. 325, Penal Code, did not form the subject of a separate charge; and that there was evidence on which the jury might have convicted the prisoners under s. 325, Indian Penal Code.

After hearing the Deputy Legal Remembrancer for Government and the pleader of the prisoners, as well as Mr. Reilly as *amicus curiæ*, we are of opinion that, on all these grounds, the Sessions Judge has committed an error of law, and that the unanimous verdict of the jury convicting Mahaddi and Panchoo under s. 325, Penal Code, should have been received.

In our opinion, under the terms of s. 457 of the Code of Criminal Procedure, it was competent to the jury to return a verdict of guilty only under s. 325, Penal Code, although that offence did not form the subject of a separate charge, but was entered in a charge coupled with s. 149, Penal Code. S. 457 of the Code of Criminal Procedure enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence. Thus, in the present case, the prisoners were not charged themselves with having caused the grievous hurt, but were charged with being members of an unlawful assembly, some of the members of which, in prosecution of its common object, caused that grievous hurt. The verdict of the jury was, as we understand it, that there was no assembly, but that the grievous hurt was nevertheless caused by these two prisoners. S. 263 requires that "the jury shall return a verdict on all the charges on which the accused is tried." The requirements of the law are satisfied if, in returning their verdict, a jury acting under s. 457 returns a verdict of conviction of a minor offence forming part of one of the charges. The verdict which the Sessions Judge refused to take was in our opinion a good and legal verdict.

S. 263 declares under what circumstances a Sessions Judge may "require a jury to retire for further consideration,"—that is to say, when "the jury are not unanimous." If the jury are unanimous, the verdict must be received unless it is contrary to law. If the Sessions Judge disagrees with an unanimous verdict which is not contrary to law, he should proceed as laid down in para. 5, s. 263. In the case now before us there is nothing in the verdict convicting the prisoners under s. 325, Penal Code, which is contrary to law. But, as Mr. Reilly very properly brings to our notice, the Sessions Judge might have said to the jury that, if they were of opinion that the prisoners could be convicted only under s. 325, Penal Code, they must return a verdict of acquittal, because there was no legal evidence to sustain such a verdict. That was not the manner in which

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5 Cal. 371.

the Sessions Judge treated this case as is shown from the extract from the record which has been quoted, but even under such circumstances the Sessions Judge would have acted contrary to law, and afforded just grounds for this appeal, because there is legal evidence which, if believed, would have been sufficient to sustain the verdict. We refer more particularly to the statements which are declared by witnesses to have been made by the wounded man that his injuries were caused by these two prisoners. These injuries have caused his death, and, therefore, his statements were legal evidence under s. 32 of the Evidence Act, on which the jury might form their verdict.

For these reasons, we direct that the verdict of the jury acquitting Mahaddi and Panchoo be set aside; that in its place the unanimous verdict of the jury convicting Mahaddi and Panchoo under s. 325, Penal Code, be entered on the record; and we do accordingly sentence Mahaddi and Panchoo to seven years' transportation.

The Sessions Judge will issue the usual warrants.

Appeal allowed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF CHUNDERNATH SEN.¹

1880.
May 28.
5 Cal. 375.

Obstruction—Pathway—Order of Magistrate—Functions of Jury—Procedure to be observed by Magistrate—Code of Criminal Procedure (Act X. of 1872), ss. 521, 523, 532.

Before a Magistrate can make an order under s. 521 of the Code of Criminal Procedure to remove an obstruction from a path alleged to be a public thoroughfare, he must first, in a proceeding held under s. 532, have come to the conclusion that the path is open to the use of the public.

The only functions which a jury appointed under s. 523 can exercise, are to consider whether the order made by the Magistrate under s. 521 is reasonable and proper, it being no part of their duty to determine the rights of parties in property.

Held, therefore, that, where a Magistrate, through a mistaken view of the law, ordered the removal of an obstruction on a pathway under s. 521, and had further submitted this order to the consideration of a jury appointed under s. 523, before he had himself come to a conclusion whether such pathway was a public thoroughfare, the only course left open to him under such circumstances was to stay all proceedings initiated under s. 521, and take action under s. 532.

Baboo *Bhoobun Mohun Dass* for the petitioner.

Baboo *Srinath Banerjee* and *Hurry Mohun Chuckerbutty* contra.

THE facts of this case appear sufficiently in the judgment of the Court (*Morris and Prinsep*, JJ.), which was delivered by

MORRIS, J.—This matter has arisen from a complaint made on 15th February 1879 regarding an obstruction to a public thoroughfare.

It appears that, a few months before this complaint was made, proceedings had been taken under s. 521 of the Code of Criminal Procedure, regarding an obstruction to another portion of the same road, and the matter had been referred to a jury under s. 523. The report of the jury was not unanimous, but the Magistrate, on 6th February 1879, accepted the opinion of the majority, declaring that the road was private, and not public.

¹ Criminal Motion, No. 82 of 1880, against the order of Baboo *Trailakya Nath Sen*, Deputy Magistrate of Moonsheegunge (in the District of Dacca), dated the 12th July 1879.

1880.

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5 Cal. 875.

The Magistrate, apparently without the consent of either side, directed the same jury to report on the second matter. Shortly after, one of the contending parties objected to one of the jurymen, who had been appointed by the Magistrate, on the ground that he had decided the matter against him in the first case. Without giving notice to the other party, the Magistrate allowed this objection, and appointed another jurymen in the place of his first nominee. The effect of this was to turn the majority to the other side, and to cause the report to be made in favour of the objector, that the road was public and not private.

We are of opinion that the Magistrate should not, at the instance of one party, and behind the back of the other party, have cancelled the appointment of one of the jurors, even though such juror was his own nominee. If the objection taken was good, it was equally applicable to all the jurymen who had previously committed themselves to an opinion in the first case.

It is unnecessary, however, to notice this further, because it is clear to us that the entire proceedings have been taken under a mistaken view of the law regarding the respective functions of a Magistrate and a jury under Ch. XXXIX. of the Code of Criminal Procedure.

In order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction from a thoroughfare or public place, it must be first found that the place so obstructed is a thoroughfare or public place. If this be disputed by the party on whom the notice to remove the obstruction has been served, the Magistrate should not refer the decision of this matter under s. 523 to a jury. The duty of a jury is declared by that section to be to try whether the Magistrate's order to remove the obstruction is *reasonable and proper*, not whether the way or place obstructed is public or private property. Until this matter has been decided by the Magistrate under s. 532 of the Code of Criminal Procedure or by a Civil Court, the order under s. 521 should not be carried out or referred to a jury, but should be stayed.

If, however, a Magistrate, under a mistaken view of the law, and in spite of the objection raising the question of the right of way, should appoint a jury, then, as pointed out by Mr. Justice Phear in the case of *Roy Omesh Chunder Sen*,¹ the order of the Magistrate to remove the obstruction complained of could not be decided by such jury to be reasonable and proper, because at the outset of their enquiry they would be met by the *bond-fide* objection that the road was private and not public property. In such a case they could only submit a report to this effect to the Magistrate, it being no part of their duty to determine the rights of parties in property. The Magistrate ought then either to refer the party complaining to the Civil Court, or in the exercise of his discretion inquire into the matter as provided by s. 532.

We may refer, in support of this view of the law, to the following cases:—*In re Becharam Bhuttacharjee*,² decided by Loch and Mookerjee, JJ.; *Roy Omesh Chunder Sen v. Ichanath Mozumdar*;¹ *Petamber Jugi v. Nasaruddy*,³ decided by Glover and R. C. Mitter, JJ.; and to some proceedings of the Madras High Court, pp. 304 and 305, published by Mr. Weir, in his Collection of the Orders of that Court.

We, therefore, set aside the order of the 12th April, and direct that, if the Magistrate finds it necessary to take further action, he do proceed in the manner now indicated.

Order set aside.

²¹ W. R., Cr., 64.

¹⁵ W. R., Cr., 67.

²⁵ W. R., Cr., 4.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Miller.

THE EMPRESS *v.* ANUNTRAM SINGH AND OTHERS.¹

1880.

April 26.

5 Cal. 954.

Confession—Code of Criminal Procedure (Act X. of 1872), ss. 122, 193, 346.

A confession recorded by a Magistrate, who afterwards conducts the enquiry preliminary to committal, and has jurisdiction to do so, is to be treated as an examination under s. 193 of the Criminal Procedure Code, and not as a confession recorded under s. 122, notwithstanding that the prisoner may have been brought before the Magistrate before the conclusion of the police-investigation. To such a confession, consequently, the provisions of the last paragraph of s. 346 apply.

S. 122 of the Criminal Procedure Code contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is enquired into or tried.

*The Empress v. Mannoo Tamaolee*² distinguished.

THIS was a reference made by Mr. Justice Jackson and Mr. Justice Tottenham to a Full Bench. The order of reference was as follows:—

“One Anuntram, with a woman named Tophia Bewah and others, were charged with a most brutal and atrocious murder, and were tried by the Court of Session of Cuttack. Anuntram and Tophia were convicted and sentenced to death, and their case is now before us. A third person, named Dariah Singh, was also convicted, and was sentenced to transportation for life, and he has appealed.

“The evidence for the prosecution was scanty, and was not of very good quality; and part of it consisted of two confessions made by the prisoners Tophia and Dariah, and recorded by the Joint-Magistrate, who afterwards committed all the prisoners for trial. Upon these confessions being tendered in evidence at the trial, it was objected on the part of the accused that they were not admissible, inasmuch as the Magistrate had omitted to annex to them the certificate prescribed by s. 346, and also that they had not the signatures or marks of the accused. The form of certificate required by s. 122 had been appended by the Magistrate, not to the vernacular record of the prisoner's statement, but to the note of it, which he took simultaneously in English. It was also contended that the prosecution was not at liberty, under s. 346, to take evidence to prove that the prisoners had duly made the statement recorded, because it was said that this examination, being taken under s. 122, had not been taken in a preliminary enquiry. It was urged that the Joint-Magistrate had not, up to that time, got the case properly before him upon his own file, and that he himself had given the strongest possible proof of the nature of his proceeding by noting the confessions in the case of both prisoners as having been taken under s. 122. The Sessions Judge, however, for the reasons stated in his judgment, came to the conclusion that, notwithstanding the use of the words ‘s. 122’ by the Joint-Magistrate, they were really examinations recorded under s. 346, and therefore he allowed evidence to be given, showing that the prisoners had duly made the statements. The Sessions Judge arrives at the conclusion not without some hesitation, and he refers to the cases of *Reg. v. Bai Ratan*³ and *The Empress v. Mannoo Tamoe-*

¹ Criminal Reference to a Full Bench, No. 8 of 1880, on Criminal Appeals, Nos. 126 and 127 of 1880, against the order of *A. W. Cochran*, Officiating Sessions Judge of Cuttack, dated the 28th January 1880.

² I. L. R., 4 Cal. 696.

³ 10 Bom. H. C. Rep. 126.

*Mr.*¹ Since then there has been another decision by Wilson and Tottenham, JJ.—*In the matter of Behari Hajdi*²—in which the same point has been considered.

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"In regard to the case of *The Empress v. Manno Tamoolee*¹ we entirely concur in the ruling of the learned Judges. There the confession was recorded under s. 122 before a Magistrate, who, at the time when he recorded it, had no jurisdiction over the case. In the present instance the facts were different, inasmuch as the Magistrate who recorded the confessions had jurisdiction, and did himself conduct the enquiry from first to last, and eventually committed the accused to the Session. The questions which appear to us material, and which are of very great importance, are: *firstly*,—Is not a confession, recorded by a Magistrate having jurisdiction, to be treated as an examination under s. 193, notwithstanding that the prisoner or prisoners may have been brought before the Magistrate before the conclusion of the police-investigation? and *secondly*,—Is the examination to be excluded by reason of the absence of a certificate, that it contains accurately the whole of the statement made by the accused person, although the certificate required by s. 122 is forthcoming, and although the prisoner himself admits that the examination does contain the whole of his statement? We think these questions to be of such difficulty and importance that they ought to be decided by a Full Bench of this Court, and we refer the case accordingly.

"We observe that the subject has also been considered in a still more recent case³ by *Morris and Prinsep*, JJ., whose judgment commends itself to our approval."

No one appeared to argue the points referred.

The opinion of the Full Bench was as follows:—

In the particular case out of which this reference arises, the prisoners, Tophia and Dariah, were arrested by the police, and forwarded under custody to the Magistrate having jurisdiction, and made each a confession to him before the police-investigation was concluded (or at least before the report of the police-investigation was submitted). The Magistrate, who recorded their confessions, was the Magistrate who conducted the preliminary enquiry, and committed them for trial to the Court of Session. And not only had this officer jurisdiction to make the enquiry preliminary to commitment, but he had also the power to determine what Magistrate should conduct the enquiry. The Sessions Judge finds that, "when the prisoners were sent up before him on the 17th, he had resolved to take up the preliminary enquiry himself," as indeed his duty required; but that the formal order to that effect was not made till a few days later. The prisoners, as the Judge also points out, ceased to be in the hands of the police from the time that they were brought before the Magistrate. Their confessions were recorded, and they were ordered to be placed in *hajut*, and thereafter the preliminary enquiry, as it affected them, was carried on, and the police-investigation was at an end.

Under these circumstances, we are of opinion that the confessions of these two prisoners must be regarded as having been made in the course of a preliminary enquiry, and not under s. 122, Code of Criminal Procedure; and that, consequently, the provisions of the last paragraph of s. 346 apply.

¹ I. L. R., 4 Cal. 696.

² 5 C. L. R. 239.

³ *Krishno Monee v. The Empress*, 6 C. L. R. 289.

1880.

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SINGH,

5 Cal. 954.

S. 122 contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is enquired into or tried. When, therefore, as here, the Magistrate, who recorded their confessions, was the Magistrate who conducted the enquiry preliminary to committal, and had jurisdiction so to do, such confessions cannot be treated as taken under s. 122; nor can the circumstance of the Magistrate having noted at the head of the confessions that they were recorded under s. 122 affect the matter. The case of *The Empress v. Mannoo Tamoollee*¹ does not conflict with this view; for though the Magistrate who recorded the confession in that case subsequently conducted the preliminary enquiry, and committed the prisoner for trial, yet, at the time of recording his confession, he was outside the limits of his jurisdiction, and had no power to take up the preliminary enquiry.

It seems to us, therefore, that the first question of reference, *viz.*, whether a confession recorded by a Magistrate having jurisdiction is to be treated as an examination under s. 193, notwithstanding that the prisoner or prisoners may have been brought before the Magistrate before the conclusion of the police-investigation, should be answered in the affirmative.

Holding this view, the second question of reference does not arise, and need not be dealt with.

APPELLATE CRIMINAL.

Before Mr. Justice White and Mr. Justice Maclean.

1880.

May 13.

5 Cal. 958.

NOSHAI MISTRI AND RAM CHUNDER HALDAR v. THE EMPRESS.²

Confession—Criminal Procedure Code (Act X. of 1872), ss. 122 & 346—Evidence Act (I. of 1872), s. 33.

When a confession is made to a Magistrate by an accused person during an enquiry held previously to the case being taken up by the committing officer, and by an officer acting merely as a recording officer, it must be recorded in strict accordance with the provisions of ss. 122 and 346 of the Code of Criminal Procedure. If the provisions of these sections have not been fully complied with by the recording officer, the Court of Session cannot take evidence that the accused person duly made the statement recorded; and a Court of Session is not at liberty to treat a deposition sent up with the record and made by the recording officer before the committing officer to the effect that the accused person did in fact duly make before him the statement recorded as evidence of that fact. In such a case the recording officer must himself be called and examined by the Court of Session, except in cases in which the presence of the recording officer cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court of Session considers unreasonable.

THE two appellants in this case had, with several others, been arrested on a charge of dacoity. The Magistrate of the district had, apparently under s. 115 of the Criminal Procedure Code, directed a preliminary enquiry to be held before a Deputy Magistrate. The Deputy Magistrate, besides examining the witnesses brought before him on behalf of the prosecution, also examined the appellants, and took down and recorded their statements, which amounted in each instance to confessions of guilt. He omitted, however, to certify, as required by ss. 122 and 346 of the Criminal Procedure Code, that the examination had been taken in his presence and in his hearing, and that the record of it contained accurately the whole of the statement made by the accused, and

¹ I. L. R., 4 Cal. 696.

² Criminal Appeal, No. 718 of 1879, against the order of A. C. Brett, Esq., Sessions Judge of Jessore, dated the 1st October 1879.

that he believed the confessions to have been made voluntarily. The case was afterwards transferred to the Joint-Magistrate, by whom the prisoners were eventually committed for trial to the Session. The Joint-Magistrate noticing that the provisions of ss. 222 and 346 had not been duly complied with, to remedy this defect, himself called and examined the Deputy Magistrate, and, after taking his deposition, attached it to the record, and sent it up with the other depositions to the Sessions Court. The Sessions Court treated the deposition of the Deputy Magistrate as sufficient evidence that the confessions of the appellants had been duly taken and recorded, and accordingly convicted both the appellants upon their own confessions.

1880.

NOSHAI
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From this order the appellants appealed to the High Court, on the grounds—

1st.—That the deposition of the Deputy Magistrate ought not, under s. 33 of Act I. of 1872, to have been received in evidence, it not appearing that his presence might not have been obtainable without unreasonable delay or expense; and

2nd.—That, without the deposition properly admitted, or the evidence of the Deputy Magistrate, the confessions of the appellants ought not to have been received in evidence.

Both the appellants and the Crown were unrepresented.

The judgment of the Court (WHITE and MACLEAN, JJ.) was delivered by

WHITE, J.—We have now considered the cases of the prisoners Noshai Mistri and Ram Chunder Halder with reference to the ruling of the Full Bench in the case of *Anuntram Singh*,¹ and are of opinion that the ruling in question has no application in the present case, but that the confessions are inadmissible for the following reasons:—

They were, in our opinion, confessions recorded under s. 122 of the Code, and are defective from the omission of the Deputy Magistrate to record the certificate required by s. 346, Criminal Procedure Code, and the defect cannot be cured by taking evidence under the last clause of s. 346.

Independently of this objection, we think that, even if the defect could have been cured by taking evidence under that section, the Sessions Judge had no evidence on the point before him on which he could act, for the last clause of s. 346 directs that the Court of Session shall take the evidence. In this case, the committing Magistrate took the deposition of the recording Magistrate, which he appears to have had no authority to do. Furthermore, we think that, if the committing Magistrate had power to take the recording Magistrate's evidence, the Sessions Judge has not shown that that Magistrate's deposition was properly admitted under the provisions of the 33rd section of the Evidence Act, 1872. There is nothing on the record to show that the presence of the recording Magistrate could not have been obtained without an amount of delay or expense which, in the opinion of the Court, was unreasonable.

We accordingly set aside the conviction and sentence, and direct the discharge of the appellants Noshai Mistri and Ram Chunder Halder.

Conviction set aside.

¹ *Ante*, p. 246.

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APPELLATE CRIMINAL.

*Before Mr. Justice Pontifex and Mr. Justice McDonell.*THE EMPRESS *v.* KALA CHAND DASS AND OTHERS.¹*Criminal Procedure Code (Act X. of 1872), ss. 505, 506—Deposit of Cash in lieu of Security Bond for Good Behaviour.*

1880.

April 22.

6 Cal. 14.

The powers given by ss. 505 and 506 of Act X. of 1872 should be exercised with extreme discretion; the former of these sections is not intended to apply to persons of "by no means a reputable character."

An order requiring persons to deposit cash in lieu of entering into a bond as security for their future good behaviour is bad in law.

This was a reference under s. 296 of Act X. of 1872 made to the High Court by *J. Smith, Esq.*, the Sessions Judge of Burrisal.

The accused persons were charged under s. 505 of the Criminal Procedure Code with being persons of notoriously bad livelihood, and the Magistrate of the District, after holding a local enquiry, at which he examined witnesses for the prosecution and defence, found the charge established, and passed the following order: "That the prisoners Kala Chand, Ram Sagar, Nobin Holdar, Ram Kumar Doss, Poddo Lochun, Raj Coomar Deb, find two sureties in Rs. 500 each for their good behaviour for one year, under s. 505 of the Criminal Procedure Code. They are also required to furnish their own recognizances—the amount to be deposited in cash; Kala Chand, Ram Sagar, and Ram Kumar Deb, for Rs. 1,000 each; Raj Coomar Deb and Ram Kumar Doss for Rs. 500 each; and Nobin Holdar and Poddo Lochun for Rs. 250 each. In default of compliance with this order, they will, under s. 510, undergo rigorous imprisonment for the period mentioned."

The Sessions Judge, being of opinion that the portion of the order requiring the accused to deposit cash in lieu of a bond for good behaviour was bad in law, referred the matter to the High Court.

No one appeared for either side at the hearing.

The judgment of the Court (*Pontifex and McDonell, JJ.*) was delivered by

PONTIFEX, J.—We agree with the Sessions Judge in this case that the order passed by the Magistrate, requiring the accused persons to deposit cash in lieu of taking a bond for good behaviour, ought to be set aside as bad.

No doubt, defendant No. 5 is, on his admission, as stated by the Magistrate, but which really is not borne out by the record, a by no means reputable character. But in my opinion s. 505 is not intended to apply to a person of such character and reputation, and the Magistrate had no jurisdiction to deal with him under that section. And, speaking generally, the order passed by the Magistrate seems to me preposterous. The seven defendants are each required to find two sureties to the amount of Rs. 500 each; three of the defend-

¹ Criminal References, Nos. 44, 45, and 47 of 1879, by *J. Smith, Esq.*, Sessions Judge of Burrisal, dated 15th March 1880, on an order passed by the District Magistrate of that district.

1880.

EMPRESS

v.

KALA CHAND

DASS,

6 Cal. 14.

ants are required to deposit in cash Rs. 1,000 each; two of them Rs. 500 each; and the remaining two Rs. 250 each, and in default to have rigorous imprisonment for one year.

With respect to the deposit, we agree with the Judge that the order is illegal.

With respect to the sureties it is prohibitive, for it is scarcely likely that fourteen sureties in Rs. 500 each would be forthcoming in a place like Bhakaly. My own experience in Calcutta has shown me that respectable people in Calcutta, who have to provide sureties upon grant of letters of administration, have to pay heavy sums to the sureties; and I can only suppose that it would be greatly more expensive for reputed *budmashes* to provide sureties for their good behaviour. So that it comes to this, that the requirement of two sureties to the amount of Rs. 500 each for each of the defendants will in effect be inflicting a heavy pecuniary fine upon them in a case only of suspicion and reputation.

Moreover, if these cases are to be approached in the spirit with which the present has been decided, to become surety for a *budmash*, will of itself be sufficient evidence to convict the surety of being himself a *budmash*.

Surely the putting in force of these very stringent sections should be exercised only with extreme discretion. In the present case the Magistrate points out incidentally the far more proper means of prevention. In the village in question he says: "So bad indeed, a few months back, had things become, that it was considered necessary to station two constables, who still remain there. . . . The accused are well known to have been in the habit of moving about the khals at night in long canoes driven by paddles, whilst thefts were of frequent occurrence. *This of course was before the arrival of the police, whose removal would simply be the signal for a return to the old state of things.*"

We quash the order of the Magistrate directing the defendants to deposit cash and to provide sureties, and in lieu thereof we direct the defendants Nos. 1, 2, 3, 4, 6, and 7, but not defendant No. 5, to enter into bonds for their good behaviour in the amounts which they were directed to deposit in cash. All the defendants will be immediately released from the rigorous imprisonment which, it appears, they are now undergoing for default in providing sureties and depositing cash.

Order set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

THE EMPRESS v. BUTOKRISTO DASS AND ANOTHER.¹

1880.

May 3.

6 Cal. 59.

Conduct of Prosecution by Advocate or Attorney—Permission by Magistrate—Presidency Magistrates' Act (IV. of 1877), s. 129.

With the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person, whether counsel or attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

¹ Criminal Reference, No. 95 of 1880, made by F. F. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 26th April 1880.

THE following letter of reference under s. 240 of Act IV. of 1877 (The Presidency Magistrates' Act) was sent by the Chief Presidency Magistrate, with the object of eliciting an expression of opinion from the High Court on the question therein asked :—

" I have the honour, under s. 240 of Act IV. of 1877, to refer, for the opinion of the High Court, the following question :—

" Under s. 129, Presidency Magistrates' Act, are counsel or attorneys entitled, as a right, to prosecute cases in the Presidency Magistrates' Court, or must they obtain the sanction of the Magistrate to do so ?"

The opinion of the Court (*Morris and Prinsep*, JJ.) was as follows :—

MORRIS, J.—In our opinion, under s. 129 of the Presidency Magistrates' Act, with the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person, whether counsel or attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF QUIROS AND ANOTHER.¹

THE EMPRESS *v.* ALLEN AND OTHERS.

Privilege—Waiver—European British Subject—Criminal Procedure Code (Act X. of 1872), ss. 82 and 84.

S. 84 of the Criminal Procedure Code must be construed strictly with s. 72, and before a European British subject can be considered to have waived the privilege conferred upon him by s. 72, it must appear that his rights under that section have been distinctly made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights.

The provisions of s. 72 of the Code of Criminal Procedure, relating to the kind of Court which shall have jurisdiction and shall not have jurisdiction to enquire into a complaint or try a charge against a European British subject, constitute a privilege—that is to say, they are not so much words taking away jurisdiction entirely, as words which confer on the British subject a right to be tried by a certain class of Magistrates and by no others, which right the Code enables him to give up.

No person can by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try by some circumstance not personal to the accused.

*The Queen v. Bholanath Sen*² distinguished.

The waiver of privilege spoken of in s. 84 must be an absolute giving up of all the rights, with reference to Ch. VII. of the Code of Criminal Procedure, which a European British subject has; and the words 'dealt with as such before the Magistrate' mean everything contained in the chapter—that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which the accused would be liable.

THE facts of this case were as follows: Quiros and Maunders and several others, all European British subjects, were, on the 18th May 1880, charged with rioting and violence before an Assistant Magistrate vested with the powers of a Magistrate of the second class only. The Assistant Magistrate was aware that,

¹ Criminal Motion, No. 116 of 1880, against the order of *Charles P. Caspers, Esq.*, Assistant Magistrate of Raneeungee, dated the 18th May 1880.

² *L. R.*, 2 Cal. 23.

1880.

EMPRESS

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DASS,

6 Cal. 59.

1880.

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6 Cal. 83.

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 6 Cal. 83.

as European British subjects, the persons charged before him were, under s. 72, triable only by a Magistrate of the first class, who was also a Justice of the Peace, and not by him; and, accordingly, before putting them on trial, asked each of them whether he had any objection to be tried before him, a Magistrate of the second class. It did not, however, appear that he informed them that, under s. 72, he had no jurisdiction to try the case, and that they were triable only by a Magistrate of a higher grade. Each of the accused said that he had no objection to the Assistant Magistrate hearing the case, and the trial, accordingly, proceeded, and terminated in the conviction of all the accused. Quiros and Maunders received sentences of two and one month's rigorous imprisonment respectively, and the others were fined.

Quiros and Maunders then applied to the High Court to quash the entire proceedings, on the ground that, under s. 72, the Assistant Magistrate, having only second-class powers, had no jurisdiction to try European British subjects.

Mr. *Piffard* appeared for the petitioners.

No one appeared for the Crown.

Mr. *Piffard*.—The provisions of s. 72 point out clearly the officers who are to have jurisdiction over European British subjects. The Magistrate in this case had no jurisdiction. [JACKSON, J.—Your clients have waived their privilege; they cannot now say that the Magistrate had no jurisdiction.] S. 72 does not confer a privilege which can be waived so as to give jurisdiction. Consent cannot give jurisdiction—*Foy's case*.¹ [JACKSON, J.—That case was decided before the Criminal Procedure Code was passed. Does not s. 84 afford a complete answer to your present contention?] I submit not. The principle that consent cannot give jurisdiction is one that has governed the Courts for years. The Legislature has not abolished the principle; it has merely said that, if the claim is not made, the person charged "shall be held to have waived his privilege as such British subject." It has not defined the consequence of such waiver, nor said that waiver shall create jurisdiction, and if it had intended to do so, apt words would have been used. [JACKSON, J.—If the words 'waived his privilege' do not mean that the Court in which he might have pleaded his privilege shall have power to try him, what do they mean?] Under ordinary circumstances, if a Magistrate tries a person without jurisdiction, and sentences and imprisons him, he may be liable to a suit for damages for false imprisonment, and the object of the Legislature was to protect a Magistrate from such consequences—*The Queen v. Bholanath Sen*.² If consent can validate a conviction, it must also validate an acquittal. Suppose the case of a man waiving his right to be tried by a higher tribunal in order to be tried before a friend, and he is acquitted, or convicted and slightly punished, could he plead such acquittal or conviction in bar of further proceedings against him?

The judgment of the Court (*Jackson and Tottenham, JJ.*) was delivered by

JACKSON, J.—We are of opinion that the provisions of s. 72 of the Code of Criminal Procedure, relating to the kind of Court which shall have jurisdiction and shall not have jurisdiction to enquire into a complaint or try a charge against a European British subject, do, in fact, constitute a privilege—that is to say, that they are not so much words taking away entirely jurisdiction, as words which confer on the British subject a right to be tried by a certain class of Magistrates, and by no others, which right the Code enables him to give up. It appears to us that that is the only view of the section which is compatible with a reasonable construction

¹ 1 Tay. & Bell 219.

² 1 L. R., 2 Cal. 23.

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of s. 84. We have had cited to us a case with which we are of course familiar—the case of *Foy*,¹ in which judgment was given by Sir L. Peel, and a more recent case before Mr. Justice Macpherson and Mr. Justice Morris—*The Queen v. Bholanath Sen*.² The case of *Foy* it appears to me unnecessary to mention at present, because the state of the law and the state of the jurisdiction under which that case was decided was altogether different, and has, in fact, passed away. In regard to the judgment delivered by Macpherson, J., I entirely concur in it, and for this reason, that there is nothing in the Code of Criminal Procedure—and I apprehend there never could be any provision—which would enable an accused person to waive an objection to jurisdiction which was not personal to himself—that is to say, no person could by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try by some circumstances not personal to the accused. That was the case in the matter before Mr. Justice Macpherson. There it was alleged that, of the three Magistrates who constituted the bench, one—the presiding Magistrate—was the virtual prosecutor, and another had himself a personal and pecuniary interest in the case, and therefore no consent of the prisoner could get over these disqualifications. As to s. 84, the language is peculiar; it does not declare that a European British subject may waive his privilege, but it provides that, if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege as such European British subject. Mr. Piffard suggested to us that the meaning of the words ‘waive his privilege’ in that section is, that the accused, while retaining all his rights as to want of jurisdiction, which s. 72 confers, so that he could not be tried except by a particular Court or Magistrate, might yet deprive himself of the right to bring an action for damages. It appears to us that that is not a reasonable construction. We do not think that the Legislature could have meant that a person might be tried or committed by a Magistrate whose act in so trying or committing him would be altogether invalid, so that such act could be immediately got rid of by application to the proper Court, but that the accused by waiver should protect the Magistrate, so that no action would afterwards lie for damages. It appears to us that the waiver of the privilege spoken of must be an absolute giving up of all the rights with reference to this chapter of the Code of Criminal Procedure which a European British subject has; and the words ‘dealt with before the Magistrate’ mean everything contained in this chapter—that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which he would be liable.

But then we are also of opinion that s. 84 must be construed strictly with s. 72, and that we must read them as if they were connected together by the word ‘but,’—that is to say: “No Magistrate shall have jurisdiction to enquire into a complaint or try a charge against a European British subject unless he is a Magistrate of the first class; *but*, if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege.” And clearly we think that, before a European British subject can be considered to have waived the privilege conferred upon him by s. 72, it must appear that his rights under that section have been distinctly made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights. Now, in the case before us, for anything that appears to the contrary, the question put to the accused may simply have been whether they had any personal objection to Mr. Casperz as Magistrate to try them. The answer na-

¹ 1 Tay. and Bell 219.

² 1 L. R., 2 Cal. 23.

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turally would be, "We have no objection to be tried by Mr. Casperz," But if the question had been—"You stand here as European British subjects, which I know you to be, and as such British subjects you have the right to claim that you should not be tried except by Magistrates of a certain class, to which class I do not belong. Do you claim that right or not?" The answer might have been quite different, and it would be entirely for them to choose whether they would avail themselves of that privilege or not. It does not appear that any such question was put to them in the present case, and therefore we think the proceedings before the Assistant Magistrate were bad, and the conviction must be quashed.

Application has been made by Mr. Piffard that this judgment might apply to the case of two other prisoners who have been also convicted, but who are not petitioners before us. We think that Mr. Casperz should be called upon to state whether, in point of fact, the provisions of the Code of Criminal Procedure were made known to those two prisoners.

Conviction set aside.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

1880.

June 15.

6 Cal. 88.

IN THE MATTER OF THE PETITION OF SURJANARAIN DASS AND OTHERS.

THE EMPRESS ON THE PROSECUTION OF D. R. DALY v. SURJANARAIN DASS AND OTHERS.¹

Order by Executive Officer—Power of Judicial Courts to question the legality of such order.

Where an executive officer makes an order or issues a notification under the provisions of the Code of Criminal Procedure, it is not within the province of judicial authority to question the propriety or legality of such order or notification until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notification. It then becomes the duty of the judicial authority to consider whether the order is properly made or not.

Mr. M. Ghose and Baboo Durga Mohun Dass for the petitioners.

Mr. Kilby for the Crown.

THE facts of this case sufficiently appear in the judgment of the Court (Jackson and Tottenham, JJ.), which was delivered by

JACKSON, J.—We are altogether unable to approve of the decision of the Sessions Judge in this case, as it appears to us that he has missed the true points in the case, and has given prominence—and given, so to say, by his judgment a certain validity—to that which he ought to have discountenanced.

As we understand the statements of the contending parties, the Maharaja of Tippera claimed a right to collect certain duties, of which the nature is not precisely stated, in respect of bamboos cut, not only over land admittedly belonging to him, but over land of which the ownership appears to be in doubt, and of which, at any rate, the Collector of Sylhet appears to have made a grant to the opposing parties in these proceedings. Whether upon application from the grantee or otherwise, the Deputy Commissioner, as Collector, appears to have taken upon himself to issue a proclamation to all persons concerned, warning them that the collection of duties or tolls on the part of the Maharaja was illegal. Notwithstanding the issue of that proclamation, the people of the Maharaja appear to have

¹ Criminal Motion, No. 87 of 1880, against the order of Baboo John Chunder Pottnovis, Extra Assistant Commissioner of Sylhet, dated 23rd of December 1879.

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6 Cal. 88.

made a further demand of tolls, which was resisted by the Collector's grantee, and thence a dispute arose; and the result of that was, that certain persons were convicted in the Court of the Extra Assistant Commissioner, and sentenced to rigorous imprisonment and fine. These persons appealed to the Sessions Judge, and the Sessions Judge, in our opinion very strangely, says: "So long as the order of the Deputy Commissioner stands, and until it has been set aside, these appellants have no right to disobey the order of the Deputy Commissioner, and to take the law into their own hands. It is not for this Court to form an opinion of the legality or the illegality of the order of the Deputy Commissioner. The employers of these appellants have their remedy by suit or otherwise." This declaration of the Sessions Judge would seem to justify the doctrine, that any public servant, with or without authority, is at liberty to issue any notification which seems good to him, and that any person committing an act contravening such notification is liable to be punished. The Judge goes on to say: "The evidence for the prosecution proves that these appellants did illegally assemble." Now, except in so far as the assembly was in contravention of the Deputy Commissioner's proclamation, it does not appear to have been illegal at all. Further on the Judge says: "The order of the Deputy Commissioner has clearly made over to the Chowtully Garden managers the sole right to the south side of the Sawal Charra, and forbade the Maharaja of Tippera and his people to make any collections." This is a view of the functions of the Deputy Commissioner very much wider than anything that my previous experience has made me acquainted with. When the Code of Criminal Procedure authorizes the making of orders by executive authorities with the view of preventing a breach of the peace or for similar purposes, it has always been held, and is now enacted in the existing Code, that the propriety of such orders is not a matter of question in that state of things for the appellate judicial authorities. It is when the executive officers seek to enforce those orders by the infliction of penalties that the Courts have to step in and see whether the orders made were with authority or not. This was precisely the occasion on which it was the duty of the Sessions Judge to consider whether that order was properly made or not. The order of the Sessions Judge, upon the ground on which it is based, cannot be supported. It, no doubt, remains to be considered, and it has not been considered, whether the agents of the Maharaja of Tippera or his farmer did, with a view to enforce any right or supposed right, commit any act which comes within the purview of s. 141 of the Indian Penal Code, and for which, therefore, they are properly punishable. That is a question which the Sessions Judge ought to inquire into, and with a view to the consideration of which this case must go back. There can be no doubt, we think, that if the Maharaja has been accustomed to levy these duties or tolls, or whatever they are called, and attempted on the present occasion to levy them from the persons from whom they are due, that would be an "attempt to enforce a right or supposed right."

Case remanded.

APPELLATE CRIMINAL.

*Before Mr. Justice Morris and Mr. Justice Prinsep.*HOSSEIN BUKSH AND OTHERS *v.* THE EMPRESS.¹

1880.

June 24.

6 Cal. 96.

Charges, distinct and separate, tried simultaneously by a Jury—Parties opposed in rioting—Consent by Pleaders on behalf of Accused to irregular Procedure—Examination of Accused by Sessions Judge—Code of Criminal Procedure (Act X. of 1872), ss. 243, 250, 264, 265.

Members of two opposing parties in a riot were, under two distinct committals, sent up for trial before the Sessions Judge and a jury. After the close of the case for the prosecution in one of these cases, the Sessions Judge, with the consent of the pleaders representing the accused, postponed the taking of the evidence for the defence, and proceeded to examine the witnesses for the prosecution in the counter-case before the same jury. The Court then took the evidence of the witnesses for the defence in the first, and in the counter-case in the order named, and, after hearing the address of the various pleaders for the defence, and the reply of the Government Pleader, proceeded to sum up the facts in both cases to the jury, who returned a verdict in respect of all the accused. *Held* that the procedure resorted to by the Judge was a practical violation of the salutary rule which necessitated the keeping of trials in such cases distinctly separate, and that its adoption having materially prejudiced the interests of the accused, the convictions should be set aside.

*Queen v. Sheikh Basu*² distinguished.

Held, further, that the defect in the procedure could not be cured by the consent of the pleaders for the defence to the arrangement suggested by the Court.

The authority given to a Sessions Court to examine an accused does not contemplate the cross-examination of such accused, nor can the Judge endeavour, by a series of searching questions, to force the accused to criminate himself. The real object involved in the power given to the Court under s. 250 of the Code of Criminal Procedure is to enable the Judge to ascertain from time to time from the accused (especially if he be undefended) such explanation as he may desire to give regarding any statement made by the witnesses, or, at the close of the case for the prosecution, to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused in the commission of the offence with which he stands charged.

Baboo Gopee Nath Mookerjee and Mr. Sandel for the accused.

THE facts of this case sufficiently appear in the judgment of the Court (*Morris and Prinsep, JJ.*), which was delivered by

PRINSEP, J.—In an attempt made by certain villagers of Juggernathpore to remove an obstruction to the flow of water erected by the villagers of Sikundarpore, a riot took place, in which Shariutoollah, one of the Juggernathpore people, was killed.

In accordance with the procedure which has been prescribed in such cases by numerous rulings of this Court, the Magistrate held separate proceedings against each party, keeping the evidence against them separate, and he committed the contending villagers for trial by the Court of Session in separate cases.

The case against the Sikundarpore villagers first came on for trial. After the close of the evidence for the prosecution (so the Sessions Judge records) by arrangement with "the pleaders, the case for the defence in the present trial was postponed till after the conclusion of the case for the prosecution in the counter-trial"—*i. e.*, the case against the Juggernathpore villagers. The trial

¹ Criminal Appeals, Nos. 266 and 324 of 1880, against the order of *J. P. Grant, Esq.*, Sessions Judge of Hooghly, dated the 30th February 1880.

² B. L. R., Sup. Vol. 750; S. C., 8 W. R., Cr. Rul., 47.

of the case last-mentioned then commenced. "The Judge required the same jury, as were then sitting on the counter-case—i. e., the case against the Sikundarpore villagers—to sit on the present trial. The pleaders for the prosecution and for the defence in both cases had suggested this course." After the close of the evidence for the prosecution in this case, the Sessions Judge returned to the first case, and took the evidence for the defence. He then took the evidence for the defence in the second case. The pleaders for the defence addressed the Court in both cases. The Government pleader for the prosecution in both cases replied. The Sessions Judge delivered a written summing-up in both cases simultaneously, and then received and recorded the verdict of the jury, convicting all the prisoners in both cases. The prisoners were, accordingly, sentenced, and they have now appealed to this Court.

The objection taken in both appeals is the same, that the prisoners have been prejudiced by the manner in which the two cases have been virtually tried together. Before dealing with this objection, we feel bound to say that the mode of trial adopted by the Sessions Judge is quite opposed to that which, for many years past, has been pursued in cases where the members of opposing factions are charged with rioting. The very salutary rule which requires that in such cases each party should be tried separately has here been practically violated by the procedure adopted by the Sessions Judge. It is true that the Sessions Judge has so far complied with this rule as to take evidence and record the defences of the accused person in each case; but, looking at the procedure, which has been already described, we cannot, in any sense of the term, regard these as two separate trials. They are certainly not distinct from one another, because the two trials were not only held before the same jury, but they proceeded almost in parallel lines, until they united in the addresses of the pleaders engaged and in the Sessions Judge's summing up. There is no authority of law for such a procedure. But it is suggested that the prisoners cannot plead that they have been prejudiced, because this mode of trial was adopted at the suggestion, and with the consent, of the pleaders engaged. We cannot, however, accept this suggestion, for, as pointed out by Macpherson, J., in the case of *Queen v. Bholanath Sen*,¹ when criminal proceedings are substantially bad in themselves, the defect will not be cured by any waiver or consent of the accused or (we would add in the present cases) of the pleaders for the accused. The arrangement, as the Sessions Judge terms it, seems to have been adopted for the convenience of the pleaders themselves, and from a narrow, but we think a mistaken, view on their part that it would benefit their clients. As for the prisoners themselves, we cannot suppose that they had any voice or understanding in the matter.

We will now proceed to consider the effect of the procedure adopted in the several stages of each case, as regards the position of the several prisoners.

The law (s. 265, Code of Criminal Procedure) declares that the "same jury may try as many accused persons successively as to the Court seems fit."

By this we understand that one trial is to follow the other—that is, that, on the conclusion of one trial, the same jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which, though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Inde-

¹ I. L. R., 2 Cal. 23.

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pends of the irregularity of the proceeding, no jury ought, we think, to be placed in such an embarrassing position. It is only fair to the prisoners that the sole issues on which they are to be tried, and the evidence bearing upon those issues, should be laid before the jury, and that the minds of the jury should not be encumbered by the consideration of foreign and irrelevant matter.

These considerations do not appear to have been present to the minds of the pleaders of the different accused when they consented to the arrangement to which the Judge refers. But, as already pointed out, this consent on their part cannot prevent the prisoners showing on appeal that they have been materially prejudiced by the course adopted. It is apparent that the prisoners accused in the second case had not the full benefit of s. 243—that is, of challenging the jurors who were to try them. Who can doubt that, if the first case, which was that of the Sikundarpore accused, had been tried out and resulted in an acquittal, the Juggernathpore accused would have at once challenged all the jurors, on the ground that they were not likely to address themselves to the case, as it affected them, with impartial and unbiassed minds? So also, the Sikundarpore people might justly complain that, though they had the right of challenge before their own trial commenced, they could have no right to object to the trial by the same jury of the second case, notwithstanding that they might be seriously prejudiced by evidence given in that case criminating them behind their backs, and without their having an opportunity of cross-examination.

It has been argued that the Sessions Judge has power under the law to adjourn a trial, and that, consequently, it was not illegal on his part to commence the second trial before the conclusion of the first. But, according to s. 264, the Court can only adjourn the trial if it “considers that such adjournment is proper and will promote the ends of justice.” No reason for the adjournment in turn of each trial has been stated. From the terms of the Sessions Judge’s summing up, it would seem that the “arrangement” was suggested by himself, or by the Government Prosecutor, for he states that it was acquiesced in by the pleaders for the defence in both the cases. In our opinion, the adjournments were neither proper, nor likely to promote the ends of justice. But, even admitting that, under some circumstances, a second case may be tried by the same jury during the pendency of the first trial, it by no means follows (and this constitutes a very grave objection) that the two cases should be summed up together, and decided simultaneously.

The Sessions Judge, in the commencement of his summing up, has himself indicated this objection to the procedure adopted by him. He tells the jury that “the evidence for the prosecution in one case is practically that for the defence in the other, though a special defence has been made in each case.” The Judge, no doubt, felt the difficulty in which the jury were placed, for he states, “I proceed to sum up the evidence in both cases on this single charge, in which, however, I will do my best to keep each case and the evidence proper to it singly before you.” We recognize the Sessions Judge’s endeavours to do his duty in this respect, but he seems to have lost sight of the fact that some of the prisoners in each case were examined as witnesses in the other; and that, under such circumstances, it was impossible to expect that the jury should be able to separate in their minds what was said by a prisoner as a witness from what he admitted on examination as an accused. A witness, under s. 132 of the Evidence Act, cannot excuse himself from answering any relevant question, upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate him; but the law also provides that no such answer, which a witness shall be compelled to give, shall be proved against him in any

criminal proceeding except a prosecution for giving false evidence by such answer. It is unnecessary to refer to the particular statements made by seven of the prisoners—three¹ on one side, and four² on the other—when under examination as witnesses; but several criminating statements have been made by them, especially in cross-examination. The Sessions Judge has made no attempt to exclude these statements, and we think that, in considering the evidence of both these cases together, the jury could not separate the evidence in each, and, even in spite of the strongest precautions both on their own part and on that of the Judge, must unconsciously have been influenced in one case by evidence given in the other. There was no such interval between the two trials as would enable them to efface from their minds the effect of the evidence in one case when considering their verdict in the other. So far, therefore, as the prisoners who were also examined as witnesses in the two cases are concerned, we are quite clear that this irregularity has prejudiced them most materially in their defence. It is almost impossible to distinguish between the case of these accused and that of their fellows, though from the position that the former occupied as witnesses we have less hesitation in finding that they have been very seriously prejudiced by the mode of trial adopted by the Sessions Judge.

Our attention has been directed to some cases, and particularly to a judgment of a Full Bench—*Queen v. Sheikh Bazu*³—in which it was held that the simultaneous trial of two parties engaged in a riot did not prejudice them so as to necessitate a reversal of their conviction and a re-trial; but we observe that in all these cases the trials were held with the aid of assessors, and not by jury, as in the present case. This difference in the trial is most material as regards the particular effect on the prisoners. The Sessions Judge, with whom the decision in the one form of trial rests, is less likely than a jury to have been influenced by what he learnt in the other case, and, while the verdict of the jury would be final on the facts, the findings of the Sessions Judge would be open to correction by the High Court on appeal.

On these grounds we consider that the prisoners in these cases should be re-tried before a separate jury in each case; and we, accordingly, set aside the convictions and sentences, and direct that the Sessions Judge do so proceed.

We regret to have to notice the manner in which the examination of the accused has been conducted. In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner after the manner of the cross-examination of an adverse witness by counsel.

This Court has already pointed out to the Sessions Judge on more than one occasion—see particularly the case of *Chinibash Ghose*⁴—that, by exercising the power allowed by s. 250, the Sessions Court is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some criminating admissions, after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain from time to time from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness, or after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. In one of these cases now before us, we

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¹ Nehal Sheikh, Bungshi Dass, and Rhedoy Chowkidar.

² Natak Sheikh, Moslem Sheikh, Hakeemoollah, and Itahar Sheikh.

³ B. L. R., Sup. Vol. 750; S. C., 8 W. R., Cr. Rul., 47.

⁴ 1 C. L. R. 436.

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observe that the Judge was engaged, during the whole of the first day, in examining the accused. In like manner, in the second case, he examined the accused at considerable length before the case for the prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law.

We cannot consider that trials so commenced have been fairly conducted. The minds of both the Judge and jury are at the outset prejudiced by irresponsible statements made by the accused, while subject to this system of cross-examination, before their guilt has been established by the examination of a single witness. We trust that the Sessions Judge will discontinue this practice, which has been repeatedly condemned by this Court, and is, in our opinion, quite opposed to the spirit of our law in India.

Convictions set aside, and re-trial ordered.

APPELLATE CRIMINAL.

Before Mr. Justice White and Mr. Justice Field.

SAMSHERE KHAN AND OTHERS v. THE EMPRESS.¹

1880.

July 31.

6 Cal. 154.

Riot—Unlawful Assembly—Culpable Homicide—Fight between two contending Factions, each armed with Deadly Weapons—Penal Code (Act XLV. of 1860), s. 300, excep. 5.

Where death results in a fight between two bodies of men deliberately fighting together, a greater proportion of the men composing both sides being armed with deadly weapons, and it being further apparent from the evidence that the man slain was an adult, and that no unfair advantage was taken by the one side or the other during the fight, the offence committed is culpable homicide, but does not amount to murder.

THE facts of this case sufficiently appear from the judgments.

Mr. Wood and Mr. Bonnerj.e (with them Baboo Nulit Chunder Sein, Baboo Jogesh Chunder Roy, and Munshee Sirajul Islam) for the appellants.

Baboo Doorga Mohun Das for the Crown.

The following judgments were delivered:—

WHITE, J.—This is an appeal against the conviction of the five appellants, named Samshere Khan, *alias* Sirdar, Abdul Rohoman Moonshee, Saheb Khan, Uasimudd Meah, and Fakiroollah Khan, for murder committed in the course of a riot, for which offence they have been severally transported for life.

The evidence extends to a very great, and in my opinion a very unnecessary, length. It is full of repetitions, and yet the inquiry in some important respects has not been as searching as it might have been. It is clear, however, that a very serious riot took place in a village called Latshaila on the morning of the 17th January of this year, which resulted in the wounding of one man and the death of another. Two of the shareholders of a portion of a share in the village, named Kurreem Sirdar and Dost Mahomed, having quarrelled about their share, sold each of them a fraction of his share to two rival zemindars, Khan Saheb and Dwarkanath Roy, with the object of enlisting two powerful neighbours in the dispute. The purchase by Khan Saheb was taken in the name of his son Hafiz. It would appear that Kurreem Sirdar, when he sold, was not in possession of his share, and that Khan Saheb, shortly before the riot took place, had been taking steps to get possession of the fractional part which he had bought,

¹ Criminal Appeal, No. 408 of 1880, against the order of *T. M. Kirkwood, Esq.*, Sessions Judge of Mymensing, dated the 21st April 1880.

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and for that purpose had erected a cutcherry on the land of the prisoner Fakiroollah, who is described as a small talukdar in the village, and who had become a partisan of Khan Saheb. This step was followed very soon afterwards by the introduction of some lathials into Fakiroollah's bari. On the morning of the 17th of January, Dost Mahomed also collected a number of persons in his homestead. As to the origin of the riot, which took place on that morning between the two partisans, we think that the most reliable evidence is that of Nobi Bux, the constable, who had, some days previously, been deputed by the authorities to keep peace in the village, and who was on the spot whilst the riot was going on. From his evidence it appears that Dost Mahomed and some of his party came down that morning to Fakiroollah's bari; that the constable, then seeing preparations being made on both sides, which led him to believe that a breach of the peace was imminent, had a report drawn up, which he forwarded to the thannah, with a request that the Inspector of Police would attend, but, before the Inspector could arrive, the two factions, with armed men on both sides, met in conflict in a field of Dhanoo Sircar, just outside the borders of Fakiroollah's bari. After a short fight, Gariboolla, who was one of Dost Mahomed's party, was wounded in the stomach with a spear. Upon this Dost Mahomed's party fled eastward to a jack tree, about fifty yards off, pursued by Khan Saheb's party; that there Dost Mahomed's party were reinforced by some more partisans armed with spear and lathies, when Khan Saheb's party, in their turn, took to flight, but, having fled about eighty yards, were rallied near some mangoe trees. The fight then re-commenced, and very soon afterwards a man named Khoaz, who also belonged to Dost Mahomed's party, was killed. A great deal of argument has been addressed to us to show that Khan Saheb's party was a lawful assembly collected together for the defence of the cutcherry, which had been erected on Fakiroollah's land. It may be that there was a motive of defence in collecting the party in the first instance, but judging them from their acts and conduct, and from what subsequently took place, we think there can be no reasonable doubt that they were originally assembled for purposes of offence as well as defence; that the purpose was, by means of criminal force, to enable Khan Saheb to assert his right, or supposed right, of collecting the rents of the share which he had bought; and that when, on the morning of the 17th, knowing that Dost Mahomed had collected a band of men to oppose them, and that he and some of his partisans had come down to Fakiroollah's bari with hostile intentions against them, they issued armed from Fakiroollah's bari, they so issued with a common object of fighting Dost Mahomed's party. The evidence, no doubt, shows that Dost Mahomed's party were in a manner the aggressors on that morning, and had done acts for the express purpose of provoking Khan Saheb's party to come forth from Fakiroollah's bari, or which at least were calculated to provoke the latter; but, on the other hand, it is clear that Khan Saheb's party were quite willing to accept any challenge from Dost Mahomed or his party. The members of the two assemblies, or a large portion on each side, were armed with deadly weapons, such as lathies and spears, and on the side of Khan Saheb's party, at least there was a large number of professional fighting men. We look upon what took place, from the time that Khan Saheb's party issued from the bari until the death of Khoaz, as one continued fight, although it consisted of more than one stage; and we think that it was in the prosecution of the common object of fighting that Gariboolla was wounded, and Khoaz killed.

We have not now before us the persons who actually inflicted the grievous hurt on the one and the death-wound on the other, but, before considering the extent to which the five prisoners are responsible for what occurred, we will state the view that we take of the crimes committed by the wounding and killing.

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As regards the wounding of the man Gariboollah, we consider that that has been proved most satisfactorily to be grievous hurt. The wound was a spear-wound, which penetrated the skin of the abdomen. It was a severe wound, and resulted in the man being, as the doctor proves, more than twenty days in hospital. But for the interposition of Providence, the man might have lost his life, for, if the spear had entered the abdomen, it probably would have ended in death.

With regard to the man who was killed, we are of opinion that the offence committed by killing him is culpable homicide, but does not amount to murder, inasmuch as Khoaz was an adult, and his death occurred in the course of a fight between two bodies of men who were deliberately fighting together, both sides being armed, or a greater part of the men on both sides being armed, with lances or spears which are deadly weapons, and no unfair advantage appearing upon the evidence to have been taken by the one side over the other in the course of the fight.

On this point, I would refer to the case of *The Queen v. Kukier Mather*,¹ decided on the 13th November 1877 by a Bench, of which I was a member. In that case I considered at some length what was the character of the offence where death was caused under circumstances similar to the present. I then held that the offence did not amount to murder, because it came within the 5th exception to s. 300 of the Indian Penal Code. After alluding to the difference between the English and Indian law on the subject as regards voluntary culpable homicide by consent, I said: "A man who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life; and, as he voluntarily puts himself in that position, he must be taken to consent to incur the risk. If this reasoning is correct as regards a pair of combatants, fighting by premeditation, it equally applies to the members of two riots or assemblies who agree to fight together, and of whom some on each side are, to the knowledge of all the members, armed with deadly weapons."

Some of the Judges of this Court entertain a different view from mine² as to the applicability of the 5th exception to a case of a premeditated fight for two reasons—*first*, because the party who is killed does not intend to get himself killed if he can help it. But the language of the exception is not confined to the case where a man consents to suffer death, but extends to the case where he consents to take the risk of death. Although it was Khoaz's intention to escape death if he could, yet he not the less ran the risk of death when an armed man he joined in encountering armed men, and he did this voluntarily, and therefore with his own consent.

The *second* reason is, because sudden fight forms the subject of an express exception, namely, the 4th exception. Hence it is argued that the Legislature could not have intended that premeditated fight was one of the cases prescribed for by the 5th exception. This argument does not appear to me to be based upon a sound construction of the 5th exception. Consent voluntarily given by an adult implies in every case premeditation. In *sultee*, which, according to the universal opinion, falls within the 5th exception, the widow deliberately intends to die by burning, and the relative who fires the funeral pyre, on which the widow mounts, deliberately and with the utmost premeditation does an act with the intention that the widow shall be burned to death. There is nothing, there-

¹ Unreported.

² See *Empress v. Rohimuddin*, I. L. R., 5 Cal. 31.

fore, in the fact that the fight is premeditated, which ought to exclude it from the operation of the 5th exception. If, as I think, according to the common and natural meaning of the words, an armed man, who deliberately fights with another man whom he knows also to be armed, consents thereby to take the risk of death, why is the adversary who kills him to be excluded from the benefit of the 5th exception, because by another exception the case of a man who kills his adversary in the course of sudden fight is specially provided for. The circumstances under which a man slays his opponent in sudden fight are different from those where he slays him in premeditated fight; and, if the Legislature intended that the offence of both should be only culpable homicide, the intention would naturally be shewn by the enactment of two distinct exceptions. Again, sudden fight is a distinction recognized by the English law of homicide, and the framers of the Code may easily be supposed to have for that occasion alone made sudden fight the subject of a distinct exception, without imputing to them the intention thereby implied, by excluding from the 5th exception a case of premeditated fight, if it actually falls within the meaning of the exception. The sound construction to my mind is, that the 5th exception extends to all cases of death occasioned by, or resulting from, premeditated acts, where the party killed takes the risk of the death with his own consent; and that the 4th exception is an independent exception, applying to all cases of death occurring in the course of sudden and unpremeditated fight, and does not in any way bind the natural operation of the 5th exception.

(The learned Judge then went into the evidence as to the share each of the prisoners had taken in the riot, and varied the order of the Sessions Judge.)

The convictions and sentences passed by the Sessions Judge will therefore be set aside, and the convictions and sentences which I have mentioned above will take their place.

FIELD, J.—I concur in the judgment which has just been delivered. I think that it is very clear that, on the morning of the 17th, a considerable number of armed lathials were collected in the village on the part of Khan Sahab, and a considerable number on the part of Dost Mahomed.

What actually occurred was this:—The constable having paid a visit to Dost Mahomed's bari, and having had reason to believe that a number of men were collected there, went over to Fakiroollah's bari, and there found the same state of things. It appears that a number of Dost Mahomed's people followed the constable, and took up a position on certain land belonging to one Dhunnoo Sircar, south of, and immediately adjoining, the homestead land of Fakiroollah. When the constable, having had a report written, and having sent it to the thannah by Bhugwan Chowkidar, came out of the cutcherry recently erected on Fakiroollah's land, south of his bari or homestead, Dost Mahomed represented to him that a number of armed men were collected within the homestead of Fakiroollah, and urged him (the constable) to arrest them. When the constable hesitated to do so, Dost Mahomed called his own men to assist him in carrying out his expressed intention of doing so himself. It would appear either that a considerable number of Dost Mahomed's men had remained behind at Dost Mahomed's bari, or that Dost Mahomed had miscalculated the strength of Fakiroollah's party. Be this as it may, Fakiroollah's people did not wait for Dost Mahomed's men to come on Fakiroollah's land, but they took the initiative, and crossed the boundary line into the land of Dhunnoo Sircar, and there the riot commenced, and first took place.

Under these circumstances I think it is impossible to say that Khan Sahab's party were acting on the defensive merely, or, in other words, were

I. L. R., Cal. 34.

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acting in the exercise of the right of private defence of person or property. It is quite clear that both parties were armed, and both parties were prepared to fight, and that a very trivial incident was sufficient to bring them into conflict. I think it is reasonable to say that, in entering upon that conflict, each party had for its object to fight for victory, and, in doing so, knowingly and deliberately took upon itself the risks of the encounter; to this state of facts I agree that the 5th exception to s. 300 of the Penal Code is applicable, and I do not think it very material which party were, in the first instance, the actual aggressors, though this should be considered in awarding the punishment. When a man, being one of an armed band, and being himself armed with a deadly weapon, as there is evidence to shew that Khoaz, who was on this occasion killed, was armed, takes part in a fight, and uses that deadly weapon against his opponents, I think it is reasonable to say that he was, within the 4th clause of s. 300, committing an act which he knew to be so imminently dangerous, that it must, in all probability, cause death, or such bodily injury as is likely to cause death; and I think further that he committed such act without any excuse for incurring the risk of causing death or such injury as has just been mentioned. When he and his party are opposed by a number of persons similarly armed, and using their arms in a similar way, I think it is reasonable to say that such person, within the meaning of excep. 5, takes the risk of death with his own consent.

Order as to conviction and sentences varied.

CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Maclean.

1880.
June 28.
6 Cal. 163.

THE EMPRESS v. NISTAR RAUR.¹

Contagious Diseases Act (XIV. of 1868), ss. 11, 21—Rules 13 and 27 passed under the Act—Magistrate, Competency of—Jurisdiction.

Any woman desirous of ceasing to carry on the business of a common prostitute is, under the provisions of the Indian Contagious Diseases Act, 1868, absolutely entitled to have her name removed from the register; and any rule, or portion of a rule, purporting to have been framed under the provisions of that Act, which places any obstacle on the way of her doing so, is *ultra vires*, and therefore void.

Where a woman is prosecuted before a Magistrate under s. 11 of Act XIV. of 1868, she is not precluded from pleading that she has ceased to be a common prostitute, and that she has taken steps, under s. 21 and the rules framed thereunder, for the removal of her name from the register; and the Magistrate is competent to entertain such a defence.

In the matter of Lakhmani Raur approved.

This was a reference from the Presidency Magistrate for the Northern Division of Calcutta, in which it appeared that the defendant, Nistar Raur, was registered as a common prostitute under Act XIV. of 1868, and her name was still borne on the register, which was produced in evidence before the Magistrate. She was several times convicted and fined for failing to appear in due time for periodical medical examination, and her fifth and last conviction was on the 23rd of March 1880.

It would seem, however, from the records of the Police Office, produced in evidence, that, in February 1880, an application on behalf of Nistar was present-

¹ Criminal Reference, No. 106 of 1880, from *B. L. Gupta, Esq., C.S.*, Presidency Magistrate of Calcutta, Northern Division, dated the 29th May 1880.

² 3 B. L. R., A. Cr., 70.

ed to the Deputy Commissioner of Police, informing him that she had ceased to be a common prostitute, and was living under the protection of a certain individual, and praying that her name might be removed from the register. The application was rejected. Later on, a second application on her behalf, claiming exemption on the same grounds, was presented to the Commissioner of Police by her attorney, Mr. Leslie, in person. A police-enquiry was ordered, and pending the result of such enquiry the woman presented herself for examination on one occasion. No orders on the petition were received for some time after this, and Mr. Leslie deposed that he made more than one attempt, but failed to obtain a hearing for his client. Upon this he intimated to the Commissioner that he would advise his client not to appear at her next examination, so that in case of a prosecution she might have an opportunity of contesting her rights before the Court. The result of these proceedings was the arrest of the woman by the police without a warrant from any Magistrate, and this prosecution under s. 11 of the Aft.

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The first question raised related to the legality of the arrest. The police are expressly authorized, by rule 27 of the Government rules, to arrest all registered women defaulting at the medical examination. But before the Magistrate it was contended that the rule itself, which purports to have been made under s. 11 of the Aft XIV. of 1868, was unauthorized by that Aft. and was therefore *ultra vires*.

The next question raised related to the jurisdiction of the Magistrate in the case, and to the validity of rule 13 passed under s. 21 of the Aft. Rule 13 provides that applications by women to have their names removed from the registers should be made in writing to the Commissioner of Police, who, if satisfied on enquiry that the applicant has really ceased to practise as a prostitute, "may cause her name to be removed from the register." Neither the Aft nor the rules indicate any other mode by which a woman once registered may procure her exemption, and the rules provide no appeal from the Commissioner's orders. It was contended, therefore, that the Commissioner's orders were final, and the Magistrate had no jurisdiction to go into the question as to whether the woman had ceased to be a common prostitute. On the other hand, it was contended that s. 21 of the Aft confers an absolute right on every registered woman to withdraw her name at her option from the register, and leaves it to the Government only to prescribe the procedure or mode by which she may do so; so that as no woman's name, not even that of a declared common prostitute, can be placed on the register against her will, or without her consent; so no woman's name can continue on the roll after she has, in the manner prescribed by Government, applied for the removal of her name; and that, if a woman, after the removal of her name from the book, still continues to carry on the business of a common prostitute, the only course left to the police is to prosecute her for each repetition of the offence under s. 4 of the Aft. It was, therefore, urged that rule 13, investing the Commissioner of Police with a discretionary power to reject applications made under s. 21, was inconsistent with the real import of that section, and therefore null and void. The ruling of the High Court in *In the matter of Lakhmani Rau*¹ was referred to.

On the evidence before him, the Magistrate found, as a fact, that the accused had ceased to be a common prostitute within the meaning of the Aft; and he referred the following questions of law for the opinion of the High Court under s. 240 of Aft IV. of 1877:—

1st—Is rule 27 of the rules passed by the Government of Bengal, under Aft XIV. of 1868, valid in law; and is a woman registered under that Aft legally liable

¹ 3 B. L. R., A. Cr., 70.

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to arrest by a police-officer without a warrant, for omitting to attend at the periodical medical examination?

2nd—Is rule 13 of the said rules consistent with the Aft, and can the Commissioner of Police, in his discretion, lawfully refuse to remove from the register the name of a woman who declares herself desirous of ceasing to practise as a common prostitute, and applies for such removal?

3rd—In either case is a registered woman, whose application to the Commissioner of Police for the removal of her name from the register has not met with success, precluded from pleading before the Magistrate, on a prosecution under s. 11 of the Aft, that she is not, or has ceased to be, a common prostitute, and is the Magistrate competent to enquire into such a plea?

Mr. R. Allen and Mr. R. N. Mitra for Nistar Raur.

The following judgments were delivered:—

MACLEAN, J.—This is a reference made by one of the Presidency Magistrates of Calcutta, under s. 240, Aft IV. of 1877, submitting for the opinion of the Court three questions of law arising out of a prosecution under Aft XIV. of 1868, s. 2.

The first question raises a point which does not affect the case before the Magistrate, who has to decide whether the person charged before him has committed the offence imputed. We think it unnecessary to express any opinion on this point.

We think that, as every woman registered under the Aft has an absolute right to have her name removed "from the book," if she is desirous of ceasing to carry on the business of a common prostitute, any rule which raises any obstacle to the exercise of that right is not in accordance with s. 21 of the Aft. Part of the 13th rule referred to by the Magistrate, commencing "may postpone," and ending "satisfied he," appears to be *ultra vires*. We answer the second question in the negative.

The third question refers to the Magistrate's competency to entertain a woman's plea that she is no longer lawfully retained on the register, and is therefore not liable to be punished for breach of the rules applicable to registered women. In our opinion, a woman prosecuted for an offence under s. 11 is not precluded from pleading that she has ceased to carry on the business of a common prostitute; that she has taken the steps prescribed by s. 21 and the rules framed in accordance therewith to obtain the removal of her name from the register; and that, if it is still retained there, it is retained contrary to law. This opinion is, we think, supported by the authority of this Court in the case to which the Magistrate refers—*In the matter of Lakhimani Raur*.¹ It was there held that the Magistrate was bound to enquire into the plea that the woman before him had not been lawfully registered, because she had not consented to it; and on the same principle, we think that, in the present case, it is the Magistrate's duty to determine whether or not the woman has been lawfully retained upon the register; and if not, whether she had, in fact, ceased to carry on the business of a common prostitute or not when the proceedings were taken against her.

TOTTENHAM, J.—I have no doubt that rule 27 is illegal in authorizing arrest without warrant, but the Magistrate cannot go into this question. I think that rule 13 is beyond the scope of s. 21 of the Aft in allowing the Commissioner of Police to retain a woman's name on the register as long as it pleases him to do so. I read the law as leaving it at the option of the woman to be put on the

register and to remain on it. She comes off at her own peril, but there is no authority given by law for keeping her name on the register against her will.

I also think that a woman brought before the Magistrate for breach of rules under s. 11 of the Act is entitled to plead that she has conformed to the procedure by Government under s. 23 of the Act; that she is not a common prostitute; and that, if she is still on the register, she is kept there against the law, and is not liable to be punished for neglecting to attend for examination. The Magistrate, I think, should acquit her if he finds her plea to be true.

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v.

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6 Cal. 163.

APPELLATE CRIMINAL.

Before Mr. Justice White and Mr. Justice Field.

GOGUN CHUNDER GHOSE v. THE EMPRESS.¹

1880.

July 16.

Evidence, Admissibility of—Judgment in Civil Suit out of which Criminal Prosecution arises.

6 Cal. 247.

In a suit by A against the obligors of a bond, the Court held, for the reasons stated in its judgment, that the signatures of the obligors were not genuine, and directed the prosecution of A on a charge of forgery. On the trial of A before a jury, this judgment of the Civil Court was put in evidence on behalf of the prosecution, and its contents commented on by the Sessions Judge in his charge to the jury.

Held that this judgment had been illegally admitted.

Mr. M. Ghose and Baboo Bykant Nath Dass for the accused.

The facts of this case sufficiently appear in the judgment of the Court (*White and Field*, JJ.), which was delivered by

WHITE, J.—This was an appeal by the prisoner Gogun Chunder Ghose against a conviction under s. 471 of the Code and a sentence of five years' rigorous imprisonment.

The circumstances out of which the prosecution arose are these: The prisoner had brought a suit against Basheeram Mundle and his two brothers, Babooram Mundle and Dharani Dhur Mundle, for the recovery of 726 rupees, being the amount of principal and interest due upon a kistibandi, or bond, alleged to have been executed in favour of the prisoner by the three brothers.

The Munsif found that the bond had been executed by one of the three, Dharani Dhur, but dismissed the suit, because he was of opinion that the signature of the other two defendants, Basheeram and Babooram, were forged; and he entertained so strong an opinion upon this point that he directed this prosecution, which we are now considering, to be instituted against the prisoner for forging the kistibandi, and using it as genuine knowing it to be forged.

The case has been tried by a jury, and they have come to a unanimous verdict that the prisoner is guilty of using this bond knowing it to be forged, and in answer to a question they said that they found the signatures of Basheeram and Babooram to be forged, but the signature of Dharani Dhur to be genuine. At the trial, the judgment of the Munsif in the civil suit, although objected to on the part of the prisoner, was put in evidence by the prosecution, and read out to the jury, and the substance of the judgment was also referred to by the Sessions Judge in his charge to the jury.

¹ Criminal Appeal, No. 433 of 1880, against the order of W. H. Page, Esq., Officiating Additional Sessions Judge of the 24 Pargannas, dated the 10th June 1880.

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The ground of the appeal is, that this judgment was improperly admitted as evidence, and that, eliminating the judgment, there is not sufficient evidence to justify the verdict. There can be no doubt the judgment was improperly received. Technically it was inadmissible, because it was not between the same parties, the present parties technically being the Queen-Empress on the one hand, and the prisoner on the other, and the respective parties in the civil suit being the prisoner and the three defendants; and furthermore, it was not admissible on the substantial ground that the issues in the civil and criminal suit were not identical, and that the burden of proof rested in each case on different shoulders. It was not necessary for the Munsif in the civil suit to find more than that the execution of the bond by the three defendants was not proved. When the Munsif went further and pronounced the bond a forgery, and directed a prosecution, it was not a decision on the question of forgery, but merely an opinion which, although he was entitled to give expression to, ought no more to have been put in evidence on the present charge than the opinion of a Magistrate who commits a prisoner to take his trial upon a criminal charge.

The Judge, in his summing up, draws the attention of the jury to this judgment and to the Munsif's opinion contained in it, and uses the following words: "The Munsif believed that one of the brothers, Dharani, executed the document, and that the other names were added afterwards by the prisoner, or with his knowledge, and with a dishonest intent. Whether this or whether all three names are forgeries, the offence is the same." It is true that the Judge, later on, says to the jury—"You are not in any way bound by the finding of the Munsif;" and that he also, still later on, draws their attention to the fact that in the civil suit the *onus probandi* was on the prisoner, whereas at the trial of forgery the onus was on the prosecution. But inasmuch as neither the judgment nor the Munsif's opinion were evidence, the Judge, if he referred to them at all, ought to have told the jury not merely that they were not bound by them, but that it was their duty to dismiss them altogether from their mind. We have next to consider whether, independently of the objectionable evidence, there is sufficient evidence to justify the verdict of the jury.

[The learned Judge then proceeded to consider the other evidence in the case, and ultimately arrived at the opinion that, independently of the Munsif's judgment, there was not sufficient evidence which, even if believed, pointed with reasonable certainty to the guilt of the accused, and therefore made an order of acquittal.]

Conviction set aside.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Tottenham.

NOOR BUX KAZI AND OTHERS v. THE EMPRESS.¹

1880.

July 20.

6 Cal. 279.

Evidence Act (I. of 1872), ss. 30, 138—Confession—Admission—Examination of Witnesses—Judge—Penal Code (Act XLV. of 1860), ss. 114, 149, and 302.

A prisoner, charged together with others with being a member of an unlawful assembly, made a statement before the Committing Magistrate, implicating his fellow-prisoners and another person. He subsequently withdrew this statement, and made another in which he endeavoured to exculpate himself.

¹ Criminal Reference, No. 39, on Appeal No. 362 of 1880, against the order of *T. M. Kirkwood, Esq.*, Sessions Judge of Mymensing, dated the 21st May 1880.

Held that this statement was not evidence against the other prisoners under s. 30 of the Evidence Act. It was not a confession, nor did it amount to any admission by the prisoner that he was guilty in any degree of the offence charged; but it was simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself, and any mention made by him in such a statement of other persons having been engaged in the riot was altogether irrelevant, and not evidence against them.

At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed.

Held that such a course of procedure was irregular, and opposed to the provisions of s. 138 of the Evidence Act.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act.

Five persons, Jamir Mundle, Taiyab, Rabiullah, Noor Bux Kazi, and Daghu, were charged with being members of a body of men, some hundred in number, who, at the instigation of one Amiruddin Khan, on the 1st February 1880, armed with spears and clubs, went to take possession of certain lands in Mouza Kumarpur. It was alleged that one Kalu Shaikh (who was not before the Court) had speared one Kobin Sircar, who had opposed the entrance of the mob on his lands, and Jamir Mundle was charged with having struck him on the head with a *lati*, from which injuries Kobin died. It was further charged that, at the same time, Taiyab slightly wounded with a spear one Reza Mahomed, a cousin of Kobin, and that Noor Bux Kazi (unarmed), and Rabiullah and Daghu (armed with deadly weapons), were all present at the time, as leaders of the rioters.

The four accused firstly mentioned pleaded an *alibi*. Daghu, who was arrested on the 5th February, stated before the committing Magistrate, that he went to Kumarpur with a body of armed men, and that Kalu, Jamir Mundle, Taiyab, and Noor Bux were amongst the party. On the 24th February, before the Sessions Judge, he, however, repudiated this statement, and said that he was forced to accompany the other armed men, but that he only did so as far as Husbendi (a place adjoining Kumarpur), where he escaped, and that he did not see Noor Bux, Rabiullah, or Jamir Mundle, as he did not go to Kumarpur.

The Sessions Judge, differing from the assessors, found that Noor Bux, Jamir Mundle, and Taiyab, "were members of an unlawful assembly in the prosecution of a common object, in which murder was committed by Kalu, which offence they knew to be likely to be committed, and the commission of which offence they, being present, actually abetted;" and that they had, therefore, committed an offence under ss. 114 and 149, read with s. 302 of the Penal Code. But, concurring with one assessor, he found that Daghu and Rabiullah were guilty of rioting armed with deadly weapons, and had committed an offence under s. 148 of the Penal Code.

He, therefore, sentenced the two latter to three years' rigorous imprisonment, and the three former to death.

The case was referred to the High Court in the usual way for confirmation of the sentence of death, and Noor Bux Kazi, Jamir Mundle, and Taiyab, preferred an appeal from that sentence.

Mr. Jackson and Munshee Serajal Islam for the appellants.—The statement made by Daghu before the committing Magistrate cannot be said to be a confession such as is mentioned in s. 30 of the Evidence Act. In order to

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implicate the prisoners, Daghu must have implicated himself. This he did not do. Daghu could not be convicted on his own statement alone, neither can the prisoners on Daghu's statement. Moreover, the statement was withdrawn at the Sessions Court. [GARTH, C.J.—It is surely evidence against them, if it amounts to a confession by him that he was a member of an unlawful assembly; it is certainly a confession that he was present with Amiruddin's men.] To render the statement a confession under s. 30, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is used—*The Queen v. Belat Ali*¹; see also *The Queen v. Mohesh Biswas*.² There is a difference between an admission and a confession. The confession must be something on which the Court could act without further evidence. [GARTH, C.J.—If the statement is admissible for the purpose of showing that Noor Bux was present, may we not connect that with the other evidence? If the Court were satisfied with the identity of the prisoners, would that not be sufficient?] The case of *Regina v. Amrita Govinda*³ is a direct answer. It is there laid down that if an abettor of a crime is, on account of his presence at its commission, to be charged as a principal, his abetment must continue down to the time of the commission of the offence. At any time before that event he may change his mind, and withdraw from the abetment. What is the meaning to be attached to the words "the Court may take into consideration" in s. 30? There is no proof that the statement was not made behind the back of Noor Bux. It was made on the 6th February, and Noor Bux was only arrested on that day, and the witnesses for the prosecution are near relatives of the deceased. As to the case against Taiyab, there is no suggestion that he was present and committed the murder. S. 149 of the Penal Code was never intended to refer to a charge of murder; see the case of *The Queen v. Sabed Ali*.⁴

No one appeared for the Crown.

The judgment of the Court (Garth, C.J., and Tottenham, J.) was delivered by

GARTH, C.J. (who, after stating the facts, proceeded to deal with the evidence against each prisoner individually, and with regard to the statement made by Daghu before the committing Magistrate as affecting Noor Bux, observed):—

The Judge also attaches some weight to what he calls the original confession made by one of the prisoners named Daghu (who has been convicted under s. 148, Penal Code) to the committing Magistrate, in which he mentions Noor Bux Kazi as present. It is our duty to point out to the Judge that this statement of Daghu's, which we have read, is no sort of evidence against Noor Bux even under s. 30 of the Evidence Act, for it is not a confession; it does not amount to any admission by Daghu himself that he was guilty in any degree of the offence charged; but it is simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself. Any mention made by him in such a statement of other persons having been engaged in the riot is altogether irrelevant, and is not evidence against them either under s. 30 or otherwise.

(The learned Chief Justice then went into the further evidence, and finding, with regard to Noor Bux, that there was not sufficient evidence of his having been present at all, ordered the conviction as regards him to be set aside. With respect to the other two appellants, the Chief Justice found that they

¹ 10 B. L. R. 453.

² *Id.* 455.

³ 10 Bom. H. C. 409.

⁴ 11 B. L. R. 347.

were members of the unlawful assembly, but there was not sufficient evidence to show that the object of the assembly was the murder of Kobin; nor that they, as leaders of the assembly, openly incited the others to cause his death, and therefore they ought not to be found guilty of murder, but only of rioting under s. 148 of the Penal Code. The learned Chief Justice then concluded as follows):—

We think it right to point out to the Sessions Judge that the course which he adopted in the examination of the witnesses for the prosecution was irregular, opposed to the provisions of s. 138 of the Evidence Act, and not fair to the prisoners.

We find that, on the examination-in-chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The result of this, of course, was to render the cross-examination by the prisoner's pleaders to a great extent ineffective, by assisting the witnesses to explain away, in anticipation, the points which might have afforded proper ground for useful cross-examination.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act. The Judge's power to put questions under s. 165 is certainly not intended to be used in the manner which we have had occasion to notice in the present case.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

THE EMPRESS v. SUNKER GOPE.¹

Criminal Procedure Code (Act X. of 1872), s. 66—Dishonestly retaining in British Territory property stolen beyond British Territory.

A Nepalese subject, having stolen cattle in Nepal, brought them into British territory, where he was arrested, and sentenced to one year's rigorous imprisonment. *Held* that he could not be tried for the theft itself, but that he might be convicted of dishonestly retaining the stolen property.

*Reg. v. Lakhya Govind*² followed.

REFERENCE to the High Court under s. 296 of the Criminal Procedure Code.

A Nepalese subject had stolen two head of cattle from the homesteads of two separate individuals in Nepal, and had brought the cattle with him into British territory, where he was arrested and sentenced by the Officiating Joint-Magistrate of Mohubarri to one year's rigorous imprisonment under s. 411 of the Penal Code.

The Officiating Magistrate of Durbhangah was of opinion that the case was not cognizable in British territory, and referred the matter to the High Court.

No one appeared on the reference.

¹ Criminal Reference, No. 1324 of 1880, from *F. H. Barrow, Esq.*, Officiating Magistrate of Durbhangah, dated the 31st August 1880.

² 1 L. R., 1 Bom. 50.

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1880.

Sep. 17.

16 Cal. 307.

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The opinion of the High Court (Garth, C.J., and Maclean, J.) was as follows:—

GARTH, C.J.—We are of opinion that the conviction of Sunker Gope, for an offence under s. 411 of the Penal Code, is legal, and that we should not interfere. Sunker Gope confessed to having stolen cattle in the kingdom of Nepal, and he was found in possession of them in British territory. S. 66 of the Criminal Procedure Code, illus. (b), lays down that “a charge of receiving or retaining stolen goods may be inquired into and tried, either in the district in which the goods were stolen or in any district in which any of them were at any time dishonestly received or retained.” Now, the theft having occurred beyond British territory, the prisoner could not be tried for that offence in our Courts, see *Reg. v. Adizigadu*,¹ but the present case seems to be very similar to one reported in the Indian Law Reports, *Reg. v. Lakhya Govind*,² and therefore we think that the conviction may be sustained.

It is unnecessary for us to say anything on the question of extradition; that matter will be dealt with by the local authorities under the orders of Government.

Conviction upheld.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

1880.

Oct. 7.

6 Cal. 308.

IN THE MATTER OF MUTTY LALL GHOSE AND OTHERS.³

Criminal Procedure Code (Act X. of 1872), ss. 471, 467, 193—Institution of Criminal Prosecution, pending Appeal in Civil Court.

If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear ground for believing that either the parties to the proceeding or their witnesses have committed perjury or any other offence against public justice, he is justified in directing criminal proceedings against such person under s. 471 of the Criminal Procedure Code without any further enquiry than that which he has already held in his own Court.

As a matter of discretion and propriety, it is right for a Court, before committing a person on a charge of perjury upon his own uncontradicted statement, to await the hearing of the appeal, where an appeal is pending, in the case in which he is charged with such perjury.

In this case the District Judge of Hooghly ordered a prosecution to be instituted against Mutty Lall Ghose, Ram Kumar Mundle, Becharam Roy, and Heroo Lal Ghose for forgery and perjury in a civil suit, under ss. 467, 471, 193 of the Criminal Procedure Code.

An application was made to the High Court on behalf of the accused that the criminal proceedings might be stopped until the appeal in the civil suit was heard.

Baboo Juggut Chunder Banerjee, for the petitioner, contended that the order of the District Judge should be set aside, or at least stayed, and that the Judge should have issued a rule calling on the petitioners to show cause why they should not be prosecuted under s. 471, before the proceedings were actually instituted.—*The Queen v. Baijoo Lall*.⁴

¹ I. L. R., 1 Mad. 171.

² I. L. R., 1 Bom. 50.

³ Criminal Motion, No. 19 of 1880, against the order of J. P. Grant, Esq., District Judge of Hooghly, dated the 5th August 1880.

⁴ I. L. R., 1 Cal. 450.

The judgment of the Court (*Garth, C.J., and Maclean, J.*) was delivered by GARTH, C.J.—We think that there is no ground either for setting aside or for staying the criminal proceedings.

We consider that the Full Bench decision of this Court in *In the matter of the Petition of Ram Prasad Hazra*¹ is a direct authority for the position that, where criminal proceedings have been instituted by a District Judge against the parties or their witnesses in course of a civil suit, the High Court has no power to stay those proceedings until the decision of the Judge in the civil suit has been heard upon appeal.

As regards the other point, we think that the ruling of the Court in the case of *The Queen v. Baijoo Lall*² has been somewhat misunderstood. It seems to be supposed from that ruling that a Court, either civil or criminal, which has heard a case tried, has no right to institute proceedings under s. 471 of the Criminal Procedure Code against any of the parties concerned in the suit, without first holding an enquiry, and calling upon those parties to show cause why such proceedings should not be taken.

We think that this is clearly a mistake. If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear ground for believing that either the parties to the proceeding or their witnesses have committed perjury, or any other offence against public justice, he is justified in directing criminal proceedings against such persons under s. 471, without any further enquiry than that which he has already held in his own Court.

Mr. Justice Macpherson in that very case says distinctly : “ If in the course of the civil trial the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he, on consideration, thinks it necessary to proceed at once, of course it may be right to do so.”

There is, therefore, no ground, as far as we can see, for setting aside the proceedings in this case, upon the ground that the Judge should, before instituting them, have held any other enquiry than that which he had already held in the probate case.

At the same time we think that the Judge might well take warning from the very excellent advice which is given to Subordinate Courts by Mr. Justice Macpherson in the judgment which we have been quoting. We do not pretend, of course, to give any opinion as to the merits of this case, but it would certainly seem rather rash to institute criminal proceedings in a case where the evidence is all one way, and where an appeal is now pending to this Court. We think that, as a matter of discretion and propriety, the Judge might have waited until the appeal had been heard before he ventured to commit the accused for perjury upon their own uncontradicted statements.

Application dismissed.

¹ B. L. R., Sup. Vol. 426; S. C., 5 W. R., Mis., 24.

² I. L. R., 1 Cal. 450.

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IN THE
MATTER OF
MUTTY LALL
GHOSH,
6 Cal. 308.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

1880.

Sep. 29.

6 Cal. 440.

IN THE MATTER OF THE PETITION OF KASI CHUNDER MOZUMDAR.

JUGGUT CHUNDER MOZUMDAR *v.* KASI CHUNDER MOZUMDAR.¹

Sanction to Prosecution for giving False Evidence—Criminal Procedure Code (Act X. of 1872), s. 468—Jurisdiction to give Sanction—Case settled without Evidence—Duties of Judge—Prosecution for False Evidence on verified Petition, when such Verification is unnecessary.

The Courts that have jurisdiction to grant a sanction to proceedings under s. 468 of Act X. of 1872 are the Court before which the offence was alleged to have been committed, and the Courts to which such Court is subordinate.

Per GARTH, C.J.—Where a case is settled without evidence being gone into, the Court in which the suit was brought, even if it have power to sanction criminal proceedings against any of the parties to such suit under s. 468 of Act X. of 1872, is guilty of great impropriety and indiscretion in so doing, inasmuch as it can have had no opportunity of judging of the *bona fides* of the claim or defence.

Semble.—A petition presented under Reg. XVII. of 1806, not requiring verification, cannot, from the fact of it being verified unnecessarily, be made the subject of a prosecution for giving false evidence.

THIS was an application to set aside an order of the District Judge of Pubna, sanctioning a prosecution under the following circumstances:

On the 17th July 1868, one Juggut Chunder Mozumdar executed a mortgage of certain property in Rajshahye in favour of one Kasi Chunder Mozumdar, securing a certain sum of money with interest. On the 28th October 1878, the mortgagee presented, under Reg. XVII. of 1806, a verified petition to the Court of Rajshahye for the foreclosure of the mortgage. Subsequently to the date of the petition this Rajshahye district was divided, and the land, the subject of the mortgage, was taken to form part of the district of Pubna. On the 15th December 1879, the mortgagor presented a counter-petition to the Court of Rajshahye, in which he stated that the mortgage-money had been paid in full (in support of which statement a registered receipt was filed, which, on the face of it, purported to show that the repayment had been made in 1869), and prayed that the property might be declared free from the mortgage charge. The mortgagee opposed that petition, and contended that the money had, in point of fact, never been re-paid, although it had been agreed and intended that it should be. On the 24th February 1880, the mortgagee presented another petition in the suit, stating that matters had been amicably settled, and praying that the petition in the foreclosure suit should be struck off the file. A decree by consent was accordingly drawn up and filed in accordance with the prayer of the petition.

In July 1880, the mortgagor applied to the District Judge of Pubna for leave to prosecute Kasi Chunder Mozumdar (the mortgagee), under s. 193 of the Penal Code, for the statements made in the petition, dated the 28th October 1878; and the District Judge, reviewing the proceedings which had taken place in the Rajshahye Court, and having regard to the registered receipt, gave his sanction to the criminal prosecution.

¹ Criminal Motion, No. 214 of 1880, against the order of C. D. C. Winter, Esq., Officiating District Judge of Pubna, dated the 22nd July 1880.

Kasi Chunder Mozumdar then applied to the High Court to set aside the order of the District Judge, and obtained a rule calling on the other side to show cause why the order should not be set aside.

Mr. *M. M. Ghose* and Baboo *Kali Churn Bannerjee* in support of the rule. —The Judge of Pubna had no jurisdiction to make the order, the false evidence (if any) was given in the jurisdiction of the Judge of Rajshahye; but, assuming the order to be legal, the Judge had no sufficient evidence before him to justify the order. And further, inasmuch as the petition filed in October 1878 did not require to be verified upon affirmation or oath, the gratuitous verification could not render the petitioner liable to a conviction for giving false evidence under the Penal Code.

No one appeared to oppose the rule.

The judgment of the Court (*Garth* and *Maclean*, JJ.) was delivered by

GARTH, C.J. (who, after stating the facts, continued).—The first ground upon which it is contended that the order is bad, is that the Judge of the Pubna Court had no jurisdiction to make it.

Upon this ground alone it appears to me that the order is clearly illegal. The offence of which Kasi is said to have been guilty is that of giving false evidence in a judicial proceeding under s. 193 of the Penal Code, and he is said to have given this false evidence in the 4th paragraph of the petition which he filed in the District Court of Rajshahye in 1878. If this was an offence at all, it seems clear to me that the Court, before which it was committed, was the District Court of Rajshahye, and that, consequently, the only Court which could give sanction to any criminal proceeding under s. 468 of the Criminal Procedure Code was either the Judge of the District Court of Rajshahye, or some Court to which the Rajshahye Court was subordinate. The offence was certainly not committed before or against the District Court of Pubna, which was not in existence at the time when the alleged offence was committed.

The District Judge of Pubna appears to be under the impression that, because the land, which was the subject of the mortgage, has since been transferred to the jurisdiction of Pubna, the offence with which Kasi is charged must also be considered as having been committed before the District Court of Pubna. But this is clearly a mistake. The question is not within what jurisdiction the mortgaged property is now situate, but before what Court the offence was committed; and there is no doubt that the offence (if any) was committed before the District Court of Rajshahye. I think, therefore, that, upon this ground alone, the sanction given by the Judge of Pubna is illegal.

But it was further contended by Mr. Ghose that, even assuming the Judge to have had jurisdiction, he had no evidence or materials before him which would legally justify his making the order. It is not necessary for our present purpose to decide this further question; but, as it is possible that another application of a similar nature may be made to the Rajshahye Court, I think it right, as the question has been raised, to express my views upon it.

In the case of *Barkatullah Khan v. Rennie*¹ it was held by a Full Bench at Allahabad that, when the Court in which the evidence in a case has been given has, under s. 468 of the Criminal Procedure Code, sanctioned criminal proceedings, no superior Court has any right to question the propriety of that sanction, and in the case of *In the matter of the Petition of Ram Prasad Hazra*²

1880.

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MATTER OF
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MOZUMDAR,
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¹ I. L. R., 1 All. 17.

² B. L. R., Sup. Vol. 426; S. C., 5 W. R., Mis. Rul., 24.

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it was held by a Full Bench of this Court that, where, in the course of a suit, a Civil Court commits a party for trial, or sanctions criminal proceedings against him on a charge of perjury or forgery, the High Court cannot, as a Court of revision, reverse such sanction or order, upon the ground that it was not warranted by the facts.

There are also other cases to the same effect. But I do not understand any of these cases to go so far as to decide that, when a Court, before which a case is pending, sanctions criminal proceedings against one of the parties to that suit, before any evidence in the case has been given, and without any materials before it upon which it could properly exercise a discretion, the sanction cannot be set aside.

It seems to me that the reason of the rule laid down in s. 468 consists in this, that suitors in a Court of Justice ought to be allowed the fullest liberty of speech and action in support of their respective contentions, and, so long as they use that liberty in good faith and honestly, they ought not to be subjected to malicious prosecutions.

The Court, which has the best means of forming an opinion upon the *bona fides* of the parties and the truthfulness of the witnesses, is the Judge who hears the evidence, and therefore, upon that Court or upon some superior Court which has the power of looking into the proceedings, the law imposes the duty of sanctioning, or refusing to sanction, criminal proceedings against the parties or their witnesses.

But, if a case is settled without any evidence being gone into, it seems to me that the Court in which the suit was brought has no opportunity of judging of the *bona fides* of the claim or defence, and, if it has any power at all under such circumstances, which I very much doubt, to give its sanction to criminal proceedings against either party, I think it would be guilty of a great impropriety and indiscretion in so doing. In this particular case no evidence was gone into. The proceedings taken by the mortgagee in 1878 were instituted under Reg. XVII. of 1806, which does not make it necessary that his petition should even be verified in the ordinary way. The suit was subsequently compromised by consent, each party paying his own costs; and it seems to me that, as no evidence was given on either side, it was quite impossible for them to form anything like a correct judgment as to whether the mortgage-money had or had not been paid when the proceedings were instituted in 1878.

Then there was another point taken by Mr. Ghose, which, I think, upon consideration, is entitled to some weight.

The petition presented by the mortgagee in 1878 did not require (as we have already seen) to be verified upon oath or affirmation. The petitioner was, therefore, not bound so to verify it, although in point of fact he did so; and Mr. Ghose's contention is that, unless the petitioner was legally bound to verify the petition, his verifying it gratuitously would not render him liable to conviction for giving false evidence or making a false claim; see ss. 191 and 193 of the Indian Penal Code.

An oath voluntarily taken in a proceeding where an oath is not necessary would not, by the English law, support an indictment for perjury, and I should doubt whether, under the Penal Code, a statement upon oath, when the oath is not necessary, would come within the provisions of s. 191. But it is not necessary for our present purpose to decide that question.

The order of the District Judge, which sanctions the criminal proceedings, will be set aside on the first ground.

MACLEAN, J.—I concur in setting aside the proceedings, on the ground that the Court of the Judge of Pubna and Bogra was not the Court before which the alleged offence was committed.

Order set aside.

1880.
IN THE
MATTER OF
THE PETITION
OF KASI
CHUNDER
MOZUMDAR,
6 Cal. 440.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF CHANDRAKANTA DE.¹

Penal Code (Act XLV. of 1860), s. 188—Injunction in Civil Suit—Disobedience of Order.

1880.
Nov. 9.
6 Cal. 445.

S. 188 of the Penal Code applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party.

The proper remedy for disobedience of an order of injunction passed by a Civil Court is committal for contempt.

THIS case was sent up to the High Court by the Sessions Judge of Mymensing for an expression of opinion on an order passed by the Magistrate of Mymensing on 29th April 1880, dismissing a complaint against Girijakanta Lahory and others for an alleged offence under s. 188 of the Penal Code.

The circumstances which led to the order were as follows :—

On the 21st August 1879, the District Judge of Mymensing, on regular appeal, passed a decree, directing “Girijakanta Lahory, the appellant, to refrain from excluding, as joint-sharer, one Tarinikanta Lahory, from any portion of a tank (the subject of litigation between the parties), and both parties from taking or giving any person exclusive possession of any portion thereof without the consent of the other of them.”

On the same date the District Judge passed another decree, “directing Girijakanta Lahory to refrain from excluding Tarinikanta from possession of two plots as a joint-sharer, and both parties from taking or giving to any other persons exclusive possession of either of the plots without the consent of the other of them.” Subsequently to the passing of these decrees, Tarinikanta Lahory presented a petition to the District Judge, stating that Girijakanta Lahory had disobeyed the injunction, and had erected a hut on the land contiguous to the tank, asking for permission to prosecute Girijakanta under s. 188 of the Penal Code.

This was granted; and, on the case coming up before the Magistrate on the 29th April 1880, he, without taking evidence as to the fact of the building of the hut, found that the order of injunction passed by the District Judge had not been promulgated, and expressed a doubt as to whether an order by a Civil Court was an order of a nature contemplated by s. 188 of the Penal Code; and therefore acquitted the accused under s. 211 of the Code of Criminal Procedure. The Sessions Judge disagreed with the view taken by the Magistrate, and referred the following points to the High Court for opinion :—

(i) Whether the Magistrate was right in holding that s. 188 of the Penal Code does not apply to disobedience of an order promulgated by a Civil Court?

¹ Criminal Reference, No. 182 of 1880, from the order made by T. M. Kirkwood, Esq., Judge of Mymensing, dated the 2nd October 1880.

1880.

IN THE
MATTER OF
THE PETITION
OF CHANDRA-
KANTA DE,
6 Cal. 445.

(ii) Whether the Magistrate was right in holding that the order had not been adequately promulgated?

No one appeared for either party.

The opinion of the High Court (*Garth, C.J.*, and *Maclean, J.*) was given by

GARTH, C.J.—In our opinion s. 188 applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party; so we think the Magistrate was right in refusing to act under the section.

If the defendant in the suit has disobeyed the injunction, the Judge ought, on the application of the plaintiff, to have sent him to jail for disobeying the Court's order; that was the proper remedy.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

1880.

Nov. 29.

IN THE MATTER OF THE PETITION OF MOHAMED ESHAK.
CHUNDRO MARWARI *v.* MOHAMED ESHAK.¹

6 Cal. 476.

Appeal—Jurisdiction—Time from which an Order of Appointment dates.

An Assistant Magistrate convicted an accused on the 12th August, and, by an order of even date, such Magistrate was invested with power to act as a Magistrate of the 1st class, although the fact, that he had been so invested with full powers, was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate, and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that, after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate, held that, even supposing the Lieutenant-Governor's order conferred first-class powers upon the Assistant Magistrate from the moment it was made, it must be shown, before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction.

Quare.—Whether an order investing a Magistrate with first-class powers is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate?

In this case the accused, Chundro Marwari, was charged with criminal breach of trust under s. 408 of the Penal Code; and the Assistant Magistrate found him guilty, and sentenced him, on the 12th of August 1880, to four months' rigorous imprisonment.

The accused appealed to the Magistrate, who held that he had not acted in such a manner as to bring him under the criminal law, and released him from imprisonment.

The prosecutor then applied to the High Court to have the District Magistrate's judgment set aside, on the ground that, on the very day (the 12th August 1880), on which the accused was convicted by the Assistant Magistrate, the latter was, by an order of the Lieutenant-Governor, made a First-class Magistrate, and consequently that the District Magistrate had no jurisdiction to entertain an appeal from his decision. It appeared from a letter from the Magistrate of Burdwan to the Registrar of the High Court that the Assistant Magistrate had been invested by Government with full powers to act as a Magistrate of the first class; but that the letter informing the Magistrate of Burdwan of the

¹ Criminal Motion, No. 280 of 1880, against the order of *C. C. Stevens, Esq.*, Officiating Magistrate of Burdwan, dated the 24th August 1880.

fact was not received until the 21st of August, and was not communicated to the Assistant Magistrate until the 23rd. A rule was granted, calling on the accused to show cause why the order made on appeal should not be set aside.

Mr. *M. P. Gasper* (with him Baboo *Amarendronath Chatterjee*) for the accused.

Mr. *H. E. Mendies* in support of the rule.

The opinion of the Court (*Garth, C.J.*, and *Field, J.*) was delivered by

GARTH, C.J.—In this case one Mohamed Eshak applied to this Court to send for the papers in a case in which one Chundro Marwari has been acquitted by the District Magistrate for the purpose of having the Magistrate's judgment set aside.

Chundro Marwari was convicted on the 12th of August last by Mr. Caspersz, who was the Assistant Magistrate, of criminal breach of trust, upon the prosecution of Mohamed Eshak, who was his employer. An appeal was preferred to the District Magistrate, who, after hearing the case, reversed the conviction and acquitted the prisoner.

We were asked to set aside this judgment of the District Magistrate, upon the ground that, on the very day on which Chundro Marwari was convicted by Mr. Caspersz, Mr. Caspersz was, by an order of the Lieutenant-Governor, made a First-class Magistrate, and consequently that the District Magistrate had no jurisdiction to entertain an appeal from his decision.

But, having now ascertained the true state of the case, I think that there is nothing in this objection. In the first place I have great doubt whether the mere order of the Lieutenant-Governor that a Magistrate shall be vested with first-class powers is of any force, or amounts to an authority to the Magistrate to exercise those powers until the order of the Lieutenant-Governor has been officially communicated to him—until, in fact, he knows officially what the order of the Lieutenant-Governor is; and as the order, which was made on the 12th of August, could not have been received by Mr. Caspersz until after that day, there is no reason whatever why his decision of the 12th of August should not have been made the subject of appeal to the District Magistrate.

But, even supposing that the order of the Lieutenant-Governor conferred upon the Magistrate first-class powers from the moment when it was made, it does not appear that in this case the order, making Mr. Caspersz a First-class Magistrate, was signed before the conviction. It may well be that the conviction took place in the early part of the day, and that the order, making Mr. Caspersz a First-class Magistrate, was made afterwards, and, unless we are satisfied that the District Magistrate had no power to hear the case upon appeal, I think it clear that we ought not to interfere.

But then it is said that, as the case is now before us, we ought to set aside the judgment of the District Magistrate, if we find that it is erroneous in point of law. I confess I entertain some doubt as to what our powers may be in that respect; but, assuming that we had the power, I certainly should be unwilling, under the circumstances of this case, to set aside a judgment of acquittal. These cases of criminal breach of trust often involve very nice questions; and I think that the materials before the Magistrate may well have justified him in holding that, having regard to the confidential relation which existed between the prosecutor and the prisoner, the acts committed by the latter might make him answerable to his master civilly, but not criminally. That being so, I am of opinion that we ought not to interfere, and that the rule must be discharged.

Rule discharged.

I. L. R., Cal. 36.

1880.

IN THE
MATTER OF
THE PETITION
OF MOHAMED
ESHAK,
6 Cal. 476.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

IN RE MIR EKRAR ALI.

THE EMPRESS v. MIR EKRAR ALI.¹

1880.

Dec. 3.

5 Cal. 482.

Penal Code (Act XLV. of 1860), ss. 192, 464, cl. 2—Fabricating False Evidence—Forgery—Alteration of Date of Document.

Where the date of a document, which would otherwise not have been presented for registration within time, is altered for the purpose of getting it registered, the offence committed is not forgery, where there is nothing to show that it was done "dishonestly or fraudulently," within cl. 2, s. 464 of the Penal Code, but fabricating false evidence within s. 192.

THE facts sufficiently appear in the judgment of the Court (Garth, C.J., and Field, J.), which was delivered by

GARTH, C.J.—The accused presented a bond for registration on the 18th December 1879. This bond is said to have been originally dated the 6th August 1879. If this date had remained, the instrument was presented after the time within which such an instrument must be by law presented for registration. The accused is said to have altered the date to the 26th August in order to bring the bond within time; or to have presented it for registration, knowing that the date had been so altered. It appears to us that the alteration of the date, under these circumstances, is not forgery, as there is nothing to show that it was done "dishonestly or fraudulently" within the meaning of cl. 2, s. 464 of the Penal Code.

It is not contended that the bond itself was not genuine, or that the accused intended to support a false claim by a false bond. It is clear that his intention in altering the date of the bond was to cause the registering officer to entertain an erroneous opinion touching a point material to the result of the registration-proceedings; and this being so, his acts constituted fabricating false evidence (ss. 192, 193, Penal Code), and using fabricated evidence (s. 196, Penal Code).

In this view of the law, and as the Sessions Judge did not take a serious view of the offence committed, we reduce the sentence of imprisonment to two months' rigorous imprisonment. The sentence of fine will stand.

Sentence modified.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF THE LEGAL REMEMBRANCER.

THE EMPRESS v. NOBO GOPAL BOSE.²

1880.

Dec. 7.

6 Cal. 491.

Transfer of Criminal Case to another District—Criminal Procedure Code (X. of 1872), s. 64—Grounds necessary to obtain Transfer when application is opposed by Accused.

Before the transfer of a case from one Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable.

¹ Criminal Revision, No. 289 of 1880, called for by the High Court on Sessions Statement of Bhagalpore.

² Criminal Rule, No. 31 of 1880, against the order of C. C. Stevens, Esq., District Magistrate of Burdwan, dated the 30th November 1880.

THIS was an application for the transfer of a criminal case under s. 64 of Act X. of 1872.

On the 19th November 1880, the Crown obtained a rule calling upon the accused to show cause why the case should not be transferred from the Court of Burdwan to Hooghly, or to such other district as the Court might direct.

The grounds on which the rule *nisi* was obtained were set out in an affidavit of Mr. Stevens, the District Magistrate of Burdwan, and were to the effect that he had been informed, and believed, that the case was causing considerable excitement in the district; that the prosecutor and one of the accused were persons of influence in the locality; and that most of the inhabitants of the district had their sympathies enlisted on one side or the other.

The rule came on for hearing on the 7th December 1880.

Mr. M. P. Gasper appeared to show cause against the rule. The grounds set out in the affidavit of Mr. Stevens (who has only lately been appointed the Magistrate of Burdwan) are insufficient; his statements are all based on information and belief; and in no one instance is the name of any informant given. My client, in his affidavit, states that he has little or no influence in Burdwan; that he had, under an order of Court, summoned thirty-two witnesses, and had been compelled to deposit 300 rupees in Court for the expenses of their attendance, and that the greater portion of such witnesses lived in Burdwan itself, and that, if the case is transferred, he would be put to great expense; that out of the 290 jurors on the jury list of Burdwan he is only intimately acquainted with at most fourteen, and entirely unacquainted with 180 others. There is further no precedent in any of the reports which admits of a transfer on the grounds put forward by the Crown. They have numerous safeguards against the grounds they rely on.

Baboo Jugodanund Mookerjee in support of the rule.

The judgments of the Court (Garth, C.J., and Field, J.) were as follows:—

GARTH, C.J.—I think that this rule should be discharged.

It was granted at the instance of the Legal Remembrancer, calling upon Nobo Gopal Bose and the other prisoners to show cause why the case against them, which now stands for trial in the Sessions Court of Burdwan, should not be transferred to Hooghly or to the 24-Parganas, or to some other jury district, upon the ground that a fair trial is not likely to be obtained at Burdwan.

The affidavit in support of this rule was made by Mr. Stevens, the District Magistrate of Burdwan, and it is certainly couched in very general terms.

Mr. Stevens says that he has been credibly informed, and believes, that the case is causing considerable excitement in the district; that the prosecutor, and the prisoner Nobo Gopal Bose, are persons of influence in the locality; and that most of the inhabitants of the town of Burdwan and its neighbourhood have their sympathies enlisted on one side or the other. But he does not tell us from what sources his information is derived, nor, except in very general terms, the grounds of his belief.

But we were nevertheless induced to grant the rule, because, having regard to the allegations in the affidavit, we thought it extremely probable that both sides might wish to have the case tried elsewhere, and that it would be at least as desirable for the prisoners as for the Crown that the trial should not take place at Burdwan.

It now appears, however, that all the prisoners, and especially Nobo Gopal Bose, object very strongly to the transfer, both upon the ground of expense and

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otherwise ; and it therefore becomes our duty to determine whether, under the circumstances disclosed in the affidavits on either side, we are justified in removing the case from the Court where it is legally triable.

I am clearly of opinion that, before we transfer a criminal case to another district against the wish of the accused party, we ought to require the very best evidence that a fair trial cannot be had, or, in other words, that the jury cannot be trusted to do their duty impartially.

Now, as I said before, Mr. Stevens's affidavit is very general in its language. It seems that he himself has only been in the district about three months. He does not tell us what are his sources of information or the grounds of his belief, and it may be, as Mr. Gasper has suggested, that he has acted upon the report of the police, who may be desirous of having the case tried in another district.

On the other hand, we have an affidavit from the prisoner Nobo Gopal Bose, in which he says, in the first place, that he has made arrangements for the trial at Burdwan, and incurred considerable expense in so doing ; and in the next place he says that there are upwards of 290 jurymen in the district of Burdwan, that with at least 180 of those persons he is not acquainted, and that to the best of his belief he does not know any one who is acquainted with them ; and lastly, he directly contradicts the statements of Mr. Stevens as to the case having caused any public excitement.

Then we must also bear in mind, in dealing with applications of this kind to transfer a case from one district to another, that there are many safeguards in this country against any undue bias on the part of the jury.

In the first place, there is the right to challenge any of the jurymen who are known to be partizans of either party, if there is any real ground for supposing that they are likely to be unduly biassed. Then another safeguard, as Mr. Gasper very properly observes, is, that the Judge may, if he pleases, disregard the verdict of the jury altogether, and there is also the High Court as a last resource in case of any miscarriage of justice. So that there is less reason here than there might be in England for transferring a case for trial to another district, upon the ground that an impartial jury is not likely to be obtained.

If, therefore, the Crown considers it desirable that the trial should take place elsewhere, the application should have been made upon much more cogent grounds and better materials than those which we have now before us, and we cannot accede to the suggestion of the learned Government Pleader, that we should postpone our decision upon their rule, in order that some fresh materials may be obtained.

I should also add that, if I had more doubt about the matter than I have, I confess that what we have just now heard from my learned brother, and from the Government Pleader, would have influenced my mind very materially. We are informed by the latter (although he has had a large experience in this Court for many years) that he is unable at present to mention a single instance in which such a transfer in a criminal case has been made. And my learned brother, who, we all know, has had a very large experience in the mofussil, both as a District Judge and a Magistrate, does not remember any case of such a transfer, although, in many instances, criminal trials have been held under circumstances which have caused considerable public excitement.

The rule must, therefore, be discharged.

FIELD, J.—I concur in thinking that this rule should be discharged.

This is an application, under s. 64 of the Code of Criminal Procedure, to have a criminal trial before the Court of Session transferred from the Burdwan District to the district of Hooghly, Howrah, or the 24-Parganas.

The grounds upon which such a transfer can be made under s. 64 are—
(1) that it will promote the ends of justice, or (2) that it will tend to the general convenience of the parties or their witnesses.

Now, the second ground may be disposed of at once, for, in the present case, it is not attempted to be shown that the transfer of the trial from Burdwan will tend to the convenience of the parties or witnesses, while on the part of the accused it is strongly urged that the transfer, if allowed, will cause considerable inconvenience and expense to him in procuring the attendance of the witnesses whom he wishes to call for the defence. Then, as to the first ground, it appears to me that, in order to obtain such a transfer, there should be shown to this Court something more tangible and something more definite than is disclosed in the affidavit made by Mr. Stevens. It may be that this gentleman entirely believed what he has stated in his affidavit, and I have no doubt that he did believe it. But what he has stated is stated, not upon his own personal knowledge, but upon his belief, and upon information received from third parties, who are not mentioned, and as to whose means of knowledge or good faith we have no means of forming an opinion.

I think that this affidavit, unsupported by other matter, even under the system of criminal law in force in England, would be considered insufficient; and I think that in this country it is *ex majore vi* insufficient, and for this reason. The system of criminal law in force in India differs in three essential respects from that in force in England. In the first place, the jury must not necessarily be agreed in the verdict. The verdict of a majority is sufficient. In the second place, the accused must not necessarily be acquitted, if the jury, or the majority of them, find him not guilty. The Sessions Judge can, if he differs in opinion from the jury, refer the case for the consideration of the High Court, and it has been decided that upon such a reference the High Court can consider the case as well upon the facts as upon the law. In the third place, the Local Government, if dissatisfied with the verdict of acquittal, can appeal against it to the High Court.

Having regard to these essential points of difference between the law in India and the law in England, it appears to me that, in order to succeed in an application of this nature when opposed by the person committed for trial, at least as strong a case should be made out in this country as in England, and, speaking for myself, I should say a stronger case.

It may be observed that, in the affidavit upon which this rule was granted, it was stated that Giridhari Mohunt, upon whose prosecution the accused have been committed, has a strong party in Burdwan opposed to Nobo Gopal, accused, while Nobo Gopal has influence with persons opposed to Giridhari. It therefore appeared quite possible that Nobo Gopal would himself wish to be tried in another district; but, as he desires to be tried at Burdwan, and is willing to risk the influence of Giridhari being exerted against him, an order for the transfer of the trial can be made only if we are satisfied that Nobo Gopal may, or may be able to, exert his influence with the jury so as to defeat the ends of justice, and of this I am not satisfied on the affidavit, which is the only evidence before us. I concur in discharging the rule.

Rule discharged.

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Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

1880.

Dec. 9.

6 Cal. 496.

THE GOVERNMENT *v.* KARIMDAD.¹

Penal Code (Act XLV. of 1860), s. 211—Prosecution for making a False Charge—Opportunity to Accused to prove the Truth of Charge.

Before a person can be put upon his trial for making a false charge under s. 211 of the Penal Code, he must be allowed an opportunity of proving the truth of the complaint made by him; and such an opportunity should be afforded to him, if he desires to take advantage of it, *not before the police, but before the Magistrate.*

Magistrates should clearly understand that, whilst the police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of such evidence when collected.

On the 26th July 1880, one Karimdad laid a complaint before the head-constable, in charge of Kubdia outpost, against one Doorga Churn Ghose, a Government officer, and against his peon, under s. 342 of the Penal Code. The police enquired into the case, and reported that the charge was false.

On the 20th August, the Deputy Magistrate, in charge of the sub-division, recorded his order on the police-report to the effect that the charge laid was utterly false, and recommended the Magistrate of the District to order the prosecution of Karimdad under s. 211 of the Penal Code. The Magistrate had previously summoned Karimdad to make his statement at head-quarters before one of the Deputy Magistrates; he, however, neglected to attend.

On the 31st August, the Magistrate sanctioned the institution of proceedings against Karimdad under ss. 211 and 198 of the Penal Code, and directed the Deputy Magistrate to take up the case.

On the 21st September, the Deputy Magistrate, without going into the case, passed the following order: "As, without first hearing the case in which Karimdad is the complainant, a case under s. 211 of the Indian Penal Code cannot proceed, it is therefore ordered that the police be directed to send up witnesses and Golok Sing, peon, as accused in the case in which Karimdad is the complainant, and the case be fixed for the 30th September. The witnesses present to appear on that day."

On the 30th September, Golok Sing was not present, and the Deputy Magistrate addressed the District Magistrate on the subject, and postponed the case until a reply was received.

The District Magistrate, considering that the course pursued by the Deputy Magistrate was wrong, transmitted the record, under s. 296 of Act X. of 1872, to the High Court.

No one appeared before the High Court.

The opinion of the Court (*Garth, C.J., and Field, J.*) was as follows:—

We are unable to see that the orders passed by the Deputy Magistrate in this case are irregular or illegal. Whatever opinion may have been formed by the Magistrate upon the police-report as to the truth of Karimdad's complaint, when he appeared with his witnesses, and asked to be allowed to prove his case, we think that the Magistrate could not, without hearing him and his witnesses, and deciding upon the truth or falsehood of his charge, proceed to put him on his trial under s. 211 of the Penal Code. It is manifest justice that a man ought not to be tried for making a false complaint until he has had an opportunity of

¹ Criminal Reference, No. 198 of 1880, from the order of *A. Manson, Esq.*, Officiating Magistrate of Chittagong, dated the 20th November 1880.

proving the truth of the complaint made by him ; and such opportunity should be afforded him, if he desire to take advantage of it, not before the police, but before the Magistrate. If persons are to be prosecuted under s. 211 of the Penal Code upon the mere report of a police-officer that their complaints are not true, the police are made the judges, whether a complaint is true or false. Such a delegation of magisterial functions is not contemplated by the law, and it requires but little experience of this country to understand how dangerous it would be to the best interests of justice. Magistrates of all grades cannot understand too clearly that, while the police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of this evidence when collected.

We decline to interfere.¹

1880.
GOVERNMENT
v.
KARIMDAD,
6 Cal. 496.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

THE EMPRESS ON THE PROSECUTION OF JOGENDRONATH BOSE v. THOMPSON.²

1881.
Jan. 5.

Presidency Magistrates' Act (IV. of 1877), s. 124—High Courts' Criminal Procedure Act (X. of 1875), s. 147—Dismissal of Complaint after Partial Hearing for want of Attendance of Complainant—Institution of Fresh Proceedings.

6 Cal. 523.

An order of dismissal under s. 124 of Act IV. of 1877 does not operate as an acquittal.

THIS case came before the High Court under s. 147 of Act X. of 1875, on the application of one James Augustus Thompson (who carried on business as Thompson and Coondoo), who had been charged, on the 5th August 1880, before the Presidency Magistrate of Calcutta, with having fraudulently retained and kept a telegraphic message sent by the Executive Engineer of Debrooghur, which message ought to have been delivered to one Jogendronath Bose (who carried on business under the name of Thompson, Coondoo, & Co.), and with having dishonestly misappropriated such message to the use of his firm, thereby committing offences under s. 22 of the Indian Telegraph Act (I. of 1876), and s. 403 of the Penal Code.

It appeared that James Augustus Thompson was formerly a partner in the firm of Thompson, Coondoo, & Co., and that, during the year 1879, he broke off connection with that firm, and sold his share in the good-will and stock-in-trade to Jogendronath Bose, his partner in the firm, and he himself set up business under the name and style of "Thompson and Coondoo." The places of business of the two firms were in the same street. It was admitted that James Augustus Thompson had received and opened, some time in August 1880, a telegram addressed to Thompson, Coondoo, & Co., and the defence put in was, that the telegram was received and retained by a mistake and in good faith.

The case came on before the Presidency Magistrate on the 15th September 1880, and part of the evidence was taken ; but the hearing was adjourned until the 22nd September, to enable certain witnesses to appear, who were un-

¹ See *Empress v. Irad Ally*, 1. L. R., 4 Cal. 869 ; *Empress v. Salik*, 1. L. R., 1 All. 527 ; *Empress v. Abul Husain*, 1. L. R., 1 All. 497 ; *Bhokteram v. Heera Kholita*, 1. L. R., 5 Cal. 184 ; and *Askruf Ali v. The Empress*, 1. L. R., 5 Cal. 181.

² Criminal Rule, No. 301 of 1880, from a decision of Mr. B. L. Gupta, Presidency Magistrate of Calcutta, dated 25th October 1880.

1881.
 EMPRESS
 ON THE PRO-
 SECUTION OF
 JOGENDRO-
 NATH BOSE

v.
 THOMPSON,
 6 Cal. 523.

able to do so on the 15th. On the 22nd the case was called on, and, the complainant being absent, the case was dismissed. Shortly after such dismissal, the complainant and his witnesses appeared; and the Magistrate, being of opinion that he could not revive the trial, directed the complainant to bring a fresh complaint. This was done on the following day; the accused was again summoned, and the trial held on the 20th October, and on the 25th October the Magistrate convicted the accused, and sentenced him to pay a fine of Rs. 200.

On the 29th November, a rule under s. 147 of Act X. of 1875 was obtained by the accused, calling upon the complainant to show cause why the order of the Presidency Magistrate should not be set aside.

Mr. *Branson* for the accused.

Baboo Gurudas Banerjee for the complainant.

The arguments sufficiently appear from the judgment of PRINSEP, J.

The following judgments were delivered:—

PRINSEP, J.—On a complaint made before the Presidency Magistrate under s. 22 of the Telegraph Act, a summons was issued on the 4th September last, fixing the 15th for the trial. The complainant and two witnesses (the Telegraph clerk and peon) were then examined; and, apparently to enable the complainant to prove that he had purchased the good-will of the firm who were the addressees of the undelivered telegram, the trial was postponed until the 22nd, summonses being granted to procure the attendance of Mr. C. T. Davis, an officer of the High Court, at 1 P.M. of that day.

The case was called on towards the commencement of the Presidency Magistrate's sitting, and, the complainant being absent "when his name was called six times," the case was dismissed. Within a very short time the complainant appeared, accompanied by Mr. Davis. The Magistrate at once saw the unfortunate result of his precipitate action, and, thinking that he could not revive the trial, adopted an alternative course, and directed the complainant to bring a fresh complaint. This was done on the following day; the accused was again summoned, the trial was held on the 20th October, and on the 25th he was convicted and sentenced to pay a fine of Rs. 200.

The matter has now come before us under s. 147 of the High Courts' Criminal Procedure Act (X. of 1875), it being contended that the order of the 22nd September last, dismissing the case, amounted to an acquittal, and that, on the facts found by the Presidency Magistrate, the accused has been wrongly convicted under s. 22 of the Telegraph Act.

I observe that the Presidency Magistrates' Act (IV. of 1877) practically provides for only one mode of procedure in the trial of offences before a Presidency Magistrate, no distinction being drawn between cases which are appealable to the High Court and those in which the Magistrate's orders are final, except in the manner of recording evidence (s. 115), the preparation of a charge (s. 116), and in the addition to an order of conviction and sentence which is appealable "of a brief statement of the reasons for the conviction" (s. 126). It seems, therefore, that the sections of the Act which provide for an order dismissing a complaint apply equally to all trials held by a Presidency Magistrate. The exact effect of an order of dismissal is not declared, except in a case dealt with under s. 32—i.e., when, after examining a complainant, the Magistrate considers that there are "no sufficient grounds for proceedings." In such cases it is expressly provided that the "dismissal of a complaint shall not prevent subsequent proceedings against the person complained against."

The Act, however, permits a Magistrate to dismiss a complaint in consequence of the absence of the complainant at the commencement of the proceedings and upon the day appointed "for the appearance of the accused person, or on any day subsequent thereto on which the case may be called on" (s. 118), or on the day to which the hearing may have been adjourned, "in order to secure the attendance of witnesses or for any other reason" (s. 124). In both instances it is left to the discretion of the Magistrate either to dismiss the complaint or again to adjourn the hearing. He is to determine whether he should impose upon the complainant the extreme consequences of his neglect to attend, or whether a further adjournment should be granted.

Mr. Branson, who supports the rule granted in this case, argues that, as s. 32 provides that an order of dismissal passed under certain circumstances shall be no bar to further proceedings, it must be presumed that it was intended by the Legislature that in all other cases such an order shall have the same effect as an acquittal.

On the other hand, Baboo Gurudas Banerjee contends, with considerable force, that an order of acquittal can be passed only under s. 126, when in a trial the Magistrate "finds the accused person not guilty;" that the law declares that it is only when a complaint is withdrawn with the permission of the Magistrate (s. 125) that any other order operates as an acquittal of the accused person, and that this is borne out by the terms of s. 113.

It is to be regretted that the Legislature, having prominently before it the precise terms of s. 221 of the Code of Criminal Procedure, left any doubt regarding the exact effect of an order of dismissal passed by a Presidency Magistrate. However, having carefully considered all that has been said on both sides, the terms of the law, and the inference that may legitimately be drawn from any omissions as already noticed, I am of opinion that an order of dismissal under s. 124 does not operate as an acquittal of the accused. No inference can, in my opinion, be properly drawn from the express terms of s. 32 that in all other cases an order of dismissal "shall prevent subsequent proceedings against the persons complained against." The rule that *expressio unius est exclusio alterius* cannot be applied when in subsequent sections the law (s. 126) has provided that an order of acquittal shall be passed "if, in any case tried" by a Magistrate, he finds "the accused person not guilty," with only one exception, *i. e.*, where a case has been withdrawn with the Magistrate's permission (s. 125), and when s. 113, in providing for the plea *autrefois acquit*, declares that it should only be raised when a person has "once been tried for an offence, &c., &c." We have, I observe, no definition of what constitutes a trial such as is conveniently given in the Code of Criminal Procedure, but it seems clear to me that, when all the evidence which is required by a Magistrate is, as we have in the case before us, not given, and when the Magistrate dismisses the complaint on account of the absence of the complainant before the time fixed for the re-commencement of the hearing, and the production of that evidence, it cannot be said that the trial has been completed.

Some remarks have been made regarding the inconvenience which would arise if an accused person, after the dismissal of the complaint, was again required to attend to answer it; but it appears to me that, on the renewal of the complaint, the Magistrate can, before he grants a process, consider under s. 32 whether there is any sufficient ground for proceeding, and unless the complainant can satisfy the Magistrate that by reason of the offence complained of being of a serious character, and that the original complaint should not have

I. L. R., Cal. 37.

1881.

EMPEROR

"

THOMPSON,

6 Cal. 523.

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6 Cal. 523.

been dismissed, the Magistrate would be fully justified in declaring that there was "no sufficient ground for proceeding," and in summarily dismissing the complaint.

Under these circumstances, I am of opinion that there was no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint, and that, therefore, the objection taken before us should be disallowed. I trust, however, that the injustice which has resulted from the precipitate order of the Magistrate, dismissing the complaint, will be a sufficient warning to him to exercise the discretion given to him by the law sparingly. In the present instance it was an unjust order, not only because the case had been fixed for trial at a later hour, but because the attendance of the complainant does not appear to have been necessary in order to proceed with the hearing. The serious nature of the offence, it being punishable with imprisonment for two years as well as fine, should also have made the Magistrate hesitate before he terminated the proceedings in so summary a manner, instead of at least allowing it to be called on at a later hour.

As regards the legality of the conviction of the accused person on the facts found by the Magistrate, I see no valid ground of objection. I am, therefore, of opinion that the rule should be discharged.

MORRIS, J.—It is much to be regretted that the Legislature have not declared what is the effect of an order of dismissal under s. 124 of Act IV. of 1877. As has been pointed out, the case under consideration before the Presidency Magistrate was one which, under the Code of Criminal Procedure, would be called a warrant-case. There had been already one hearing in the presence of the accused, and evidence had been taken. A second hearing was fixed for the 22nd September, but, though the accused appeared on that date, the complainant did not appear, and so, under the discretion allowed him by the section, the Magistrate dismissed the complaint. It would have been satisfactory had the law made it perfectly clear that in such a case, in spite of the accused appearing twice to hear, and, if necessary, to answer to, the complaint made against him, and in spite of that complaint being dismissed, he is liable at any future time to fresh proceedings being taken against him on the same subject of complaint. In s. 32, which deals with a complaint being dismissed upon its presentation after the examination of the complainant, a special provision is inserted that such "dismissal shall not prevent subsequent proceedings against the person complained against." And in cases under Ch. VIII., that is of inquiry by the Magistrate into cases triable by the High Court, express provision is made in the event of the absence of the complainant after examination of witnesses in the presence of the accused. The Act declares (s. 87) that the absence of the complainant, except when the offence may be lawfully compounded, shall not be deemed sufficient for a discharge, and a discharge is described as "not equivalent to an acquittal, and no bar to the revival of a prosecution for the same offence."

In a case of lesser gravity under Ch. X., triable by the Magistrate himself when the circumstances are precisely similar—that is, when the accused has appeared, and witnesses have been examined, but the complainant has absented himself—the words of the section (124) are, the "Magistrate may dismiss the complaint." It might reasonably, therefore, be thought that a distinction is purposely drawn by the Legislature between the order to dismiss and the order to discharge, and that the former carries finality with it, whereas the latter does not. At the same time, whatever may have been the real intention of the Legislature in making this distinction of terms, and in the absence of any qualifying

provision to the term "dismiss" in s. 124, I am unable to disregard the other considerations which have been pointed out by my learned colleague. The succeeding section (125) deals with the case of a withdrawal of a complaint of a certain description, and contains an express provision that the withdrawal under this section of a complaint shall operate as an acquittal of the accused person. The question naturally suggests itself why, if the Legislature intended a dismissal under s. 124 to operate as an acquittal, it did not make an express provision to that effect, as in the case of a withdrawal under the subsequent section. Again, s. 126 prescribes—"If the Magistrate, in any case tried under this chapter, finds the accused person not guilty, he shall record an order of acquittal. If the accused person is convicted, the Magistrate shall pass sentence upon him."

1881.
EMPRESS
v.
THOMPSON,
6 Cal. 523.

In the particular case before us, the Magistrate, on the 22nd September, came to no finding at all, and recorded no order of acquittal or conviction. Having regard to the language of s. 119, I understand the trial of the case to have commenced on the occasion of the first appearance of the accused—that is, the date fixed for the hearing, and it was not brought to its legitimate conclusion because of the absence of the complainant—a circumstance which is specially contemplated and provided for in s. 124. When, therefore, these sections (124 and 126) are looked at in conjunction with s. 113, which prescribes that a person, who has once been tried for an offence, and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, the conclusion seems to be that, unless the antecedent trial has resulted in a conviction or acquittal, there is nothing in the law which prevents a person being tried again for the same offence. Consequently, an order of dismissal is not a bar to the revival of fresh proceedings.

On the merits I agree in thinking that there is no ground in law for disturbing the decision of the Magistrate. There is evidence which goes to show that the accused Thompson did not act "in good faith"—that is, with due care and attention—in retaining and keeping the telegraph message, which on the face of it was addressed to a rival firm.

Rule discharged.

ORIGINAL CRIMINAL.

Before Mr. Justice Prinsep.

THE EMPRESS v. DABEE PERSHAD.

Admission made to Police-officer before Arrest—Evidence Act (I. of 1872), ss. 25, 26.

An admission made by an accused person to a police-officer before arrest is admissible in evidence.

In the course of the trial in this case, the *Standing Counsel* (Mr. Phillips) asked a witness, on behalf of the Crown, Police Inspector Kristo Chunder Bannerji, to state what the accused had stated to him on an occasion when the witness had already said that the accused was not under arrest.

Mr. Sale, for the accused, objected, on the ground that the accused at the time was under arrest. Ultimately, Mr. Sale being permitted to cross-examine the witness on this point, the Court decided that the accused was not at the time under arrest.

The *Standing Counsel* then repeated his previous question to the witness.

1881.
Jan. 29.
6 Cal. 530.

1881.
 EMPRESS
 v.
 DABEE PER-
 SHAD.
 6 Cal. 530.

Mr. Sale again objected. It is immaterial whether the accused was under arrest or not—*In the matter of Hiran Miya*.¹ No statement or admission of any kind made by an accused to a police-officer can be given in evidence. The prohibition contained in s. 25 of the Evidence Act applies to cases where the accused is under arrest or not, while s. 26 deals with cases where the accused is in custody. S. 25 says: "No confession" (not no confession by an accused person) "to a police-officer shall be proved against an accused person." The section is wide in its terms, and draws no distinction between admissions and confessions; see *In the matter of Hiran Miya*.¹ S. 25 must be construed in the widest and most literal sense; see *The Queen v. Hurribole Chunder Ghose*.² Nor is it restricted in any way by s. 26. The word "confession" is not defined in the Evidence Act, while the word "admission" is defined. Hence it may be inferred that no distinction was intended to be drawn between them, and that the words were intended to be synonymous for purposes of the Act. See s. 121 of the Criminal Procedure Code (Act X. of 1872) passed almost simultaneously with the Evidence Act. There confession embraces confession, admission, and confession of guilt; see also *The Empress v. Rama Birapa*³ and *Reg. v. Jora Hasji*.⁴ The decision by Phear, J., in *The Queen v. Macdonald*⁵ was not prefaced by argument at the bar, and the report itself is a most meagre one.

The *Standing Counsel* (Mr. Phillips) was not called upon.

PRINSEP, J.—The question may be put. I agree in the opinion expressed by Phear, J., in *The Queen v. Macdonald*⁵ that the Evidence Act draws a distinction between an admission and a confession of guilt. The other cases quoted are not altogether on the point.

Before Mr. Justice Prinsep.

THE EMPRESS v. DABEE PERSHAD.

1881.
 Jan. 31.
 6 Cal. 532.

Evidence of Witness taken upon Commission, when admissible in Criminal Trial—High Courts' Criminal Procedure Act (X. of 1875), s. 76—Presidency Magistrates' Act (IV. of 1877), s. 158—Evidence Act (I. of 1872), s. 33.

The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X. of 1875, or unless it is admissible under s. 33 of the Evidence Act.

In the course of the trial in this case, Mr. Phillips (the *Standing Counsel*) tendered, and proposed to read, the evidence of one Wayed Mahal Begum, taken upon commission issued by the Committing Magistrate under s. 158 of the Presidency Magistrates' Act (IV. of 1877).

Mr. Sale for the prisoner objected. Before evidence taken on commission can be read in this Court in a criminal trial, it must be shown that the taking of such evidence was upon an order issued to that effect by the High Court under s. 76 of Act X. of 1875. Here the order was made by the Committing Magistrate, and not by the High Court. The reason which induced the Magistrate to issue that commission may have ceased to operate in the time between the commitment and the trial of the accused in the High Court. Further, if the evidence attempted now to be put in is admissible, it would practically have

¹ 1 C. L. R. 21.

² 1 L. R., 1 Cal. 207.

³ 1 L. R., 3 Bom. 12.

⁴ 11 Bom. H. C. Rep. 242.

⁵ 10 B. L. R. (App.) 2.

the effect of subordinating the discretion given to the High Court under s. 76 of A^ct X. of 1875 to the decision of the Magistrate on the same matter; in short, that the opinion of the Magistrate would be binding on this Court. S. 75 of the High Courts' Criminal Procedure A^ct (X. of 1875) authorizes the Court to refer to the evidence of an absent witness, only in cases in which such is admissible under the Evidence A^ct, or some other law on the same subject. There is no law under which the evidence now tendered can be admitted.

The *Standing Counsel* (Mr. *Phillips*) for the Crown.—There is evidence in the case that the witness Wayed Mabal Begum is one of the wives of the ex-King of Oudh, and therefore a *pardanashin*. It may, therefore, be presumed that the reasons which induced the Magistrate to grant the commission still exist, and would equally weigh with this Court. Further, s. 158 of the Presidency Magistrates' A^ct says that the deposition, once taken on commission, shall "form part of the record." S. 76 of the High Courts' Criminal Procedure A^ct only refers to cases where cause has arisen for obtaining evidence on commission after commitment. [*Prinsep*, J.—S. 33 of the Evidence A^ct appears not to be applicable to a case of this kind.]

PRINSEP, J.—The deposition is inadmissible. S. 76 of the High Courts' Criminal Procedure A^ct contemplates that evidence, when taken upon commission, if intended to be used in the High Court, must be taken upon an order made by that Court under that section. The terms of s. 158 of the Presidency Magistrates' A^ct, quoted by Mr. *Phillips*, refer only to the record of the trial or enquiry before the Magistrate. The evidence taken by a commission issued by order of a Magistrate could not here be admissible under s. 33 of the Evidence A^ct.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

RAM CHUNDER SHAW AND OTHERS *v.* THE EMPRESS.¹

Bengal Excise A^ct (Beng. A^ct VII. of 1878), ss. 9, 58, 74—Introduction into Calcutta of spirituous liquor manufactured elsewhere—Limits fixed by Collector—Additional punishment—Alternative sentence of imprisonment.

The provisions of s. 74 of the Bengal Excise A^ct as to additional punishment, where there has been a "previous conviction for a like offence," contemplate merely the case of the offender having been already convicted of an offence punishable with a fine of Rs. 200 or upwards, and being again convicted of another offence punishable with the same punishment; it is not necessary that he should have been previously convicted of the same offence.

The accused were sentenced by the Presidency Magistrate, under ss. 58 and 74 of the Bengal Excise A^ct, to a fine of Rs. 200 each, in default to three months' imprisonment, and in addition to six months' imprisonment, which was the maximum term that could be awarded under s. 74. *Held* that the sentence of imprisonment was not in excess of the powers given to the Magistrate by s. 12 of the Presidency Magistrates' A^ct, the imposition of the additional sentence of imprisonment not affecting the Magistrate's powers as regarded the original sentence under s. 58.

No limits with regard to any distilleries in Calcutta having been fixed under s. 9 of the A^ct within which spirituous liquor manufactured otherwise than in that particular distillery shall be introduced or sold without a special pass, and, the fixing of such limits being necessary to a conviction of an offence under s. 58, the convictions in this case were set aside.

¹ Criminal Appeal, No. 765 of 1880, against the order of *F. F. Marsden, Esq.*, Chief Presidency Magistrate of Calcutta, dated the 20th November 1880.

1881.
EMPRESS
v.
DABEE PER-
SHAD,
6 Cal. 532.

1881.
Jan. 5.
6 Cal. 575.

1881.

RAM
CHUNDER
SHAW
v.
EMPRESS,
6 Cal. 575.

IN this case, Obinash Chunder Shaw; Husnoo Khan, Ram Chunder Shaw, Chinibash Shaw, Adhore Chunder Shaw, and Baneshur Shaw, were charged with having introduced for sale spirituous liquor into the town of Calcutta, at 14, Mechooa Bazar Street, without a special pass from the Collector, the said spirit not having paid duty as required by s. 18 of Beng. Act VII. of 1878, and not having been manufactured at a distillery within the limits of the town, in contravention of ss. 9 and 58 of the said Act, and also for having in their possession spirituous liquor without a pass in contravention of ss. 17 and 61 of the same Act. They were tried before the Chief Presidency Magistrate, and Obinash and Baneshur were each fined Rs. 100, in default to undergo three months' rigorous imprisonment; and Ram Chunder, Chinibash, and Adhore Chunder, were each fined Rs. 200, in default to undergo three months' rigorous imprisonment, and in addition to undergo six months' rigorous imprisonment. Husnoo Khan was discharged.

From this sentence, Ram Chunder, Chinibash, and Adhore Chunder, appealed to the High Court.

Mr. *R. Allen* for the appellants.

The *Standing Counsel* (Mr. *Phillips*) for the Crown.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

PRINSEP, J.—The three appellants before us, as well as two others, have been convicted and sentenced under s. 58 of the Bengal Excise Act (Beng. Act VII. of 1878), and in addition to the penalty prescribed thereby, they have, under s. 74, been sentenced to imprisonment, in consequence of their having been previously convicted of an offence under the Act punishable with a fine of Rs. 200 or upwards.

The Presidency Magistrate has recorded on the proceedings of the trial that he has "not the least doubt that the defendants (with the exception of Husnoo, who has been discharged) did introduce spirituous liquors without a pass, and have committed an offence under s. 58 of the Excise Act."

To constitute an offence under the latter part of s. 58, it is necessary that the offender shall have introduced, or attempted to introduce, for sale, spirituous liquors manufactured at another place into the limits fixed for the consumption of such liquors manufactured at such distillery (*i. e.*, a distillery established under s. 9) without a special pass from the Collector.

In the present case, we find that there is some evidence, which apparently the Magistrate has believed, to show that the liquor seized in Calcutta had been manufactured in Tallygunge, a suburb. Under the circumstances, it is not necessary for us to express any opinion on the value of that evidence. But Mr. *R. Allen* for the appellant has maintained, and the Standing Counsel for Government, who appeared to support the conviction, has ultimately admitted, that the Collector of Calcutta, up to the present time, has not, under s. 9, fixed limits with regard to any distillery in Calcutta within which no spirituous liquor manufactured after native processes, except in that particular distillery, shall be introduced or sold without a special pass. There cannot, therefore, be the special protection necessary to constitute an offence under s. 58, and the conviction and sentences passed on the appellants must accordingly be set aside.

Two other persons have been convicted simultaneously with the appellants, who have not been able to appeal, their sentences not being appealable. We have already held that no offence has been committed, and we therefore feel bound to deal with their cases under s. 147 of the High Courts' Criminal Proce-

dure Act. The Standing Counsel, on behalf of Government, consents to our proceeding summarily with this matter without complying with the special procedure provided by s. 181 of the Presidency Magistrates' Act, and, as this would necessitate a mere compliance with form without any possible advantage, we direct that the conviction and sentences passed on these two men, Obinash Chunder Shaw and Baneshur Shaw, be set aside. The fines, if paid, will be refunded; and the appellants will be released from jail.

It is right that we should notice two objections taken in this appeal to the legality of the sentences passed. Mr. Allen first contended that, in order to render an offender under the Bengal Excise Act liable to additional punishment under s. 74, it is necessary that he should have been previously convicted of the *same* offence, the words *like offence* being synonymous with *same offence*. It appears to us, however, that the section contemplates merely that the offender having been already convicted of an offence punishable with fines of 200 or upwards should be again convicted of another offence punishable with the same punishment, and that this is the correct interpretation to be put on the term *like offence*. The additional sentence of imprisonment passed under s. 74 would not be illegal if, in the case now before us, an offence had been established under s. 58.

The other objection is, that the alternative sentence of imprisonment—*viz.*, three months' rigorous imprisonment in default of payment of the fine imposed—is beyond what the Magistrate can inflict under s. 12 of the Presidency Magistrates' Act (IV. of 1877). Mr. Allen contends that, as under s. 74 of the Bengal Excise Act, the appellants were liable to imprisonment for a term not exceeding six months, the Magistrate, under s. 12 of the Presidency Magistrates' Act, could not sentence them to undergo imprisonment for more than six weeks—*i. e.*, one-fourth of six months—on default of payment of the fine imposed.

It appears to us, however, that the appellants have been sentenced practically to two sentences—one under s. 58 to fine of "rupees one hundred each, in default to undergo three months' rigorous imprisonment each;" and the other under s. 74, in addition to the penalty under s. 58, to imprisonment each for six months. The imposition of the additional sentence would not affect the Magistrate's powers as regards the original sentence under s. 58. It cannot be denied that, standing by itself, the sentence under s. 58 is perfectly legal; but it is contended that, by reason of the additional sentence of imprisonment under s. 74, the term of imprisonment, in default of payment of the fine imposed under s. 58, is excessive, and therefore illegal. We see no valid reason for this contention, and indeed it would be an anomaly if a sentence perfectly legal under s. 58 should become otherwise, because the offender had rendered himself liable to an *additional* punishment on account of a previous conviction under the Bengal Excise Act.

We observe that this case was heard by the Magistrate on the 6th, 9th, and 16th November, though it was of a nature which should ordinarily have permitted of its decision at the first hearing. No reason is assigned for the postponements, if it existed, or that they were owing to the absence of the necessary evidence for the prosecution. We think it necessary to notice this, because frequent postponements add considerably to the expense incurred by the parties, and should be avoided.

We observe also that in the affidavit it is stated on behalf of appellants that "application was made to the Magistrate for copies of the evidence in this case, but the same was refused," notwithstanding the terms of s. 170 of the Presidency Magistrates' Act.

Conviction set aside.

1881.

RAM
CHUNDER
SHAW
v.
EMPRESS,
6 Cal. 575.

Before Mr. Justice Mitter and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF PANJAB SINGH AND ANOTHER.

THE EMPRESS *v.* PANJAB SINGH AND ANOTHER.¹

1881.

Jan. 5.

6 Cal. 579.

Criminal Procedure Code (Act X. of 1872), s. 227, cl. (h)—Recording Reasons for Conviction—Practice of High Court on Revision.

Under cl. (h) of s. 227 of the Criminal Procedure Code, although a Magistrate is not required to record any evidence, he should, in recording his reasons for the conviction, state them so, that the High Court, on revision, may judge whether there were sufficient materials before him to support the conviction.

Where they were not so stated, the High Court, on motion, set the conviction aside.

THE accused were found guilty of an offence under s. 447 of the Penal Code. It appeared there was gambling going on in the house of one Jakri, in which the accused confessedly took part. The gambling ended in a quarrel and consequent disturbance, which caused great annoyance and alarm to the women in the house. The Assistant Commissioner was of opinion that, although the original entry might be considered lawful, their remaining there to gamble and creating a disturbance was sufficient to bring the accused within s. 447 of the Penal Code.

Against this order the accused filed a petition in the High Court.

Mr. *M. M. Ghose* and Baboo *Baidnath Dutt* appeared for the petitioners.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—We are of opinion that the conviction in this case must be set aside. The lower Court is of opinion that the prisoner is guilty, under s. 447 of the Indian Penal Code, of criminal trespass. In order to constitute that offence, it is necessary to establish, on behalf of the prosecution, that the entry into another person's property must have been made with intent to commit an offence, or to intimidate, insult, or annoy that person in his possession, or that, having lawfully entered the premises, remaining there for the purpose of intimidation, annoyance, or insult, or with intent to commit an offence. Now, in this case, which was tried summarily, we have simply before us the finding and the reasons upon which the conviction is based under cl. h, s. 227 of the Code of Criminal Procedure. Under that section the Magistrate was not required to record any evidence.

We think that, under the clause in question [cl. h of s. 227], a Magistrate, in recording his reasons for the conviction, should state them so, that this Court, on revision, may judge whether there were sufficient materials before him to support the conviction.

In this case we do not find that there is any finding at all in the reasons stated, that the applicants remained in the premises on which they are alleged to have trespassed with any such intents as are mentioned in s. 447 of the Penal Code. All that the lower Court upon that point says is this, that "their original entry on the property was lawful, but their remaining there to gamble and creating a row must be held to bring the accused within s. 447." It does not even say that they remained there in order to create a row, but simply that they remained there to gamble, and then created a row afterwards. Even if the lower Court had found that they remained there to create a row, it would

¹ Criminal Motion, No. 300 of 1880, against the order of *A. W. Paul, Esq.*, Assistant Commissioner of Darjeeling, dated the 23rd October 1880.

have been doubtful whether such a finding would have been sufficient, because it would have been as much consistent with the knowledge that they were likely to annoy as with the intention to do so. But, as the finding now stands, there is not a shadow of ground for supposing that there was any evidence before the lower Court upon which it could be found that they remained there with any such intent as it is necessary to establish under s. 447.

The conviction is, therefore, set aside, and the applicants directed to be released.

Conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Maclean.

MONA SHEIKH v. ISHAN BARDHAN.¹

Criminal Procedure Code (Act X. of 1872), s. 211—Order of Acquittal—Compensation to Accused.

An order for compensation against a complainant may be made on an order of acquittal under s. 211 of the Criminal Procedure Code.

THE complainant, Mona Sheikh, complained, before the police at Gopalpore, that the accused and others arrested him, took him to one Poran Bardhan's house, maltreated him, and kept him in confinement, but afterwards released him. The accused was discharged at the hearing before the Sub-Deputy Magistrate, a Magistrate who could only exercise 3rd-class power under s. 211 of the Criminal Procedure Code, and the complainant was directed to pay the accused Rs. 20 as compensation. The case was referred by the Joint-Magistrate to the High Court under s. 296 of the Criminal Procedure Code.

The material portion of the opinion of the Court was as follows:—

MITTER, J.—We do not think that the trial and acquittal were illegal. As for the order for compensation, s. 209 seems to contemplate a dismissal of the complaint rather than an acquittal of the accused; but, referring to s. 212, and to the order in which the sections come, we are not prepared to say that an order to pay compensation may not be added to an acquittal.

Before Mr. Justice Mitter and Mr. Justice Maclean.

THE EMPRESS v. SALIK ROY.²

Penal Code (Act XLV. of 1860), s. 211—Charge made on Report of Police that Case was False—Charge of giving False Information.

A commitment for trial under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons accused, is not illegal, merely because the complaint which the accused made has not been judicially enquired into, but is based on the report of the police that the case was a false one.

SALIK ROY, the accused, sent information to the police through the chowkidar, charging certain persons with setting fire to his house; and he repeated

¹ Criminal Reference, No. 211 of 1880, and letter No. 2087, from A. J. Alexander, Esq., Magistrate of Mymensing, dated the 14th December 1880.

² Criminal Reference, No. 213 of 1880, and letter No. T. b. 1, from J. F. Stevens, Esq., Officiating Sessions Judge of Sarun, dated the 18th December 1880.

1881.

In re
PANJAB
SINGH,
6 Cal. 579.

1881.

Jan. 10.
6 Cal. 581.

1881.

Jan. 19.
6 Cal. 582.

1881.
EMPRESS
 v.
SALIK ROY,
 6 Cal. 582.

the charge to the police-officer who went to his village to investigate the case. In the end, the police reported the case to be a false one. The Magistrate, thereupon, at once directed the prosecution of Salik Roy for giving false information, without calling upon him, or giving him any opportunity, to prove his case. Salik Roy was committed to the Court of Session for trial, under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons whom he accused.

The Sessions Judge, being of opinion that the commitment was illegal and against a decision of the High Court, which he referred to, but did not name, sent the record to the High Court in order that the commitment might be quashed, or such other order passed as should seem proper to the High Court.

The following was the opinion of the High Court :—

MITTER, J.—This is a reference from the Judge of Sarun, asking us to quash a commitment. The ground upon which we are asked to do so is, that the accused, who is charged with an offence under s. 211, Penal Code, should not have been committed for trial until the complaint which he made had been judicially enquired into; and the Judge refers to a case decided by this Court, which, he considers, applies to the present case.

If the case referred to by the Sessions Judge is the case of *Biyogi Bhagut*,¹ we may point out that it is not in all respects similar to the present case. In that case, the complainant, dissatisfied with the police-investigation and report, made a complaint to the Magistrate, which was dismissed without hearing his witnesses.

We do not find in the record that there was any complaint made to the Magistrate in this case; but, on the report of the police that the case was false, the prosecution of the complainant was set on foot. We are unable to say that there is anything illegal in the proceedings, and we are supported in this view by the case of *Empress v. Abul Hasan*.² We are not aware of any recent ruling of this Court of a contrary tenor. We must, therefore, refuse to quash the commitment on the ground on which the Judge's recommendation is based; see *Ashrof Ali v. The Empress*.³

Before Mr. Justice Mitter and Mr. Justice Maclean.

THE EMPRESS v. SHIBO BEHARA.⁴

1881.
 Jan. 20.
 6 Cal. 584.

Penal Code (Act XLV. of 1860), s. 211—Sanction to Prosecution for making False Charge.

A sanction for a prosecution for making a false charge under s. 211 of the Penal Code, without hearing all the witnesses whom the person accused of making the false charge wishes to produce, is illegal.

The High Court has power to quash an illegal commitment at any stage of the case.

THE accused, Shibo Behara, at Teapo police-outpost, brought a charge against one Bali Jenna and others of arson. The police took up the case, and

¹ 4 C. L. R. 134.

² I. L. R., 1 All. 497.

³ I. L. R., 5 Cal. 281.

⁴ Criminal Reference, Nos. 226 and 227 of 1881, and letters Nos. 120 and 121, from the order of A. W. Cockran, Esq., Officiating Sessions Judge of Cuttack, dated the 27th December 1880.

reported it to be a false charge, and the Magistrate thereupon sanctioned the prosecution of Shibo Behara under s. 211 of the Penal Code. Previously to this order, however, Shibo presented a petition to the Magistrate, asking for a judicial enquiry; but this petition does not appear to have been disposed of. The case under s. 211 was sent to a Deputy Magistrate, who committed the accused for trial. Before the Sessions Judge, the accused pleaded not guilty, and objected to being tried, on the ground that he had been prejudiced by the refusal to grant judicial inquiry he asked for.

1881.
 EMPRESS
 v.
 SHIBO
 BEHARA,
 6 Cal. 524.

The Sessions Judge, being of opinion that the objection was a good one, and that the commitment should be therefore quashed, referred the case to the High Court under s. 296 of the Criminal Procedure Code, in his reference citing the following cases:—*In the matter of Gour Mohan Sing*,¹ *In the matter of Bishoo Barik*,² *Ashrof Ail v. The Empress*,³ *Nusibunnissa Bibee v. Sheikh Erad Ali*,⁴ *Sheikh Erad Ail v. Nusibunnissa Bibee*,⁵ and *Government v. Karimdad*.⁶

The following were the opinions of the High Court:—

MITTER, J.—Whether the Judge was right or not in postponing the trial after it had once begun, I think this Court has the power to quash an illegal commitment at any stage of a criminal proceeding.

In these two cases, I am of opinion that the commitments should be set aside, on the ground that the sanction for prosecution under s. 211 was illegally given. Whatever might have been said in *Nusibunnissa Bibee v. Sheikh Erad Ali*,⁴ the later cases have distinctly laid it down that a sanction for prosecution under s. 211, given without hearing all the witnesses whom a complainant wishes to produce in Court, is illegal. In these cases, therefore, the original orders sanctioning prosecution under s. 211 are illegal. That being so, the commitments are also illegal. I would, therefore, set them aside as recommended by the Judge.

MACLEAN, J.—The principle involved in these cases is the same as that involved in the case of Chukrodhur Pati just disposed of; and, as I am of opinion that any convictions had upon the trials under the commitments which we are asked to quash would be set aside, I think the simplest course is to set aside the proceedings at this stage.

¹ 8 B. L. R., Ap., 11.

² 16 W. R., Cr., 77.

³ I. L. R., 5 Cal. 281.

⁴ 4 C. L. R. 413.

⁵ *Id.*, 534.

⁶ *Ante*, p. 286.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF JAMOONA.

THE EMPRESS *v.* JAMOONA.¹

1881.

Jan. 22.

6 Cal. 620.

Penal Code (Act XLV. of 1860), s. 211—Making False Charge to Court or Officer having no Jurisdiction.

It is necessary for a conviction under s. 211 of the Penal Code that the false charge should have been made to a Court or officer having jurisdiction to investigate and send it up for trial.

THE accused, Jamoona, was charged, under s. 211 of the Penal Code, with having made a false charge of rape against one Sheikh Ahmed, with intent to injure him, before Captain Simpson, the Station Staff Officer of the Cantonment of Dorenda.

It was proved that she did make the charge, and it was also proved that the charge was false; and she was sentenced to one year's rigorous imprisonment.

The prisoner appealed to the High Court.

The judgment of the Court (*Miller and Maclean, JJ.*) was delivered by

MITTER, J.—This case came before one of the Judges of the present Bench in the vacation, and it occurred to him that no charge was made to any one competent to act upon it. Enquiries were, therefore, made as to the powers (magisterial or police) of the Station Staff Officer.

From the papers within it will be seen that he has no such powers.

The appellant appeared before Captain Simpson, Adjutant, 11th M. N. L., and Station Staff Officer, and charged a non-commissioned officer with rape. There was an enquiry, and, the charge being found to be false by the military authorities, the Commanding Officer caused the appellant to be prosecuted before the criminal authorities under s. 211. She was committed for trial, and convicted by the Judicial Commissioner under that section.

We are of opinion that the appellant neither instituted, nor caused to be instituted, a criminal proceeding. She, no doubt, charged the non-commissioned officer with an offence; but the Station Staff Officer having neither magisterial nor police powers, as we are informed, it seems to us that s. 211 will not apply. We do not think it is unduly refining the words of the section to say that the false charge must be made to a Court or to an officer who has powers to investigate and send up for trial.

We, therefore, set aside the conviction, and direct the appellant's discharge.

Conviction set aside.

¹ Criminal Appeal, No. 735 of 1880, against the order of *H. L. Oliphant, Esq.*, Judicial Commissioner of Chota Nagpore, dated the 18th September 1880.

CRIMINAL REFERENCE.

*Before Mr. Justice Mitter and Mr. Justice Maclean.*THE EMPRESS v. NOBOCOOMAR PAL.¹*Bengal Excise Act (Beng. Act VII. of 1878), s. 53—Sale by Licensed Vendor contrary to Terms of his License.*

1881.

Jan. 28.

6 Cal. 601.

S. 53 of the Bengal Excise Act does not apply to sales by a licensed vendor contrary to the terms of his license. That section provides for a breach of the condition of a license not covered by the second clause of s. 59 of the Act.

NOBOCOOMAR PAL was summarily tried before the Magistrate of Howrah, on a charge of having sold imported liquor by the bottle, without a license empowering him to do so, and having, therefore, committed an offence under s. 53 of the Bengal Excise Act (Beng. Act VII. of 1878). At the time of the alleged offence, the accused held a license (under Form 4A of those prescribed under the Act by the Board of Revenue) empowering him to sell only imported liquor, and that only by the glass, to be drunk only on the premises licensed, and not to be removed from them before consumption. The offence imputed to him was, that he sold imported liquor on several occasions by the bottle, delivering it to his customers at their own residences.

He was found guilty under s. 53 of the above Act, and sentenced by the Magistrate to pay a fine of Rs. 200, and to rigorous imprisonment in default of payment. An application was made to the Sessions Judge, who considered the conviction illegal, and referred the case to the High Court under s. 296 of the Criminal Procedure Code.

The judgment of the Court (*Mitter and Maclean, JJ.*) was delivered by

MITTER, J.—The Magistrate of Howrah having convicted the petitioner, Nobocoomar Pal, of an offence under s. 53, Beng. Act VII. of 1878 (the Bengal Excise Act), and sentenced him to a fine of Rs. 200, and rigorous imprisonment in default of payment, an application was made to the Judge of Hooghly, in order that the proceedings might be referred to this Court under s. 296, Criminal Procedure Code.

In his application, Nobocoomar Pal raised two objections to his conviction and sentence—first, that he held a retail license for sale of spirits, and could not, therefore, be convicted under s. 53 of the Act; second, that he was not liable to rigorous imprisonment in default of payment of the fine.

The Judge has referred the case to this Court, and his opinion is, that s. 59, and not s. 53, of the Act applies. He brings to notice certain informalities in the proceedings of the Magistrate, and recommends that the proceedings may be set aside, or the fine reduced to Rs. 50.

We have carefully considered the papers sent up to us, and have come to the conclusion that s. 53 of the Act does not apply to this case. It is not disputed that Nobocoomar Pal held a license for retail-sale of imported spirituous and fermented liquors, which is one of the two classes of licenses to which the Act refers. The license, however (No. 49—4A), restricts him to sale *by the glass*, and art. vi. of the license confines the sale to his shop, and directs that the spirits, &c., shall be drunk on the premises. The Magistrate thinks that, because

¹ Criminal Reference, Nos. 3 and 6 of 1881, from the order of *J. P. Grant, Esq., Sessions Judge of Hooghly*, dated the 6th January 1881.

1881.

EMPRESS

v.

NOBOCOOMAR

PAL,

6 Cal. 621.

Nobocoomar had not a simple Retail Vend License (Form 4B), and because he sold liquor by the bottle for consumption off the premises, he was justified in convicting him under s. 53.

We concur with the Judge in his view that s. 53 does not apply to sales by a licensed vendor contrary to the terms of his license. This seems to follow from a consideration of s. 60 with s. 53. If s. 53 were to be applied to wholesale sales by a retail-licensed vendor, a fine of Rs. 500 might be imposed, whereas, by s. 60, the maximum fine is Rs. 200 for that offence. S. 60 would be redundant if the construction put by the Magistrate upon s. 53 is correct, whereas it is, upon the construction we put upon it, quite consistent with the previous section, and provides for a breach of the conditions of a license not covered by the second clause of s. 59.

As has been said already, Nobocoomar held a license for retail-sale. An ordinary retail licensee might sell up to twelve quart bottles; but, under its powers, under s. 28, the Board of Revenue has regulated the conditions of Nobocoomar's license, and limited him to selling by the glass, with a condition that the liquor shall be drunk in his shop. The information laid against him was, that he had, on seven dates, in April, May, and July 1880, sold liquor by the bottle without a bottle-license. This seems to be another modification of the ordinary retail-license.

The proceedings before the Magistrate were held under Ch. XVIII. of the Criminal Procedure Code. It is therefore difficult to say whether there was legal evidence for any conviction. In his summary and reasons, the Magistrate alludes to account-books, orders, and bills, as satisfying him that the offence was committed. It would have been better if the Magistrate had summed up the evidence by which the orders and bills were *proved*, for their mere production is no evidence. Two of the orders refer to lemonade, and we are not aware that this is an excisable article.

We are unable to say for what offence the prisoner really was tried. The complainant was not examined as required by s. 144 of the Procedure Code, and it is certain that the seven offences mentioned in the information could not be dealt with in one trial, *vide* s. 453, Procedure Code. The omission to record the date of the commission of the offence in the register, as required by s. 229, Procedure Code, is therefore a material error, and the whole case shows the necessity of recording the few particulars required by law in trials under Ch. XVIII.

As we are unable, on the record as it stands, to say that any offence has been made out for which the petitioner ought to have been convicted, we must set aside the conviction under s. 53, Beng. Aft VII., 1878.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF SHUMSHER KHAN.

THE EMPRESS *v.* SHUMSHER KHAN.¹*Criminal Procedure Code (X. of 1872), s. 36—Confirmation of Sentence by Sessions Judge.*

1881.

Feb. 7.

6 Cal. 624.

S. 36 of the Criminal Procedure Code, as regards the necessity for confirmation of the sentence by the Sessions Judge, refers to cases in which the sentence of imprisonment is a sentence of upwards of three years, without including any additional sentence as to fine or whipping.

THE accused, who was a head-constable, was charged with having received a bribe. The trial was held under the special powers conferred by s. 36 of the Criminal Procedure Code; and he was found guilty of an offence under s. 161 of the Penal Code, and was sentenced to rigorous imprisonment for three years, and to pay a fine of Rs. 1,000, or, in default, to suffer rigorous imprisonment for a further period of six months.

The accused appealed to the High Court.

Baboo *Rashbehary Ghose* and Baboo *Saroda Prosonno Roy* for the appellant.

The judgment of the Court (*Cunningham* and *Prinsep*, JJ.) was delivered by

CUNNINGHAM, J.—We think that the appeal must be dismissed, on the ground that there is no sufficient reason shown for calling in question the deliberate conclusion at which the Magistrate has arrived.

With regard to the point that the sentence required the confirmation of the Sessions Judge, we think that the words of s. 36 of the Code of Criminal Procedure must be construed to refer to cases in which the sentence of imprisonment is a sentence of upwards of three years, and to leave aside any sentence the Magistrate may pass as to fine or whipping.

We, therefore, think that it is unnecessary for the sentence in this case to be confirmed by the Sessions Judge.

The appeal is dismissed.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF JANOKINATH GUPTA.

THE EMPRESS *v.* JANOKINATH GUPTA.²*Police Act (V. of 1861), s. 29—Overstaying Leave without Permission.*

1881.

Jan. 27.

6 Cal. 625.

The failure of a police-constable to resume his duty on the expiration of his leave does not constitute an offence under s. 29, Act V. of 1861.

THE accused, a police-constable, obtained leave of absence from his duties, which had expired on the 15th October 1880. He obtained no extension of

¹ Criminal Appeal, No. 759 of 1880, against the order of *A. C. Campbell, Esq.*, Deputy Commissioner of Goalpara, dated the 30th September 1880.

² Motion, No. 9 of 1881, against the order of *C. E. Buckland Esq.*, Magistrate of Howrah, dated the 17th December 1880.

1881.
 IN THE
 MATTER OF
 THE PETITION
 OF JANOKI-
 NATH GUPTA,
 6 Cal. 625.

leave, but did not return to resume his duties until the middle of December. He was then charged with having committed an offence under s. 29, Act V. of 1861, by having overstayed his leave without permission, and, being found guilty, was sentenced to two months' rigorous imprisonment.

He petitioned the High Court against this conviction and sentence.

Baboo *Baikant Nath Doss* for the petitioner.

The judgment of the Court (*Mitter and Maclean*, JJ.) was delivered by

MITTER, J.—The petitioner, a constable, obtained a month's leave, but failed to join his post at the expiration of that time. For this omission on his part, he has been committed under s. 29, Act V. of 1861, and sentenced to two months' rigorous imprisonment.

We think the conviction is bad, because his failure to resume his duty on the expiration of the leave does not, in our opinion, constitute an offence under the aforesaid section.

The conviction is therefore set aside.

Conviction set aside.

CRIMINAL REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter, and Mr. Justice Maclean.

THE EMPRESS v. M. J. VYAPOORY MOODELIAR.¹

1881.
 Jan. 22 &
 Feb. 9.
 6 Cal. 655.

Evidence, Admissibility of—Receiving illegal gratification—Penal Code (Act XLV. of 1860), ss. 161, 165—Evidence of subsequent, but unconnected, receipt, showing footing on which parties stood—Evidence Act (I. of 1872), ss. 5—13 & 14.

The accused was charged with having received illegal gratifications from C. and Co. on three specific occasions in 1876. In 1876, 1877, and 1878, C. and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office. Held that evidence of similar, but unconnected, instances of receiving illegal gratifications from C. and Co. in 1877 and 1878 was not admissible against him under ss. 5 to 13 of the Evidence Act.

Held per GARTH, C.J. (MACLEAN, J., concurring), the evidence was not admissible under s. 14.

Per GARTH, C.J.—S. 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling.

Per MITTER, J.—If the receipt of the illegal gratifications mentioned in the charge be considered proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 would be relevant under s. 14, but they would not be relevant to establish the fact of payments in 1876.

THIS was a reference to the High Court on a difference of opinion between two Judges sitting as the Special Court of British Burma.

The case referred was as follows :

"The accused was charged under s. 161 of the Penal Code with receiving illegal gratifications, on three distinct occasions, at Tonghoo, in the year 1876,

¹ Criminal Reference, No. 1 of 1880, and letter No. 8-1, from R. F. Crosthwaite, Esq., and C. F. Egerton Allen, Esq., Judges of the Special Court of British Burma, dated 12th November 1880.

from the firm of Cohen and Co. ; and there were also three counts charging him under s. 165 of the Penal Code with reference to the same sums. He was tried before the Additional Recorder and a jury, and acquitted by a majority of the jury on all the charges ; and the Additional Recorder, dissenting from the opinion of the majority, referred the case to the Special Court under s. 263 of the Criminal Procedure Code.

" At the trial, evidence was admitted of similar, but unconnected, receipts of illegal gratifications by the accused from the same firm of Cohen and Co. during the years 1877 and 1878 at Thayetmyo. At both places, and in the three years, 1876, 1877, and 1878, the firm of Cohen and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office, first at Tonghoo, then at Thayetmyo.

" The Officiating Judicial Commissioner, at the hearing before the Special Court, was of opinion that the evidence as to the similar, but unconnected, receipts of illegal gratifications at Thayetmyo during the years 1877 and 1878 was not admissible to prove the specific charges relating to the year 1876, and, therefore, thought that the verdict of the majority of the jury, acquitting the accused, should not be interfered with. The Additional Recorder was of opinion that that evidence was admissible, and that the verdict of the majority of the jury should be reversed.

" The Officiating Judges, therefore, being unable to agree in a judgment, referred the case under s. 80 of the Burma Courts' Act (XVII. of 1875) to the High Court of Judicature at Fort William.

" The point as to which the Officiating Judges differ is as follows :

" Whether, in trying the three specific charges of receiving illegal gratifications from the firm of Cohen and Co. at Tonghoo in 1876, evidence of similar, but unconnected, instances of receiving illegal gratifications from the same firm at Thayetmyo, in the years 1877 and 1878, is admissible."

The *Standing Counsel* (Mr. Phillips) for the Crown contended that the evidence was admissible. The footing on which these sums were received may have remained unchanged during the years 1876, 1877, and 1878. It now appears that, in 1878, the footing on which the money was received from the firm of Cohen and Co. by the prisoner was such that the receipt of the sums was with a corrupt motive ; if they were on the same footing in 1876, it would go to show the prisoner's guilt ; then it is submitted that the evidence is admissible. [GARTH, C.J.—Could you give evidence to show what happened even at a longer interval, say ten years?] Yes, I submit so. The subsequent conduct of the parties can be looked at to show on what footing Cohen and Co. and the prisoner were. The longer the interval, the less would be the probability of the footing having remained the same, and therefore of the evidence being conclusive, but it would be admissible. [GARTH, C.J.—Does it not depend on intention? Is there any question of intention here?] Yes, it is submitted there is ; see s. 161, Penal Code. [GARTH, C.J.—Suppose a man charged with theft in 1876 : the fact of his having stolen something in 1877, a year afterwards, would be no evidence of the former crime.] In that case there would be no constant element : here we have the parties possibly in the same relation to one another, and on the same footing, subject to alteration of place and detail, which would be immaterial. The evidence cannot be said to be absolutely irrelevant. Proof of subsequent utterance of coin or notes is admissible ; see Taylor on Evidence, 7th ed., § 345, though possibly not if the notes or coin were of a different descrip-

I. L. R., Cal. 39.

1881.

EMPRESS

vs.

M. J.

VYAPOORY

MOODELIAR,

6 Cal. 655.

1881.
 EMPRESS
 v.
 M. J.
 VYAPOORY
 MOODELIAR,
 6 Cal. 655.

tion—*Id.*, note 1. Thus, in *Rex v. Smith*¹ and *Rex v. Taverner*,² the evidence was held inadmissible on that account. So in *Rex v. Harris*.³ Here the footing was probably the same; therefore, evidence of subsequent illegal receipt of money is admissible. Suppose the footing an innocent one. Might not a prisoner give evidence of the footing on which he stood with another person to show he was innocent? Why can evidence not be admitted of the subsequent footing to prove his guilt? The basis would be the same—*viz.*, that the footing remained identical. The question here is, not whether the evidence is sufficient to convict, but whether it is absolutely inadmissible? In the case of *Boddy v. Boddy and Grover*,⁴ evidence of acts of adultery subsequent to the date of the last act charged was held to be admissible for the purpose of showing the character and quality of previous acts of improper familiarity. In the present case, what we want to show is the quality and character of these acts of receiving money. We have not a series of isolated acts, but acts which must have been done on some footing, which may have remained the same throughout. [GARTH, C. J.—The evidence shows that the arrangement was changed in 1877.] There is evidence here to show that there was a previous agreement for a monthly sum, but the purpose is not stated. Now, in 1877, the purpose appears: may evidence not be given to connect them? They are probably parts of a continuous transaction. Under the Evidence Act, s. 6, this evidence would be admissible. It would be for a jury to say if the acts were done on the same footing, and if this evidence is excluded, the jury would be prevented entirely from finding out what the footing was on which the parties were in 1876, so as to see if the footing was the same. Ss. 8, 9, 14, and 15 of the Evidence Act were also referred to, and it was contended the evidence was relevant also under those sections.

Cur. adv. vult.

• The following judgments were delivered:—

GARTH, C. J. (MACLEAN, J., concurring).—The prisoner in this case was tried before the Special Court at Rangoon upon three charges for receiving money illegally as a public servant, contrary to the provisions of ss. 161 and 165 of the Indian Penal Code.

The transactions upon which the charges were based are all said to have occurred in the year 1876, and the nature of them was, that the prisoner, being then the managing clerk in the Commissariat office of Tonghoo, where Messrs. Cohen Brothers carried on business as Commissariat contractors, accepted certain remuneration from Messrs. Cohen for services, which he is said to have rendered them in his official capacity.

The case for the prosecution was that these services were rendered, and the remuneration received, by the prisoner under some arrangement which existed between the parties in the year 1876, but which came to an end in January 1877.

In the year 1877, the prisoner was transferred to the Commissariat office at Thayetmyo; and it was alleged by the prosecution that in that year Messrs. Cohen, who also carried on business as Commissariat contractors at the latter place, made a similar arrangement there with the prisoner, and that certain sums were given to him as remuneration in that year for similar services.

Upon the trial evidence was adduced on the part of the prosecution to show the receipt of these sums, and the existence of this arrangement in 1877.

¹ 4 C. & P. 411.

² *Id.*, 413 note.

³ 7 C. & P. 429.

⁴ 30 L. J. P. & M. 23.

But the learned Judges in the Special Court differed in opinion as to whether the evidence was admissible, and therefore, under s. 80 of the Burma Courts' Act, they have referred the question to us in the following terms (*reads the point referred*).

It has been contended by Mr. Phillips for the Crown that the evidence was admissible under some one or more of the sections from 5 to 14 of the Evidence Act, as showing the illegal nature of the transactions between Messrs. Cohen and the prisoner in 1877, and the probability that, if sums were received by the prisoner from them for an illegal consideration in that year, the sums which were received from them by the prisoner in the previous year were also for an illegal consideration.

I believe that we are all agreed that this evidence was not admissible under any of the sections from 5 to 13 of the Evidence Act; but my brother Mitter is of opinion that it might be admissible under s. 14 upon the grounds stated in his judgment.

After carefully considering this point, and the authorities to which our attention was called by Mr. Phillips, I have come to the conclusion that the evidence was not admissible.

S. 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th ed., ss. 318 to 322—that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as for instance, in actions of slander or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations to s. 14, as well as the authorities cited in Taylor, show, with sufficient clearness, the sort of cases in which this evidence is receivable.

But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts*, and *not upon the state of a man's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion by shewing that he committed similar crimes on other occasions.

Suppose, for example, that usury was a crime by the law of this country, and that a prisoner was charged with having taken usurious interest from A B in a transaction which occurred in 1870. It seems quite clear to me that, for the purpose of proving the nature of this transaction in 1870, evidence could not be given of some other usurious transaction having taken place between the same parties in 1871. The question in such a case would be, not whether the prisoner had a mind prone to the commission of usury, or whether he was in the habit of making usurious contracts, but whether, in the particular instance, the prisoner had, *in point of fact, been guilty of usury*.

Now, as I understand, the argument for the Crown in the present case amounts to this. In the year 1876, Messrs. Cohen were Commissariat contractors at Tonghoo, and the prisoner was the managing clerk in the Commissariat. In the year 1877, these parties were employed respectively in the same way at Thayetmyo. In the year 1876, the prisoner is charged with receiving certain sums of money as bribes from Messrs. Cohen for showing them some favour in his official capacity, and he is proved to have actually received those

1881.

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v.

M. J.

VYAPOOREY

MOODELIAR,

6 Cal. 655.

1881.
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 MOODELIAR,
 6 Cal. 655.

sums. Under these circumstances, Mr. Phillips argues that evidence is admissible that, in the year 1877, he received other sums from Messrs. Cohen as bribes, in order to prove that the sums which he received in 1876, he also received as bribes. But it seems to me that the question, whether he took the sums in 1876 as bribes for doing a favour to Messrs. Cohen, is, in each case, purely a question of fact. It is not, as it seems to me, a matter of intention, or feeling, or knowledge; and I think that in such a case evidence is no more admissible to show that he took bribes from Messrs. Cohen in 1877, than it would be to show that he stole some of the Government money in 1876, because he afterwards stole some in 1877.

I would, therefore, answer the question referred to us by saying that, in my opinion, the evidence is not admissible.

MITTER, J.—The facts of the case in which this reference has been made are briefly these :—

The accused was committed for trial on twelve separate charges of receiving illegal gratification, as a public servant, under ss. 161 and 165, the receipt of these several sums of money extending over a space of three years, 1876, 1877, and 1878.

At the trial the prosecution elected to proceed on three charges. The transactions out of which they are alleged to have arisen all happened in the year 1876. The accused was the managing clerk in the Commissariat office at Tonghoo in the year 1876, where the Cohens transacted business as Commissariat contractors. The evidence for the prosecution is, that there was an understanding between the Cohens and the accused, under which he had agreed for certain remuneration to show to them certain favour in the exercise of his official functions; that this agreement came to an end in January 1877, when the accused was transferred to the Commissariat office at Thayetmyo; that in the month of June of that year the Cohens, who also transacted business as Commissariat contractors at the latter place, entered into a similar agreement with the accused, and the evidence of payments of money to him in 1877 and 1878 at Thayetmyo, under the last-mentioned agreement, was adduced in the course of the trial. The question of law that has been referred to us is as follows (*reads the point referred*).

I am of opinion that receipt of illegal gratification in the years 1877 and 1878 at Thayetmyo cannot be proved in order to establish that the accused *received* the three sums of money mentioned in the charges for which he was tried. The two sets of transactions are not so connected as would make them relevant to one another within ss. 5 to 13 of the Evidence Act. S. 6 cannot apply, because the payments of 1877 and 1878 are not so connected with the facts in issue in this case as to form part of the same transaction. The alleged agreement of 1876, according to the case for the prosecution, came to an end in January 1877, and the alleged payments in 1877 and 1878 were said to have been made under a different understanding.

The next section, under which it was contended in the lower Court that the transactions in 1877 and 1878 were relevant, was s. 8. But it seems to me that it cannot be said that they show or constitute a motive or preparation for the facts in issue. Neither can the conduct of the accused, as shewn in the alleged transactions of 1877 and 1878, be said to have been influenced by the facts in issue in the sense in which these words are used in the section. No doubt, a person who commits a crime with impunity may ordinarily be found more ready to commit another crime of a similar nature, and in that sense the second crime may be considered to have been influenced to a certain extent by

the commission of the first crime. But it seems to me that that kind of connection is not contemplated by this section. If it did, then, where a person is charged with an offence, the whole of the previous history of his life would be relevant, because every event of his life that preceded the commission of the crime may be considered to have influenced it in some way. But that is not the meaning of the section. The influence referred to here must be direct and obvious; and in this sense I cannot say that the transactions of 1877 and 1878 were in any way influenced by the facts in issue. The same observation will apply to the contention based upon s. 11. There also the words "*highly probable*" point out that the connection between the facts in issue, and the collateral facts sought to be proved, must be so mediate as to render the co-existence of the two *highly probable*.

The only other section which it is necessary to notice is s. 14. Under that section collateral facts specified therein can be proved if the question be as to the existence of any state of mind. In this case, if the receipt of the several sums of money mentioned in the charges be considered to have been proved to the satisfaction of the Court by *other* evidence, and if it be necessary to ascertain whether the accused *received* them as a *motive* for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1887 may, in that case, be relevant under this section. But they are not relevant for the purpose of establishing the *fact* of payment in the year 1876.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF DEELA MAHTON (PETITIONER) *v.*
SHEO DOYAL KOERI (OPPOSITE PARTY).¹

1881.
Feb. 28.

Evidence—Summoning witnesses—Refusal of a Magistrate to summon prisoner's witnesses—Criminal Procedure Code (Act X. of 1872), s. 359.

6 Cal. 714.

A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds specified in s. 359 of the Criminal Procedure Code; and if he does refuse, he is bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed.

Mr. R. E. Twidale appeared for the petitioner on this motion.

The facts of this case appear sufficiently, for the purposes of this report, from the judgment of the Court (*Cunningham and Prinsep, JJ.*), which was delivered by

CUNNINGHAM, J.—We think that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused, except on the grounds specified in s. 359 of the Code of the Criminal Procedure; and that, if he did refuse on those grounds, he ought to have proceeded under that section. The fact that the accused stated that they did not wish to examine those witnesses when the case closed, was no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate after hearing the arguments on behalf of the defence. We must, accordingly, direct that the proceedings be re-commenced from that stage, and that the Magistrate do either take the evidence, or record his reasons for not doing so, and proceed as directed by law.

Case remanded.

¹ Criminal Motion, No. 30 of 1881, against the order of *E. Stewart, Esq.*, Deputy Magistrate of Barh, dated the 22nd November 1880.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1881.

Feb. 18.

6 Cal. 718.

IN THE MATTER OF THE PETITION OF JUBDUR KAZI AND GOLAB KHAN.

THE EMPRESS *v.* JUBDUR KAZI AND GOLAB KHAN.¹

Practice—Cumulative sentence—Separate charges—Criminal Procedure Code (Act X. of 1872), s. 454, illus. (f)—Penal Code (Act XLV. of 1860), ss. 147, 148, and 324.

Under s. 454 of the Criminal Procedure Code, the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code, must not exceed that which may be awarded for the graver offence.

Quære.—Whether separate convictions under ss. 147 and 324 of the Penal Code are legal?

THESE two appeals arose out of the same trial. The prisoners, Jubdur Kazi and Golab Khan, having been members of an unlawful assembly, some of whom were armed with spears and shields, and some with lathees, which took place on the 12th Kartick 1256, corresponding with the 28th October 1879, and resulted in the death of one man named Guru Churn, and in severe injury to another named Babul Chund. The prisoners were charged, along with others, on several charges under the Indian Penal Code, but the Sessions Judge, concurring with the assessors, acquitted Jubdur Kazi of the graver charges under s. 302 and s. 304, and Golab Khan of those under s. 324 and s. 326; but convicted them both under s. 148, and also under s. 149, coupled with s. 324, and sentenced them each, under s. 148, to three years' rigorous imprisonment; and further, under s. 149, coupled with s. 324, to a further term of two years' rigorous imprisonment, to commence on the expiry of the former sentence; and further sentenced the first prisoner Jubdur Kazi, under s. 148, to pay a fine of Rs. 200, or in default to suffer a further term of six months' rigorous imprisonment. Against these sentences both the prisoners appealed to the High Court.

Mr. L. M. Ghose and Baboo Boido Nath Dutt for the appellant, Jubdur Kazi.

Baboo Juggodanund Mookerjee for the Crown.

No one appeared on behalf of the other appellant, Golab Khan.

The judgment of the Court (*Mitter* and *Maclean*, JJ.) was delivered by

MITTER, J.—These appeals arise out of the same trial. The appellants have been convicted of being members of an unlawful assembly, in which one Guru Churn received fatal injuries, and one Babul Chund was less severely hurt.

It seems that they were acquitted of any offence as respects the death of Guru Churn, the conviction being for rioting armed with deadly weapons under s. 148, and for hurt caused to Babul Chund under s. 324, read with s. 149 of the Penal Code. The periods awarded being three years under s. 148, and two years under ss. 149 and 324.

The learned counsel who appeared for Jubdur Kazi, appellant in No. 22, confined himself to urging that the sentences passed upon his client were in excess of what could be passed according to law, and that the injuries caused

¹ Criminal Appeals, Nos. 22 and 15 of 1881, against the order of C. A. Kelly, Esq., Sessions Judge of Furriddpore, dated the 17th November 1880.

to Babul Chund by one of the members of the unlawful assembly, not found to be his client, were not caused in prosecution of the common object of the assembly.

The learned counsel's contentions apply equally to the case of Golab Khan, for whom, however, he did not appear.

The first point turns upon s. 454 of the Criminal Procedure Code, which provides for collective punishment, either for one offence falling within two separate definitions of law, or for acts severally constituting more than one offence, but collectively coming within one definition. In the former case one punishment, and in the latter separate punishments, may be awarded; but in the former case it must not exceed what can be awarded for either offence, and in the latter they must not collectively amount to more than could have been awarded for any one of the several offences, or for the combined offence. *Illus. (f)*, which is referred to by the Judge, shows that offences under ss. 147, 324, 152, may be separately dealt with.

In this case the conviction is for offences under ss. 147 and 324, and this Court has held that separate convictions under those sections are not legal: *vide* the case of *Queen v. Durzoola*.¹ There is, however, a contrary ruling in the case of *Queen v. Callachand*,² followed apparently in *Empress v. Ram Adhin*;³ but, whether there can be separate convictions or not, it is certain that, under s. 454, Criminal Procedure Code, the collective punishment must not exceed that which may be given for the graver offence: *Reg. v. Tukaya bin Tamana*.

We shall, therefore, reduce the sentences on these appellants to three years in each case.

It is not necessary to discuss the second question raised in the appeal of Jubbur Kazi.

Sentence modified.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF MAYADEB GOSSAMI.⁵

THE EMPRESS *v.* MAYADEB GOSSAMI.

False evidence in judicial proceeding—Deposition of the accused when admissible as evidence—Civil Procedure Code (Act X. of 1877), ss. 178, 182, 183, and 647—Evidence Act (I. of 1872), s. 91.

Failure to comply with the provisions of ss. 182 and 183 of Act X. of 1877 (Civil Procedure Code) in a judicial proceeding is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition; and under s. 91 of Act I. of 1872 (Indian Evidence Act), no other evidence of such deposition is admissible.

Baboo *Baikant Nath Dass* for the appellant.

No one appeared on behalf of the Crown.

¹ 9 W. R. Cr. 33.

² 7 W. R. Cr. 60.

³ I. L. R., 2 All. 139.

⁴ I. L. R., 1 Bom. 214.

⁵ Criminal Appeal, No. 66A of 1881, against the order of *A. Porteous, Esq.*, Assistant Commissioner of Kamrup, dated the 27th December 1880.

1881.

EMPRESS

v.

JUBBUR KAZI

AND GOLAB

KHAN,

6 Cal. 718.

1881.

Feb. 22.

6 Cal. 762.

1881.

IN THE
MATTER OF
THE PETITION
OF MAYADEB
GOSSAMI,
6 Cal. 762.

The facts of this appeal sufficiently appear in the judgment of the Court (*Cunningham and Maclean, JJ.*), which was delivered by

CUNNINGHAM, J.—The prisoner in this case applied for a certificate under Aft XL. of 1858 in respect of the estate of two infants, and in support of his application he gave a sworn deposition on the 4th October last before the District Judge.

His deposition was made in Assamese, and was translated by the Sherishtadar of the Court, and the Judge recorded it in English. He did not sign it, nor was it read over to the witness or translated? The requirements of ss. 182 and 183 of the Civil Procedure Code were, therefore, not complied with. This is clear from the deposition of the Sherishtadar before the Deputy Commissioner.

At the conclusion of the proceedings in his Court, the Judge considered that the prisoner had given false evidence, and he directed that he should be prosecuted. This has resulted in his conviction, and, as this Court was of opinion, on the facts brought to its notice, that the appeal ought not to be tried by the Judge before whom the false evidence was given, the appeal has been called up to this Court.

It is contended for the defence that the informalities which took place in recording the accused's deposition render the record of his evidence inadmissible; and that, under s. 91 of the Evidence Aft, no other evidence of his deposition is admissible.

We consider this contention sound. By s. 647 of the Civil Procedure Code, the procedure prescribed by the Code is to be followed, as far as it can be made applicable, in all proceedings, in any Court, other than suits and appeals. By s. 178 a party to a suit required to give evidence is governed by the rules as to witnesses. Ss. 182 and 183, therefore, applied to the accused's deposition, and those sections not having been complied with, the record is inadmissible.

The conviction must, therefore, be quashed, and the prisoner released.

The record of the proceedings before the District Judge does not show that the Sherishtadar was sworn or affirmed as required by Aft X., 1873, s. 5 (b). The Judge's attention should be drawn to this, and a copy of this judgment furnished to him from this Court.

Conviction quashed.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN AND OTHERS.

THE EMPRESS *v.* ASGUR HOSSEIN AND OTHERS.¹

1881.

Mar. 10.

6 Cal. 774.

"Incapable of giving evidence"—Evidence Act (I. of 1872), s. 33—Duty of Committing Magistrate—Witnesses—Examination on oath—Statements of witnesses.

The incapacity to give evidence mentioned in s. 33 of the Evidence Aft need not be a permanent incapacity.

*In re Pyari Lall*² dissented from.

¹ Criminal Appeal, No. 67 of 1881, against the order of *H. L. Oliphant, Esq.*, Judicial Commissioner of Chota Nagpore, dated the 15th December 1880.

² 4 C. L. R. 504.

The Magistrate to whom a complaint was made examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any and what case against the prisoners; and he did not take down in writing the statements of the persons so examined. *Held* that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused, or for the purpose of finding out whether there was a case; but that, having done so, he was not bound to take down their statements in writing.

1881.

IN THE
MATTER OF
THE PETITION
OF ASGUR
HOSSEIN,
6 Cal 774.

IN this case one Asgur Hossein, a police head-constable, and four chowkidars, were charged with voluntarily causing hurt to two men, named respectively Dooli and Darshan. The committing Magistrate made an enquiry, not in the presence of the accused, in the course of which he examined certain persons, some of whom were afterwards called as witnesses. No note of these examinations was made by the committing Magistrate, though the persons examined were examined on oath. At the trial it was proved that one of the complainants, Darshan, was ill, and confined to his house; and the Judge, under s. 33 of the Evidence Act, allowed in evidence the deposition which Darshan had made before the committing Magistrate. The prisoners, having been found guilty by the Sessions Judge sitting with assessors, appealed to the High Court.

Mr. M. M. Ghose for the appellants.—The prisoners have been prejudiced in their defence by the conduct of the Deputy Magistrate, who refused to give them copies of the depositions on which the committal was based. Again, the deposition of the complainant Darshan should not have been admitted in evidence, as there was no proof that he was “incapable of giving evidence” within the meaning of s. 33 of the Evidence Act. See *In the matter of Pyari Lall*.¹

The judgment of the Court (*Pontifex* and *Field*, JJ.) was delivered by

PONTIFEX, J.—(The learned Judge, having gone through the evidence, confirmed the finding of the Sessions Judge. His Lordship then continued.)

The deposition before the Deputy Magistrate of one of the complainants (Darshan) was admitted by the Sessions Judge under s. 33 of the Evidence Act, it being stated by certain of the witnesses that he was ill and confined to his house. We are of opinion that the evidence as to his illness was not sufficient to bring the case within s. 33 of the Evidence Act. The Sessions Judge ought to have required more precise evidence as to the nature of the illness and the incapacity of the witness to attend. A case has been cited to us, that of *Pyari Lall*, petitioner,¹ in which it was held that the incapacity to give evidence mentioned in s. 33 must be a permanent incapacity. In our opinion, that is not a necessary construction. We are inclined to think on the construction of the entire section, and from reference also to s. 32 which precedes it, that something short of permanent incapacity might satisfy the words of the section “incapable of giving evidence.” It is not, however, necessary to decide that question in this case, or we might have to send the case before a Full Bench. It is sufficient in this case, without reading the deposition of Darshan, to support the conviction.

There was a preliminary objection which was taken, *viz.*, that the committing Magistrate had made a kind of preliminary enquiry, in which he examined certain persons, some of whom were afterwards called as witnesses; that the appellant before us applied for the depositions given by these persons; and that, though they were so examined in answer to his application, no depositions were forthcoming. This Court called for an explanation on this point. The Deputy Magistrate explains that this preliminary enquiry was not an enquiry conducted in the presence of the accused; that the enquiry he made of these particular per-

¹ 4 C. L. R. 504.

1881.
IN THE
MATTER OF
THE PETITION
OF ASOUR
HERASATUL,
S. Cal. 774.

sons was for the purpose of finding out whether there was any and what case ; and that he did not take down their statements in writing, though he did examine them after swearing them. We think it was inofficious and improper to swear these witnesses on an occasion, and for the purpose, as stated, but having sworn them, we are of opinion that, under the circumstances, he was not bound to take down their statements in writing. As the Deputy Magistrate was only the committing officer, and as he did not try the case, we think that the accused has no cause of complaint in this respect.

The conviction will be confirmed.

Conviction confirmed.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF BEHALA BIBI.

THE EMPRESS *v.* BEHALA BIBI.¹

Penal Code (Act XLV. of 1860), s. 201—False Information.

1881.
Mar. 7.
6 Cal. 789.

A woman, who, with her infant child, eloped from her husband's house, was afterwards arrested on a charge of murdering the child, which was missing. She made three different statements : (1) that she had left it with her husband ; (2) that she had been enticed away by one R, who had taken the child from her ; (3) that one H had drowned the child. The Sessions Judge believed the last statement, and convicted her under s. 201 of the Penal Code.

Held that the conviction was wrong, and must be set aside.

S. 201 of the Penal Code does not apply to a case where the person, who is the probable or possible offender, makes statements exculpating himself by inculpating another.

THE facts of this case are set forth in the judgment of Mr. Justice *Pontifex*.

No one appeared for the appellant or respondent.

PONTIFEX, J.—We think that the conviction in this case cannot be sustained.

The facts are as follows : Behala, the appellant, with her infant, was sleeping in the same room with her husband. Her husband, on awaking about dawn, found her and her child missing. After some search, she was found at a relation's house, but without the child. As to what had become of the child, she then, and subsequently, made contradictory statements. She said at one time that she had left it in the room with her husband. At another time, she said that she had been enticed away by one Rakhal ; that the child had cried, and Rakhal had said, " Let me go and leave it with its father ;" that he then took the child away and quickly returned, upon which she and Rakhal went away together.

Before the Magistrate she said that one Herasatula had enticed her away, and that he had thrown the child into the river.

The Sessions Judge has believed the last story, and has convicted the woman, under s. 201 of the Penal Code, of giving false information respecting the murder of Ujjala, her infant, with the intention of screening the murderer from legal punishment, *i. e.*, with the intention of screening Herasatula. The information said to be false is that contained in her statement as to Rakhal. Now, there is no evidence to show that the story about Herasatula is more true

¹ Criminal Appeal, No. 86 of 1881, against the order of *F. W. V. Peterson, Esq.*, Sessions Judge of Jessore, dated the 14th January 1881.

than that about Rakhal, and there is no good reason why the Judge should adopt one story rather than the other.

As to what the woman stated about Rakhal, the evidence is very meagre as to the exact language and the exact occasion upon which this language was used ; and the statement as given by the police-officer Bereshur is certainly not information respecting the *murder of Ujjala*, for she said merely that Rakhal had taken the child away after expressing an intention of leaving it with its father.

The unfortunate woman appears to have disappeared by night from her husband's side, and there is much reason to suppose that she took her infant with her. She was found some time after without her infant, which was of too tender an age to take care of itself. Under these circumstances, grave suspicion attached to the woman. When she was arrested, she made contradictory statements as to what she had done with the child. Her manifest object in making these statements was to exculpate herself. We think that s. 201 of the Penal Code was not intended to apply to such a case—a case, that is, in which the person, who is the possible or probable offender, makes statements exculpating himself by inculpating another.

That Herasatula murdered the child, and that Behala, knowing this, gave information respecting the murder, with the intention of screening Herasatula from punishment, rest upon no evidence. We reverse the conviction, and direct the release of the appellant Behala.

Conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Pontifex and Mr. Justice Field.

THE EMPRESS *v.* NUDDIAR CHAND SHAW, ACCUSED.¹

Excise—Sale by wholesale—Sale by Servant—Beng. Act VII. of 1878, ss. 15, 59, and 60.

A sale of more than twelve quart bottles, or two gallons of spirituous or fermented liquors of the same kind, made at one transaction, is a sale by wholesale.

Quare.—Whether a sale of twelve quart bottles of one kind of liquor, and three quart bottles of another kind, at the same time, comes within the prohibition in the explanation clause of s. 15.

The licensed retail vendor himself is the only person liable to conviction under s. 60.

THIS was a reference made to the High Court under s. 296 of the Criminal Procedure Code.

One Nuddiar Chand Shaw, a servant of a licensed retail vendor of imported liquors, sold to an informer twelve quart bottles of beer and three quart bottles of brandy (the sale of the two sorts of liquor being completed in one transaction). On these facts being proved, the Joint-Magistrate of Howrah convicted Nuddiar Chand of an offence under s. 60 of Beng. Act VII. of 1878 for having sold excisable imported liquor by wholesale, and sentenced him to pay a fine of one hundred rupees.

On the case coming up before the Sessions Court, the Judge was of opinion that the facts proved did not amount to an offence under s. 60 of the Act, for

¹ Criminal Reference, No. 33 of 1881, from the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 28th February 1881.

1881.

IN THE
MATTER OF
THE PETITION
OF BEHALA
Bibi,
6 Cal. 789.

1881.

Mar. 9.

6 Cal. 832.

1881.
EMPRESS
 v.
NUDDIAR
CHAND SHAW,
 6 Cal. 832.

that the sale of two distinct quantities of different liquors, although in total exceeding two gallons, did not amount to a wholesale sale within the meaning of the Act. He further added that the transaction was one which was prohibited by s. 15 of the Act, and by the conditions of the license held by the convicted person's employer, and, as such, would be punishable, under s. 59 of the Act, with a fine of Rs. 50; but the offence could not be brought under s. 60. He further was of opinion that the conviction was bad, inasmuch as it had been had upon *the servant of the vendor*, whereas the last clause of s. 59 made the vendor alone responsible. He therefore referred the case for the opinion of the High Court.

No one appeared at the hearing.

The opinion of the Court (*Pontifex* and *Field*, JJ.) was given by

PONTIFEX, J.—The accused has been convicted under s. 60 of "The Bengal Excise Act," VII. (B.C.) of 1878. This section enacts that "every licensed retail vendor who sells by wholesale . . . shall be liable for every such offence to a fine not exceeding two hundred rupees."

The Sessions Judge is of opinion that the conviction is bad: (1) because the sale of twelve bottles of beer and three bottles of brandy at the same time is not a sale by wholesale; and (2) because the person convicted is not a retail vendor, but the servant of such a vendor.

We think that the Sessions Judge is right in his view of the law as to the second point.

As to the first point, there is more room for doubt. Under s. 15 of "The Bengal Excise Act," the sale of a larger quantity of spirituous or fermented liquors than twelve quart bottles would be a sale by wholesale. If, therefore, more than twelve bottles of beer or of brandy, *i.e.*, of the same kind of liquor, had been sold at one transaction, this would be a sale by wholesale. In this case two kinds of liquor were sold, and the quantity of neither kind exceeded twelve bottles. The case of such a sale is provided for by a clause of the 15th section, which is in fact an explanation, *viz.*, "Under this section a sale of an assortment of spirituous or fermented liquors . . . in greater quantity than is specified above, by a licensed retail vendor, is prohibited." If this provision stood alone without any other provision following or qualifying it, the sale in the present case would probably be within the prohibition. The section then goes on to enact: "The Board may, by rule, define what shall be held to be an assortment for the purposes of this section." So far as we have been able to discover, there is no evidence that the Board have made a definition of "an assortment" from which would be excluded such a sale as that in this case—a sale, that is, of twelve bottles of beer and three bottles of brandy. This being so, the sale in question probably comes within the prohibition in the explanation clause above referred to; but, for the decision of this case, it is not necessary to determine this point, as we think that, upon the second ground, the convictions must be reversed.

We are clear that the licensed retail vendor himself is the only person liable to the penalty provided by s. 60, and that the servant of such vendor is not liable to conviction under this section.

We set aside the conviction of Nuddiar Chand Shaw had under s. 60 of "The Bengal Excise Act," acquit him, and direct that the fine, if realized, be refunded.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF GOBIND CHUNDER MOITRA (PETITIONER)

v. ABDPOOL SAYAD AND OTHERS (OPPOSITE PARTY).¹

1881.

Mar. 4.

6 Cal. 835.

Criminal Procedure Code (Act X. of 1872), ss. 491, 530—Dispute likely to cause Breach of the Peace—Decision on Title by Civil Court—Police Report—Incorporation of, by reference.

On the 20th of March 1879, A applied to have certain lands, which he had lately purchased, registered in his name. The order of the Deputy Collector, declaring that A had proved possession, and was entitled to registration, was not passed until the 24th December 1879. Prior to A's purchase, B and C had, on the 6th March 1879, obtained registration of the same property. The proceedings were sent to the Commissioner, who, on the 20th September 1880, declared A to be entitled to the land; and in October the registration in the names of B and C was cancelled, and A's name was finally registered. In July 1880, proceedings under s. 530 of the Criminal Procedure Code were commenced upon the petition of certain ryots, who alleged that other ryots, at the instigation of A, were going to do acts which would lead to a breach of the peace. The Deputy Magistrate, the same person who as Deputy Collector had decided the land-registration case in favour of A, proceeded under s. 530 to consider the question as to who was in possession, and found that B and C were in possession.

Held that the Deputy Magistrate could not, in these proceedings, set aside the order which he had made in the registration-case, as that order could only be set aside in a regular suit.

The proceedings recorded by the Deputy Magistrate did not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question, between A on the one side, and B and C on the other; nor did it set forth the grounds upon which he was so satisfied that such dispute existed.

Held that the proceeding was therefore defective.

In the proceedings, the Magistrate referred to a police-report, which, however, did not show that a breach of the peace was imminent.

Held that although this report might be taken to be incorporated by reference, yet that it was not sufficient to justify the order.

Per FIELD, J.—Unless the parties are able to show that there is such a dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand, and not proceed further. When the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party, and the proper course for the Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under s. 491 of the Criminal Procedure Code, and require from such person security to keep the peace.

In this case a rule had been obtained by one Gobind Chunder Moitra, calling upon one Abdool Sayad and others to show cause why an order of the Deputy Magistrate of Pubna, made under s. 530 of the Criminal Procedure Code, declaring that Abdool Sayad and others were entitled to retain possession of certain lands until ousted by due course of law, and forbidding all disturbance of possession until such time, should not be set aside.

The facts of the case sufficiently appear from the judgment of PONTIFEX, J. Mr. H. Bell and Baboo Ishur Chunder Chuckerbutty in support of the rule.

Mr. Lee and Baboo Tarucknath Paulit showed cause.

¹ Criminal Motion, No. 37 of 1881, against the order of Baboo Dmarka Nauth Roy, Deputy Magistrate of Pubna, dated the 20th January 1881.

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The following judgments were delivered :—

PONTIFEX, J.—I think this rule must be made absolute, and the order of the Deputy Magistrate must be set aside. In giving my reasons for this decision, it is necessary to advert shortly to some circumstances which preceded the order made by the Deputy Magistrate. The person moving for the rule is one Gobind Chunder Moitra, who alleges that, in March 1879, he purchased the property with respect to which the order which he seeks to set aside was made under s. 530 of the Code of Criminal Procedure, the date of such order being the 20th January 1881.

On the 20th March 1879, Gobind Chunder applied, under the Land Registration Act, to have the land registered in his name. The decision of the Deputy Collector, in which he found that Gobind Chunder had proved possession, and was entitled to registration, was not passed until the 24th December 1879.

Now, it appears that, prior to this alleged purchase by Gobind Chunder Moitra, Abdool Sayad and Abdool Majid, who now oppose the rule, had obtained registration of the property in their names, under the Land Registration Act, on the 6th March 1879. It was therefore impossible for the Deputy Collector, on the 24th December 1879, to direct that the land should be registered in the name of Gobind Chunder Moitra. It was necessary that, for that purpose, his proceedings should go up to the Commissioner, who, if he confirmed the decision of the Deputy Collector, alone had the power to direct that the registration in the names of Abdool Sayad and Abdool Majid should be cancelled in order that registration might be effected in the name of Gobind Chunder Moitra. The proceedings accordingly went before the Commissioner, but it was not until the 29th September 1880 that he passed his final orders, and under those orders, in the month of October 1880, the registration in the names of Abdool Sayad and Abdool Majid was cancelled, and Gobind Chunder Moitra's name was finally registered. These registration-proceedings, therefore, occupied a period extending from the 18th March 1879 to October 1880. It must, however, have been manifest to Abdool Sayad and Abdool Majid, from the 24th December 1879, when the Deputy Collector decided in favour of Gobind Chunder's possession that there was every probability that the result of the proceedings would be that the property would be registered in the name of Gobind Chunder Moitra. As it seems to me to evade these consequences, and while the reference was pending before the Commissioner in order that his ultimate orders might be obtained, recourse was had to proceedings under s. 530, which were commenced in July 1880.

In the registration-proceedings under the Land Registration Act, the Deputy Collector had decided the question in the presence of both parties. Each party had had an ample opportunity of adducing all the evidence that he thought necessary to prove his case. Each party did adduce evidence, and upon that evidence the Deputy Collector, acting under the Land Registration Act, finally decided that Gobind Chunder Moitra *had proved possession*, and that he was entitled to have his name registered. Now the criminal proceedings in July 1880 were started by certain ryots submitting a petition of complaint, alleging that others of the ryots, at the instigation of Gobind Chunder Moitra, were going to do certain acts which would tend to a breach of the peace. Upon the receipt of that complaint, a police-report was called for, and a report was accordingly made by the police. Their report is, that there were two persons who claimed to be landlords; that certain of the ryots took the part of one side, and others of the other side; and that, at a future time, when the crops came to be cut, it was probable that the ryots of one side might cut the crops which had been grown by the

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other side, and a breach of the peace might ensue; but the police recommended that it would be sufficient if the leading ryots on either side were bound over to keep the peace. Upon that report, the District Magistrate, who possibly had no notice of the registration-proceedings, held a proceeding under s. 530, and referred it to the Deputy Magistrate, who was the very same person who, as Deputy Collector, had decided the land-registration case in favour of Gobind Chunder Moitra, finding that he had proved that he was in possession of this property. The Deputy Magistrate took evidence with respect to the complaint under s. 530. There was nothing in the police-report to implicate Gobind Chunder Moitra in any of the afts, out of which it was suspected a breach of the peace might ensue. The police had only implicated the ryots. But notwithstanding the Deputy Magistrate, in his office of Deputy Collector, had so recently, and after a full investigation, decided that possession was in Gobind Chunder Moitra, he considered that he might altogether disregard his prior proceedings as Deputy Collector, and proceed again under s. 530 to determine who was in actual possession of this land, being the very same question which he had already tried and decided.

Now, in my opinion, the fact that these registration-proceedings were pending at the time that the application was made for interference under the Criminal Procedure Code should have made the Deputy Magistrate extremely careful not to make any order as to possession under s. 530, unless he was quite satisfied that a *bond fide* dispute existed, and that a breach of the peace was imminent.

The Meahs, knowing that the registration-proceedings could, under ordinary circumstances, only properly be set aside by a regular suit, thought they might avoid being obliged to resort to that remedy, if they could set the Criminal Court in motion under s. 530, and hence this alleged quarrel between the ryots and the application to the District Magistrate.

Unfortunately, the Deputy Magistrate, altogether disregarding the former order that he made after a full trial, has now entirely rendered nugatory his order of October 1880. In my opinion, the Deputy Magistrate, knowing that the land-registration proceedings only awaited formal completion, ought not to have proceeded under s. 530 to deal with the question of possession—a question which he had himself so recently decided in the presence of both parties.

It would have been quite sufficient, if he thought a breach of the peace was imminent, to bind over the leading ryots on either side as recommended by the police. There was nothing to show from the police-report that Gobind Chunder Moitra was implicated in the afts complained of, and it seems to me, in passing the order in respect of possession, and in setting aside his own order, the Deputy Magistrate was acting improperly and unfairly to Gobind Chunder Moitra. It was never intended that the provisions of s. 530 should be used for the purpose of avoiding a decision so recently arrived at after a full trial.

The rule will be made absolute, and the order of the Deputy Magistrate set aside.

FIELD, J.—I also am of opinion that this rule must be made absolute, and the order of the Deputy Magistrate set aside. Under s. 530 of the Criminal Procedure Code, a Magistrate, in order to give himself jurisdiction, must first record a proceeding setting forth that he is satisfied that a dispute likely to induce a breach of the peace exists concerning land, &c., and this proceeding must state the grounds upon which he is so satisfied. It appears to me that, in the case before us, the proceeding recorded by the District Magistrate is defective, in that it does not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question between Gobind Chunder Moitra on the one side, and the Meahs on the

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other side ; and that it is further defective in that it does not set forth the grounds upon which he was so satisfied that such dispute existed. The Magistrate's proceeding refers to a police-report, which may, perhaps, be taken to be incorporated by reference. I think the proceeding itself ought to contain all the particulars essential to give the Magistrate jurisdiction, and that reference to any other document ought not to be necessary in order to the ascertainment of these essential particulars. But, even if the police-report be here taken to be part of the proceeding, the above defects are not removed, as this report shows merely that there was a dispute between two sets of ryots in the village, who had respectively taken the sides of Gobind Chunder Moitra and of the Meahs. Now, the ryots are not parties to the present proceedings, the only parties being Gobind Chunder Moitra on the one side, and the Meahs on the other side ; and it thus appears that the real "parties concerned in the dispute" were not the parties called upon to attend Court, and state their claims to actual possession. There is another ground upon which it appears to me that the order of the Deputy Magistrate in this case should be set aside, and that is, because there was no such *dispute* as is contemplated by s. 530. When once a Magistrate has recorded the preliminary proceeding under the section, and has called upon the parties concerned in the dispute to appear before him, the express language of the section does not provide for any further inquiry into the fact of the existence of a dispute likely to induce a breach of the peace. When the parties appear before the Magistrate, the law expressly requires only that the fact of actual possession be inquired into. But it appears to me that the essence and basis of the jurisdiction, which a Magistrate can exercise under s. 530, depends upon there being a dispute likely to create a breach of the peace ; and that, when the parties appear before the Magistrate, if they are able to show, or if it otherwise appears to the Magistrate, that there is no dispute, or no such dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand, and not proceed further.

I take it that the term "dispute" in s. 530 means a reasonable dispute, a *bond fide* dispute, a dispute between parties who have each some semblance of right or supposed right. It has been decided by this Court, in the case of *Rai Mohun Roy v. Wise*,¹ that, when a decree has been passed by a Civil Court regarding land in dispute, it is the duty of a Magistrate to maintain it ; and he has no power again to institute proceedings regarding such land under this section of the Code of Criminal Procedure. The principle of this decision is this, that, when the rights of parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party. In other words, the defeated party will not be allowed to go to the Criminal Court, and, alleging the existence of a dispute, invoke the aid of the Magistrate and the police to neutralize the effect of the decree of a competent Civil Court. When the rights of the parties have been determined, there is no longer a "dispute" within the meaning of s. 530 ; and the proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under s. 491 of the Code of Criminal Procedure, and require from such person security to keep the peace.

In the case of *Rai Mohun Roy v. Wise*,¹ the question of title had been definitively determined by the Civil Court ; and no case has, so far as I am aware, as yet arisen in which the principle of that decision has been carried further, or extended to cases in which there has been merely a summary ad-

¹ 16 W. R., Cr. Rul., 24.

judication upon the question of possession. I think, however, that the proceedings under the Land Registration Act are proceedings to which the same principle should be extended. Under this Act, a revenue-officer is directed to hold an inquiry; that inquiry in this particular instance was held in the presence of both parties, and they had an opportunity of producing before the revenue-officer evidence to show that they were in possession of the land. After making his inquiry, the revenue-officer came to the conclusion that Gobind Chunder Moitra was in possession; his name was registered in the Collector's general register as that of the person in possession of the estate; and the result of this registration is, that the Meahs are not entitled to sue the tenants for rents; for to any such suit it is a sufficient defence that their names are not registered in the Collector's general register.

If, after these formal proceedings before the revenue-authorities, it is competent to the Magistrate to take action under s. 530, an order made under this section may absolutely neutralize the effect of the registration-proceedings (as has happened in this case), and great confusion and possible injustice may be done. Persons who have had experience in the mofussil are well aware why an order under s. 530 is so strenuously sought after in many cases. Such an order is important as regards the question of limitation. The person who is declared by the order of the Magistrate to be in possession under s. 530 can successfully set up such possession in answer to a plea of limitation.

The question of burden of proof, no unimportant question in many cases, depends materially upon whether a party occupies the position of a plaintiff or a defendant in a civil suit, and the person who succeeds in getting the Magistrate to declare him to be in possession obtains no small vantage ground for subsequent litigation, *melior est conditio defendantis*.

Then, whether a person who had a good title will be able to procure witnesses to give evidence in his favour, depends in no slight degree upon whether he is in possession or out of possession. Regard being had to these considerations, I think that Magistrates should be most careful in applying the provisions of s. 530; that they should not proceed to act under this section unless they are satisfied that a dispute, a *bond fide* dispute, a reasonable dispute, a dispute in which there is some semblance of right on either side, exists, and that such dispute is likely to induce a breach of the peace. I am satisfied that it was not the intention of the Legislature that the provisions of this section should be applied to any case in which a competent Court, whether in a regular suit, or in that sort of proceeding which is in this country known as a summary proceeding, has decided that one person is entitled to, or is in possession of, land.

I may refer to s. 535 of the Code of Criminal Procedure by way of further argument in support of this view. This section enacts that "nothing in this chapter shall affect the powers of a Collector, or a person exercising the power of a Collector or of a Revenue Court." The officer acting under the Land Registration Act is probably a Revenue Court; and if a Magistrate may, under s. 530 of the Code of Criminal Procedure, decide that a person is in possession, whom a revenue-officer has, under the provisions of the Land Registration Act, held not to be in possession, the powers of such revenue-officer or Court would be materially affected.

It therefore appears to me that the order of the Deputy Magistrate should be set aside, (1st) because the initiative proceeding of the District Magistrate was defective; (2nd) because the whole of the proceedings were without jurisdiction.

Rule absolute.

I. L. R., Cal. 41.

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VOLUME VII.

CRIMINAL REFERENCE.

*Before Mr. Justice Pontifex and Mr. Justice Field.*JHUMUK NONIAH *v.* SHADASHIB ROY.¹*Distrain—Rent Act (Beng. Act VIII. of 1869), ss. 72, 74, 76—Criminal
Trespass.*

1881.

Mar. 31.

7 Cal. 26.

A, the servant of B, was convicted of criminal trespass in going upon the land of C, one of B's tenants, and preventing him from cutting his crops. B was convicted of abetment of criminal trespass. A and B pleaded that they were acting in the exercise of the legal right of distraint.

It appeared that no written demand under s. 72 of the Rent Act (Beng. Act VIII. of 1869) for the amount of the arrears, together with an account exhibiting the grounds on which demand had been made, was served on C, and that no written authority under s. 76 had been given by B to A.

Held that it lay upon A and B to show that they had conformed to the provisions of the law, or at least had acted with the *bond fide* intention of distraining the complainant's crops; and that the conviction was right.

Held, also, that, as under s. 74 standing crops and ungathered products may, notwithstanding distraint, be reaped and gathered by the cultivator, A had no right, even if he was acting *bond fide*, to restrain C from cutting his crops.

The facts of this case sufficiently appear from the judgment of the Court (PONTIFEX and FIELD, JJ.), which was delivered by

PONTIFEX, J.—In this case Shadashib Roy has been convicted of criminal trespass punishable under s. 147 of the Indian Penal Code, and Sheosahai has been convicted of abetment of criminal trespass punishable under s. 447 read with s. 109. The facts of the case appear to be as follows: There is a dispute between Sheosahai and his tenants on the subject of rent. On the day of the occurrence, which forms the subject of these criminal proceedings, Shadashib, the servant of Sheosahai, and a number of other persons, went on the field of the complainant, and prevented him from cutting his paddy. Shadashib was sentenced to pay a fine of Rs. 10, and his master, Sheosahai, was sentenced for abetment to pay a fine of Rs. 100. The Sessions Judge of Tirhoot, on the appeal of Sheosahai, set aside his conviction and sentence; and he has now made a reference to this Court in order to have the conviction and sentence of Shadashib Roy set aside. The Sessions Judge is of opinion that the facts of the case as shown by the evidence do not constitute the offence of criminal trespass. We are unable to take this view of the case. It lay upon the accused persons, who set up in their defence that they were acting in the exercise of the legal right of distraint, to show that they had conformed to the provisions of the law, or at least to prove such facts as would raise a reasonable presumption that, even although they had in some respects acted illegally, still what they did was done with the *bond fide* intention of distraining the complainant's crops.

Under s. 72 of the Rent Act, the distrainer is bound to serve the defaulter with a written demand for the amount of the arrears, together with an account exhibiting the grounds on which the demand is made. No attempt was made

¹ Criminal Reference, No. 47 of 1881 (letter No. 114), from the order of H. W. Gordon, Esq., Officiating Sessions Judge of Tirhoot, dated the 14th March 1881.

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to show that this was done. Under s. 76 of the same Act, if Sheosahai, instead of going himself to distrain, employed a servant to make the distress, he was bound to give such servant a written authority. No attempt has been made to show that such authority was given. There is upon the record some evidence to show that Sheosahai was only one sharer in the estate upon which the complainant was a ryot. Under the provisions of s. 68 of the Rent Act, a sharer in a joint estate in which a division of the lands has not been made amongst the sharers, is precluded from exercising the powers of distraint otherwise than through a manager authorized to collect the rents of the whole estate on behalf of all the sharers in the same. There is nothing to show that the person who is alleged to have distrained the property of the complainant in this case was the manager acting on behalf of all the sharers. We desire, however, to say that we do not give much weight to this last point in deciding the present case, as the evidence does not clearly show whether the estate in which Sheosahai has an interest falls within the above definition. Then, under s. 74 of the Rent Act, standing crops and other ungathered products may, notwithstanding the distraint, be reaped and gathered by the cultivator. Now, the evidence shows that Shadashib Roy and the men with him prevented the complainant from cutting the paddy, and this they clearly had no right to do even if they were acting *bond fide* in the exercise of the power of distraint. It was said by one of the witnesses for the defence that Sheosahai had called upon the ryots to produce receipts for the rents lodged by them in Court, and that, as they failed to do so, their crops were distrained. The complainant stated on oath that his receipt had been filed in a case in the Civil Court; and if this were so, this was a good reason for not producing it on demand. At the same time it is to be observed that there was on the record evidence that the rent had been lodged in Court. If it were lodged, a notice would have been given by the Court to Sheosahai under s. 47 of the Rent Act. Sheosahai did not deny having received this notice.

Having regard to all these circumstances, we think that we ought not to interfere with the conviction of Shadashib Roy, more especially as the fine imposed upon him will probably be paid by his employer, and we further think that the conviction of Sheosahai was not properly reversed.

APPELLATE CRIMINAL.

1881.
Mar. 29.
7 Cal. 28.

Before Mr. Justice Pontifex and Mr. Justice Field.

FAIZ ALI AND OTHERS (PETITIONERS) v. KOROMDI (OPPOSITE PARTY).¹

Recalling Witnesses, Time for—Right of Accused to recall Witnesses for Prosecution—Criminal Procedure Code (Act X. of 1872), ss. 217, 218.

Reading ss. 217 and 218 of the Criminal Procedure Code together, it appears that, if an accused person desires to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire is when the charge is read over to him, and he is called upon to make his defence; and although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case, the accused has no right to insist upon the witnesses being recalled.

In this case the petitioners were charged with having wrongfully confined one Koromdi. The complainant's witnesses were examined and cross-examined. On the 17th December 1880 the charge was drawn up, and the case was

¹ Criminal Motion, No. 64 of 1881, against the order of *Moulvie Syud Faisoddeen Hossein*, Deputy Magistrate of Mymensing, dated the 20th December 1880.

adjourned until the next day. On that day the accused presented a petition, asking for leave to recall and cross-examine the complainant's witnesses. This application was refused, on the ground that it was too late, and the petitioners were convicted and sentenced to fine and imprisonment. An appeal to the Magistrate was dismissed. The petitioners, thereupon, obtained a rule calling upon the complainant to show cause why the conviction should not be quashed, on the ground that the Deputy Magistrate had improperly refused to allow the petitioners to recall and cross-examine the complainant's witnesses.

Baboo Grish Chunder Chowdhry in support of the rule.

Baboo Foy Gobind Shome showed cause.

PONTIFEX, J.—This rule was moved for and granted by us, on the ground that the Deputy Magistrate had improperly refused to allow the petitioners to recall and cross-examine the witnesses of the complainant after the charge had been framed under s. 217. The same objection was taken in appeal before the Magistrate, and the Magistrate, in his decision, has held that the petitioners did not exercise their right, under s. 218, of recalling the witnesses for the prosecution for cross-examination within proper time, and that therefore they were not now entitled to take any objection on account of the refusal by the Deputy Magistrate to recall such witnesses.

Now, in the petition before us, it is stated that the charge was drawn up on the 17th of December 1880, and that on the same day an application was made to the Deputy Magistrate, asking that the witnesses should be recalled for further cross-examination. It appears, however, that the petition before the Deputy Magistrate, asking that the witnesses should be recalled, although dated on the 17th December 1880, could not have been filed before the 18th December 1880, the date on which the stamp was punched, and the date on which the endorsed order was made. It appears that, early in December, the witnesses, both for the complainant and for the accused persons, had been examined and cross-examined, and on the 17th December the charge was drawn up, and the Deputy Magistrate made this order: "To-day having heard the pleaders and mukhtears, the case will stand over until to-morrow." The ordinary inference would be that, the pleaders and mukhtears having been heard, the case had closed, and only awaited the decision of the Deputy Magistrate. But, however that may be, the only rights that the accused person has are under s. 218 of the Criminal Procedure Code. Now, under s. 217, the charge is to be read and explained to the accused person, who is to be asked whether he has any defence to make. That was done on the 17th December. Under s. 218, if the accused has any defence to make, he is to be called upon to enter upon the same, and to produce his witnesses, and is to be allowed to recall and cross-examine the witnesses for the prosecution. These two sections coming together, it seems to us that it was intended that, if the accused person desired to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire was, when the charge was read over to him, and he was called upon to make his defence. That was done on the 17th December. The petition to recall these witnesses was not put in until the 18th. Therefore, we think that it was no longer in the power of the accused persons to insist upon their right of recalling these witnesses, although it remained in the discretion of the Deputy Magistrate to recall them if he thought fit. Now, on the 18th December, he made another order directing that the case should come on again on the 20th; and on the 20th, an order was drawn up, but not signed, directing that the witnesses should be produced for re-examination on the 28th. The Deputy Magistrate never signed that order, for, before he was prepared to sign it, one of these witnesses for

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the prosecution, a policeman, who happened to be in Court, was produced, and it was asked on behalf of the prosecution that, if the accused persons wanted to cross-examine this witness, they should do so at once. The accused refused to cross-examine him then, alleging that it would prejudice their case unless all the witnesses were cross-examined together. The Deputy Magistrate then considered that the application for cross-examination was made only with the object of delaying the proceedings, and that it was not a *bond fide* application; and it being, under the circumstances, in his discretion to recall the witnesses or not, and the accused having lost their rights under s. 218, the Deputy Magistrate decided that he would not sign the order drawn up, and he proceeded to dispose of the case. The Magistrate, on the appeal before him, considered that the Deputy Magistrate had acted with propriety, and we are disposed to agree with the Magistrate in that opinion. We think that there is not sufficient ground for this application, and that the rule must be discharged.

FIELD, J.—I only desire to add that the vernacular record shows that “the vakils and mukhtears,” that is, as I understand, the vakils and mukhtears of both sides, were examined on the 17th. Now, though the Code of Criminal Procedure contains no express provisions similar to those to be found in the Civil Procedure Code as to the time at which, or the order in which, the pleaders and mukhtears for the prosecution, or for the defence, shall address the Court, still, according to mofussil practice, the usual practice on this point is followed. I therefore understand from the vernacular record that the pleader or mukhtear of the accused had addressed the Court, and that the pleader or mukhtear of the prosecution had been heard in reply. This being so, I take it that the case was closed on the 17th, and the accused not having exercised the right given them by s. 218 at the time at which they ought, if they intended to exercise it, to have expressed their intention of doing so, I think they could not afterwards claim to exercise that right.

Rule discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

1881.

Mar. 25.

IN THE MATTER OF THE PETITION OF ROCHIA MOHATO (APPELLANT).

THE EMPRESS v. ROCHIA MOHATO.¹

7 Cal. 42.

Evidence Act (I. of 1872), s. 32, cl. I, and s. 33—“Questions in Issue”—Charges added at Sessions—Depositions before Magistrate—Witness dying or absconding—Charge to Jury—Omission to notice evidence—Qualification of Furyman.

In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died, in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial.

Held that the evidence was admissible either under s. 32, cl. I, or s. 33 of the Evidence Act, notwithstanding the additional charges before the Sessions Court.

¹ Criminal Appeal, No. 162 of 1881, against the order of *H. Beveridge, Esq.*, Officiating Sessions Judge of Patna, dated the 19th February 1881.

The question whether the proviso to s. 33 of the Evidence Act is applicable—that is, whether the questions at issue are substantially the same—depends upon whether the same evidence is applicable, although different consequences may follow from the same act.

At the trial it was proved that the other witness who had been examined before the Magistrate had disappeared, and that it had been found impossible to serve him with a summons. His deposition was put in and read.

Held that it was properly admitted under s. 33.

In summing up the case to the jury, the Judge omitted to call their attention to the evidence of the witnesses for the defence. This evidence appeared to the High Court to be untrustworthy.

Held that the summing up was not defective on account of this omission on the part of the Judge.

The fact that a person is a clerk in the office of the Magistrate of the District is not sufficient to disqualify him from sitting on a jury.

THE facts of this case sufficiently appear from the judgment.

Mr. *Gasper* for the appellants.

Mr. *M. Ghose* for the prosecution.

The judgment of the Court (*Pontifex* and *Field*, JJ.) was delivered by

PONTIFEX, J.—This is an appeal from a conviction by a jury in respect of which we can only interfere if there has been some error of law or misdirection by the Judge. Now, it is alleged that we ought to interfere on two grounds: *first*, that evidence has been wrongly placed before the jury; and, *secondly*, that in certain particulars there has been a misdirection, or rather a want of direction, by the Judge.

With respect to the first ground, that improper evidence has been placed before the jury, the complaint is, that the depositions of two witnesses who were examined before the Magistrate were improperly allowed by the Judge to be put in by the prosecution and used in the Sessions Court under the following circumstances:

One of these witnesses was the person whom the defendant and his party were accused of assaulting, and who has since died. Now, before the Magistrate the only complaint was a charge of grievous hurt. But in consequence of the death of the person who was hurt, *viz.*, Khedroo, other charges were added before the Sessions Judge, *viz.*, a charge of murder and a charge of culpable homicide not amounting to murder. In consequence of these additional charges, it is argued that, under s. 33 of the Evidence Act, the questions in issue before the Sessions Court, and before the Magistrate, were not substantially the same in the two proceedings. As a matter of fact, the prisoner has only been convicted of grievous hurt; and therefore the issue that was before the Magistrate was the only issue that has been decided against the accused by the jury. It appears to us that, by "the questions in issue," referred to in s. 33, being required to be "substantially the same," it is not intended that, in a case where the prisoner injured dies subsequently to the enquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because in consequence of his death other charges are framed against the accused. We are of opinion that the evidence of the deceased in this case was admissible under s. 33, and, even if it were not admissible under s. 33, that it would be admissible under the first clause of s. 32 of the Evidence Act. The question whether the proviso to s. 33 is applicable—that is, whether the questions at issue are substantially the same—depends upon whether the same evidence is applicable, although different consequences may follow from the same act. Now, here the

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act was the stroke of a sword which, though it did not immediately cause the death of the deceased person, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased; but the evidence to prove the act with which the accused was charged remained precisely the same. We therefore think that this evidence was properly admitted under s. 33.

With respect to the other deposition which was put in and read before the Sessions Court, it appears that a person named Jan Ali, alleged to be the gomasta of the ticcadar, was examined before the Magistrate, and that he lived in the cutcherry-house. A summons was properly taken out to be served on Jan Ali at the cutcherry-house; but the peon in his return stated that as he was unable to find Jan Ali and serve him personally, he hung up the summons on the cutcherry-house. There is also evidence to show that Jan Ali suddenly disappeared from the cutcherry-house. It is further shown that inquiry was made in his native village whether he had returned there; but the result of the inquiry was that nothing had been heard of him. It was therefore impossible to say where Jan Ali was, or to serve him with a summons. We think, under these circumstances, that his deposition was properly usable under s. 33 before the Sessions Court; and it does not appear that any objection was made before the Judge to its admission. We find on the record no petition or memorandum showing that objection was made when the deposition was read; but we do find that, on the part of the defendant himself, the deposition before the Magistrate of one of his own witnesses was put in, and was used as evidence. We think, therefore, that both these depositions were properly admitted by the Judge to be used as evidence in this case.

We then come to the next ground before us that there has been a misdirection by the Judge, or rather a want of sufficient direction to the jury. It is alleged that many matters were not mentioned by the Judge in his charge which ought to have been brought to the notice of the jury; and, in particular, stress was laid on the fact that the Judge made no reference whatever to the evidence of the witnesses for the defence. We asked that the evidence of the witnesses for the defence should be read to us, and it has been read to us, and we have no hesitation in saying that the Judge, by making no reference to it in his charge to the jury, acted favourably rather than otherwise towards the prisoner. For, if reference had been made to that evidence, it would at the same time have been necessary to point out to the jury that the witnesses were not in accord with one another; that their statements were discrepant; and that the evidence of the principal witness, who is now relied upon for the defence, was really unreliable.

Moreover, we know that the prisoner was defended by counsel in the Court below; and although particular points may not have been alluded to in the Judge's charge to the jury, we have little doubt that they were made, and properly made, much of by the defendant's counsel. It is therefore not to be assumed that these points were absent from the minds of the jury in considering their verdict. It is impossible for a Judge in summing up to go into every particular of the evidence. It is only necessary to direct the attention of the jury to the important and salient points in the case.

There is one other objection to which it is necessary to refer, and that is an objection that is taken before us as to the constitution of the jury, but about which there is nothing in the grounds of appeal to this Court. It is stated that the foreman of the jury was a clerk in the Magistrate's office. This is the only ground, as we understand it, on which objection could be made to him. He

was challenged before the Judge, and it was for the Judge to decide whether the grounds of the challenge were such that he ought not to be allowed to sit on the jury.

The Judge was not satisfied that the grounds were sufficient; nor do we see any reason why his being a clerk in the Magistrate's office should disqualify him from sitting on the jury.

Under the circumstances we must dismiss this appeal. The conviction and sentence will stand.

Appeal dismissed.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF KALI KRISTO THAKUR (PETITIONER)
v. GOLAM ALI CHOWDHRY (OPPOSITE PARTY).¹

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Criminal Procedure Code (Act X. of 1872), s. 530—Record of Grounds—Police Report, Incorporation of—Evidence of Possession—Evidence of Title.

1881.
Mar. 23.
7 Cal. 46.

In proceedings under s. 530 of the Criminal Procedure Code, the Magistrate recorded the following words: "Whereas from the police-report a breach of the peace probable," and found that certain persons were in possession.

Held that, although the record of grounds was unsatisfactory, as the initial proceeding did not contain within itself all which the law requires to be recorded, *viz.*, in the first place, that the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists, and in the second place, the ground upon which he is so satisfied, yet that, as the police-report from which the grounds for apprehending a breach of the peace appeared was incorporated by reference, the final order was not defective.

*In re Gobind Chunder Moitra*² distinguished.

No sufficient evidence of possession was produced before the Magistrate, but evidence as to the title of the person in whose favour the Magistrate found was given, and the Magistrate based his decision upon the latter evidence, and determined the case with reference to the merits of the claims of the parties to the *right* of possession.

Held that, although the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession, he was wrong in basing his decision on the evidence of title, and his order was set aside.

In this case an order had been made under s. 530 of the Criminal Procedure Code, declaring one Moonshi Golam Ali to be in possession of certain land. A rule was obtained calling upon him to show cause why the order should not be set aside, upon the grounds, *first*, that the preliminary proceeding recorded by the Magistrate, *viz.*, "Whereas from the police-report a breach of the peace probable," was defective; *secondly*, that the order made by the Magistrate was bad, inasmuch as it did not contain a sufficient description of boundaries so as to enable the land in respect of which the order had been obtained to be identified; and, *thirdly*, that the Magistrate allowed his mind to dwell, not upon the question of possession, but on the question of title; and that he had not evidence of possession before him which could justify him in making the order.

Mr. M. Ghose, Baboo Doorga Mohun Doss, Baboo Kali Mohun Doss, and Baboo Ram Sukha Ghose in support of the rule.

Mr. H. Bell and Baboo Seetanath Roy showed cause.

¹ Criminal Motion, No. 65 of 1881, against the order of Baboo Ackoy Chowdhry, Deputy Magistrate of Madaripore, dated the 14th January 1881.

² L. R., 6 Cal. 835.

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The judgments of the Court were as follows :—

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FIELD, J.—This is a case under s. 530 of the Code of Criminal Procedure. The land in dispute is a piece of newly-formed chur land. It was claimed by one party as belonging to his estate Jahazmara, and by the other party as belonging to the Mehal Panchkati. This rule was obtained substantially on three grounds: *first*, that the preliminary proceeding of the Magistrate was defective; *secondly*, that the order made by the Magistrate is bad, inasmuch as it does not contain a sufficient description by boundaries so as to enable the land in respect of which the order has been made to be identified; and, *thirdly*, that the Magistrate allowed his mind to dwell, not upon the question of possession, but on the question of title; and that he had not evidence of possession before him which could justify him in making the order. As to the first of these points, the learned Counsel for the petitioner relied on the case of *Sheikh Munglo v. Durga Narain Nag*.¹ In that case no proceeding whatever was recorded by the Magistrate who initiated the proceedings under s. 530 of the Code of Criminal Procedure. There was merely an order endorsed on the back of the police-report, which order was in these terms: "Serve a notice on Durga Churn to at once cease from building the hut under s. 518, Criminal Procedure Code, and call on both parties to appear before me this day week with their documents, that I may determine, under s. 530, Criminal Procedure Code, who is in possession of the disputed land."

Now, in the case at present before us, there is a proceeding. The Magistrate has recorded the following words: "Whereas from the police-report a breach of the peace probable." It would seem that some such word as "is" or "appears" has been omitted. In *In re Gobind Chunder Moitra*,² which was before this Bench a few days ago, I expressed an opinion that it is the duty of the Magistrate, before taking proceedings under s. 530, to record a proceeding stating, in the first place, that he is satisfied that a dispute likely to induce a breach of the peace exists, and, in the second place, the ground upon which he is so satisfied; and these observations have been now pressed upon me. I certainly think that it is the duty of a Magistrate to record distinctly, in cases under s. 530, that which the law requires to be recorded. But whether the omission on the part of a Magistrate to comply precisely with the requirements of the law will, in every case, afford a sufficient ground for setting aside his order, is another matter. In the case *In re Gobind Chunder Moitra*,² which was recently before this Bench, a reference was made, in the Magistrate's proceedings, to the police-report, and I expressed an opinion that, even if the police-report were taken to be incorporated by reference in the initial proceeding, there would not be matter sufficient to satisfy the requirements of the law. In the present case, the Magistrate's proceeding by itself is not a sufficient compliance with the requirements of the law; but if the police-report, to which this proceeding refers, be taken to be incorporated, there is sufficient to show, *first*, that a dispute likely to induce a breach of the peace existed; and, *secondly*, to show grounds upon which the Magistrate might reasonably be so satisfied. I am distinctly of opinion that a Magistrate who records a proceeding like that which has been recorded in the present case performs his duty in a perfunctory and unsatisfactory manner, but I am not prepared to say that the final order in the present case is defective, on the ground that the initial proceeding did not contain within itself all which the law requires to be recorded, but that we have to look to the police-report in order to find matter sufficient to satisfy the requirements of the section. On this *first* ground, then, it appears to me that the objection taken by the learned Counsel must fail. As to

¹ 25 W. R., Cr. Rul., 75.² 1 L. R., 6 Cal. 835.

the *second* ground, that, namely, connected with the boundaries, there is, in all probability, a sufficient description, regard being had to the nature of the land which formed the subject of dispute and to the difficulty of giving precise boundaries of chur land; but it is not necessary to go farther into this question, because the order of the Magistrate ought, in my opinion, to be set aside on the remaining ground, which I am about to deal with. This ground is, that there was not evidence of possession before the Deputy Magistrate to justify his order; that he has allowed his mind to wander away from the question of possession, which it was his duty to adjudicate upon; and that his order is based entirely upon the view which he has taken with respect to title.

I have read through the evidence of the witnesses examined on behalf of the petitioner before the Magistrate, and it appears to me that this rule ought to be made absolute upon the ground so taken. S. 530 of the Code of Criminal Procedure enacts that the Magistrate shall, without reference to the merits of the claims of any party to the right of possession, proceed to enquire and decide which party is in possession of the subject of dispute. Now, it has been contended before us, that the proper meaning to be placed upon these words is, that the Magistrate is entirely precluded from receiving any evidence whatever as to the title of the parties. In that argument I do not concur. That possession should follow title is a reasonable and natural presumption; and if a Magistrate, in a case of this kind, uses evidence of title merely in order to guide and assist his mind in coming to a decision upon the question of possession, it appears to me that he is not transgressing the provisions just quoted by using evidence of title for this limited purpose; but if, instead of proceeding to decide as to the actual possession, he virtually puts aside the consideration of this question, and determines the question of title alone, then I think he is clearly doing that which the law has forbidden him to do. In the present case, the Deputy Magistrate, in the commencement of his judgment, says that the parties were called upon to show their respective claims to it, *i.e.*, the chur. He does not say that they were called upon to show their respective claims to possession. He then proceeds to enter into the question of title, to consider the circumstances under which the chur came into existence, and to give reasons for thinking that this newly-formed chur is part of the estate of one party rather than of the estate of the other party. Having devoted a considerable portion of his judgment to the question of title, he then proceeds to deal with the question of possession. He commences this part of his judgment by saying, "Now, to show possession, Baboo Kali Kristo Thakoor's men have examined several witnesses, one of whom is a munsif's peon." He then deals with the evidence of the witnesses called to prove the distraint proceedings, which he believes to be fictitious; and finally he says, "I lay not much stress on the deposition of such witnesses. As the circumstance and probability go in favour of Moonshi Golam Ali and as (to?) what I have stated in paragraph two of this decision, the disputed land lies beyond Jahazmara, and is adjoined to Chur Panchkati; and, as I believe it is in Golam Ali's possession, I direct that the disputed land should remain in Moonshi Golam Ali's possession till otherwise decided by competent Court." Here the Deputy Magistrate expressly states that he does not lay much stress upon the testimony of the witnesses; and if we put aside this oral evidence, the other evidence before him is concerned mainly, or indeed altogether, with the question of title. It is therefore clear that, apart from the oral evidence upon which he did not lay much stress, there was not evidence upon which the Deputy Magistrate could determine the question of actual possession, for evidence of title, though it may supplement and support direct evidence of possession, cannot, standing alone, be proof of possession. If the oral testimony of the

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witnesses went to show that the possession was with Golam Ali, and if the circumstances and probabilities of the case and the evidence of title had been used merely to corroborate this testimony, there would be sufficient on the record to support the order of the Deputy Magistrate; but on examining this oral evidence I find that it is mainly directed to the question of title, and contains little or nothing upon the question of possession.

On the whole, it is clear from the matter upon which the witnesses were examined, and from the Deputy Magistrate's judgment, that he did not properly address his mind to the question which it was his duty to try—that is, the fact of actual possession, but did that very thing which by the provisions of s. 530 he was precluded from doing—namely, determined the case with reference to the merits of the claims of the parties to the *right* of possession. This being so, it appears to me that the Deputy Magistrate's order under s. 530 of the Code of Criminal Procedure must be set aside.

This rule will be made absolute.

PONTIFEX, J.—I also agree that the proceedings must be set aside, and after the judgment of my learned brother, it is only necessary for me to say that, in my opinion, there was a sufficient proceeding recorded for the purpose of initiating proceedings under s. 530 of the Code of Criminal Procedure. I also wish to add that, if there had been substantial evidence of possession or a conflict of evidence on that question, the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession. But as my learned brother has read the deposition of the witnesses, and it does not appear that there was sufficient evidence of possession, I agree that the case should not have been decided upon evidence of title alone.

Rule absolute.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF CHANDRA NATH SIRKAR
 AND OTHERS.

THE EMPRESS *v.* CHANDRA NATH SIRKAR AND OTHERS.¹

*Confession—Persons jointly charged—Statement by Prisoner in absence of
 Co-prisoners—Evidence Act (I. of 1872), s. 30.*

1881.
 April 2.
 7 Cal. 65.

Several persons were charged together with offences under ss. 148, 302, 324, and 326 read with s. 149 of the Penal Code. The Sessions Judge, when about to examine the prisoners, required all but the prisoner under examination to withdraw from the Court, until his turn for examination came round, and convicted each prisoner chiefly upon what was said by his co-prisoners during his absence from the Court.

Held that the evidence so given was inadmissible.

THE facts of the case fully appear from the judgment.

Mr. Gasper and Baboo Grish Chunder Chowdhry for the appellants.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

MORRIS, J.—This is a case of ryot, which resulted in the death of one Gopeenath Manjhi, permanent injury to the right arm of Khaim Sheikh caused by gunshots, and minor injuries to others, also caused by gunshots and by cutting weapons.

¹ Criminal Appeal, No. 756 of 1880, against the order of C. D. Winter, Esq., Officiating Sessions Judge of Pubna, dated the 25th October 1880.

The Sessions Judge, in concurrence with both the assessors, has convicted Chandra Nath Sirkar, Alum Poramanick, Nundo Manjhi, and Hukim Poramanick, of ryot under s. 148 of the Penal Code, but, differing from the assessors, he has also convicted Chandra and Nundo Manjhi of culpable homicide not amounting to murder; and he has sentenced Chandra Nath Sirkar to transportation for life, Nundo Manjhi to transportation for ten years, and Alum Poramanick and Hukim Poramanick to rigorous imprisonment for three years.

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Concurring with one assessor, but differing from the other, the Sessions Judge has further convicted Malu Sheikh, Modhone Sheikh, Mudhee Sheikh, and Kolimuddeen Pathan, of ryot, but he has, differing from both assessors, also convicted the last named of culpable homicide not amounting to murder; and he has sentenced Kolimuddeen Pathan to transportation for life, and the other three persons to three years' rigorous imprisonment. Two other men were acquitted by the Sessions Judge.

Appeals have been preferred against all these sentences.

The appellants have been defended by Mr. Gasper both in the Sessions Court and before us, and we are surprised to find that, in a case of such public importance and of so serious a character, the Legal Remembrancer has not been instructed to appear on behalf of the prosecution.

It appears that disputes have been existing, for some time passed, in the village of Tepri, between two parties claiming to receive rents from the ryots, the one party being certain Sandyls of Solop, Kali Sunder Sandyal and another, and the other party, one Debi Doss, the auction-purchaser of the rights and interests of Bykunt Sandyal, brother of the Sandyls of the first party. Before this occurrence, Debi Doss died, but his interest is represented by his son Jibun Ram.

The existence of these disputes, and the likelihood of their terminating in a serious ryot, was well known to the local police, whose station is two-and-a-half kos, or five miles, distant from Tepri; and so late as the morning of the ryot, which forms the subject of the present trial, the head-constable left the place on completion of an investigation into an offence which arose out of the disturbed state of the village. The evidence shows that both sides had then assembled forcibly to assert their respective claims, and foreign clubmen (*desh-walis*) had been enlisted to overawe the villagers, and, in the event of a disturbance, to give to their respective sides the benefit of their superior strength and skill.

Under his purchase in 1283 or 1876 of the rights and interests of Bykunt Sandyal, Debi Doss claimed the entire sixteen annas share of the rents of the village. The other Sandyls opposed him, alleging that the interest of Bykunt Sandyal was only a small fractional share not exceeding one anna. The villagers generally had yielded to the claim of Debi Doss, but a certain number of men of the fisher-class, inhabiting the quarter called Manjhipara, refused to pay him the rent demanded of them, and were supported and encouraged in their resistance by the Sandyls.

The zemindari cutcherry of Debi Doss was held at the house of Nundo Manjhi, close to the Manjhi's quarter, and a fence had been set up, barring the passage into the homestead of Dusrut and Subul Manjhi, at the head of the path, which runs west and north of Nundo Manjhi's homestead. The object of this was apparently to protect the Manjhis against any sudden attack from the cutcherry quarter. These facts must have been patent to the head-constable, who was in Tepri on the morning of the ryot, and it is impossible to believe that they

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were not also known to the superior police-officers at the adjoining police-station. It is matter, therefore, of extreme surprise that they did not take strict measures to prevent the breach of the peace that was evidently imminent, or at any rate to hinder the introduction of firearms and large bodies of "deshwalis" into the village. This negligence on their part has deprived this Court of independent testimony, and made it extremely difficult to ascertain from the garbled accounts of the partisans of either side what the real facts connected with the origin of this ryot are, or to say which party took the initiative. We gather, however, from the evidence that, on the 10th July 1880 (Asar 27th, 1287), Chandra Nath Sirkar held open cutcherry under a gab-tree close to the house of Nundo Manjhi, which had been set apart for a cutcherry, and began collecting rent from the villagers on the part of Debi Doss.

An attempt was evidently made to collect the rent from the residents of the Manjhipara close by, and this was at once met by an attack in force by the Manjhis, aided by deshwalis of the Sandiyals, who were either stationed in the house of Gopal Manjhi, or in the neighbouring house of Bhagirathi Thakur. The houses of Gopee Manjhi, Dusrut, and Subul, which were in one cluster, became the scene of the disturbance, and almost immediately a large body of men on both sides assembled there, and began the fight. One or more guns were discharged at the Manjhis, resulting in the wounding of Gopeenath Manjhi, Khaim Sheikh, and Dhonai. Gopeenath died in hospital on the 13th from peritonitis caused by this injury, and Khaim has been permanently deprived of the use of his right arm. It would seem that they were standing in the lane near the bamboo-fence. There is much discrepancy in the evidence regarding the number of shots fired, and by whom they were fired; but it is clear from the nature of the injuries inflicted, and the shot-marks found on the spot, that there must have been more than one discharge of firearms. There was some attempt made on behalf of the prisoners to account for these gun-shots by an accidental discharge in the struggle brought on by the Manjhis, but there is no reason for accepting this explanation. There can be no doubt that the guns were fired deliberately at the Manjhis to injure some of them, and to ensure success to Debi Doss's party. Some of the witnesses even declare that certain persons, one of whom was the prisoner, Kolimuddeen, were ordered to fire to drive off the Manjhis; whichever party, therefore, made the first move, it is clear that the other was fully prepared to resist, and it is equally clear that the party of Debi Doss overcame the Manjhis, and looted their houses after they ran away. There is no evidence to show that the prisoners acted in the exercise of their legal rights of self-defence, and therefore any one of them, who is proved to have been present, engaged in this riot, is liable to be convicted of some offence connected therewith. The Sessions Judge has felt the difficulty of relying implicitly on the evidence of the Manjhi witnesses, who, no doubt, were actively engaged on their side; and he has adopted the extraordinary expedient of convicting the prisoners principally on what each has said regarding the other. However much the law (s. 30, Evidence Act) may allow him to take into consideration a confession made by one of the prisoners as affecting himself, and also another prisoner, the course which Mr. Gasper states the Sessions Judge adopted in recording the statements of the prisoners, and which is not denied by the Sessions Judge, in reply to our enquiry on this subject, would prevent us from giving full effect to that law. It would seem that, when the Sessions Judge was about to examine the prisoners, he required each to withdraw from the Court until his turn for examination came round. In consequence of this procedure, the principal prisoner, Chandra Nath Sirkar, was examined in the absence of the other prisoners, who never had an opportunity of denying, or even knowing, what he had said, and

yet that statement, made behind their backs, is made the chief ground for convicting them. It is an elementary rule that no one should be condemned in his absence, and yet the Sessions Judge has acted in a manner directly opposed to it. We, therefore, are obliged to place entirely out of consideration any statement made by any of the accused in the absence of another prisoner so far as it affects the latter. (His Lordship then proceeded to consider the evidence, and dismissed the appeals.)

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF SOKHINA BIBI.

THE EMPRESS *v.* GRISH CHUNDER NUNDI.¹

1881.
April 26.
7 Cal. 87.

False Charge—Penal Code (Act XLV. of 1860), s. 211—Opportunity of substantiating charge.

Upon a trial for bringing a false charge with intent to injure, it appeared that the original complaint was lodged in the Court of the Extra Assistant Commissioner, and a local enquiry, by a competent police-officer, was directed. The officer reported that the charge was false, and recommended that the prisoner should be prosecuted. The Extra Assistant Commissioner ordered the papers to be sent to the Deputy Commissioner, who ordered the prosecution, and the prisoner was convicted.

Held that the conviction was bad. The Extra Assistant Commissioner should, on receipt of the report of the police, have communicated its contents to the prisoner, and afforded her an opportunity of substantiating her complaint, and should then have decided the case.

BABOO *Joy Gobind Shome* for the petitioner.

The facts of the case sufficiently appear from the judgment of the Court (MORRIS and TOTTENHAM, JJ.), which was delivered by

MORRIS, J.—It appears to us that there is no legal foundation for the trial of Sokhina Bibi under s. 211 of the Indian Penal Code. Sokhina Bibi lodged a complaint under ss. 354 and 376, coupled with s. 511, in the Court of the Extra Assistant Commissioner. After her examination, the Court, under s. 146 of the Code of Criminal Procedure, directed a local enquiry to be made by a competent police-officer. This officer, a Sub-Inspector, submitted a report, in which he expressed the opinion that the charge preferred was false, and that the complainant should be prosecuted for making a false complaint. Thereupon the Extra Assistant Commissioner passed the following order: "Let the papers be recorded as false, and let the papers be sent to the Deputy Commissioner for proper orders as regards instituting a case against the complainant under ss. 211 and 182." Upon this the Deputy Commissioner, on the 3rd December, passed an order to the effect that in his view no notice ought to have been taken of the complaint owing to the character of the complainant; but, as an enquiry had taken place, he would allow the petitioner to be prosecuted if the District Superintendent of Police wished it. The District Superintendent of Police expressed a wish that a prosecution should follow. Upon this the Deputy Commissioner, on the 20th December, ordered the prosecution.

¹ Criminal Motion, No. 91 of 1881, against the order of *T. F. Murray, Esq.*, Assistant Commissioner of Sylhet, dated the 12th February 1881.

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 BIBI,
 7 Cal. 87.

It seems clear to us that there has been no proper adjudication by the Extra Assistant Commissioner of the complaint preferred by Sokhina Bibi. On the receipt of the report of the Sub-Inspector, he should have communicated its contents to the complainant, and afforded her an opportunity, if she so desired it, of producing the witnesses named in her complaint, or of giving such other proof in support of her complaint as she might think proper. Having thus put the complainant to the proof, and given her the opportunity of substantiating her complaint, the Extra Assistant Commissioner should have proceeded to decide the case. This course he has not adopted at all, and, as Sokhina Bibi was prepared to give evidence in support of her complaint, the Deputy Commissioner had, we think, no power to direct a prosecution under s. 211 to be instituted. This is in accordance with the rulings of this Court in *Syed Nissar Hossein v. Ramgolam Singh*¹ and in *Government v. Karimdad*.² It also strikes us as improper that this prosecution should have been directed by the Deputy Commissioner contrary to his own expressed opinion as to its propriety, and solely in deference to the wishes of the District Superintendent of Police, whose subordinate had been complained against.

We have to observe, with reference to the Assistant Commissioner's explanation as to the examination of the complainant's witnesses, that their examination by the Sub-Inspector of Police when enquiring into the original complaint, and their subsequent examination in the present case as witnesses for the defence before himself, could not give the prisoner the opportunity of proving that the original complaint was true, to which she was entitled before she could legally be prosecuted for making a false charge.

We, therefore, quash the proceedings, which have resulted in the conviction of Sokhina Bibi under s. 211, and, setting aside the sentence of eighteen months' rigorous imprisonment, direct her release.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF GOPAL DHANUK.

THE EMPRESS *v.* GOPAL DHANUK.³

1881.
 April 21.
 7 Cal. 96.

Plea of Guilty—False Charge—Penal Code (Act XLV. of 1860), s. 211—Record of Plea—Explaining Charge—Criminal Procedure Code (Act X. of 1872), s. 237.

A prisoner, charged under s. 211 of the Penal Code with having brought a false charge with intent to injure, by accusing A of having caused the death of a person by doing a rash or negligent act not amounting to culpable homicide under s. 304A, stated at the trial that the original complaint made by him was false, and that he made it unthinkingly. The Sessions Judge treated this statement as a plea of guilty, and sentenced the prisoner to rigorous imprisonment. No record of the prisoner's plea, as required by s. 237 of the Criminal Procedure Code, appeared on the proceedings, nor did it appear that the charge had been explained as well as read to the prisoner, and the Judge considered that the original complaint did not amount to a false charge of an offence under s. 304A.

Held that the conviction was bad.

In this case one Gopal Dhanuk was charged under s. 211 of the Penal Code with having made a false charge with intent to injure one Bedwa. It appeared

¹ 25 W. R., Cr. Rul., 10.

² 1. L. R., 6 Cal. 496.

³ Criminal Appeal, No. 188 of 1881, against the order of *W. H. Verner, Esq.*, Officiating Sessions Judge of Bhagalpore, dated the 26th February 1881.

that the prisoner had stated to the police that Bedwa had assaulted one Manjar, who died shortly afterwards, and that the death was the result of, or accelerated by, the blow. At the trial before the Sessions Judge, the prisoner stated that the original complaint made by him to the police was false, and that he made it unthinkingly. The Judge treated this statement as a plea of guilty, and sentenced the prisoner to eight months' rigorous imprisonment. No record of the prisoner's plea, as required by s. 237 of the Criminal Procedure Code, appeared on the proceedings, nor did it appear that the charge had been explained as well as read to him; and the Sessions Judge, in giving judgment, stated that the original complaint, though malicious, could hardly be regarded as amounting to a charge of culpable homicide.

The prisoner appealed to the High Court.

No one appeared.

The judgment of the Court (*Morris and Tottenham, JJ.*) was delivered by

MORRIS, J.—This conviction is bad in law, and must be set aside. The Sessions Judge states that the prisoner pleads guilty to the charge, and that the only question is as to what punishment should be allotted. We find in the proceedings no record of the prisoner's plea, as required by s. 237 of the Code of Criminal Procedure, when he pleads guilty. All that we find is a narrative by the Judge of what occurred and of the statements made by the prisoner. We do not find from this that the charge was explained as well as read to the prisoner (*vide* s. 237), and we do find that he did not admit one very important element in an offence under s. 211 of the Penal Code, *viz.*, the intention to injure another. The prisoner is said to have represented that he made the false complaint unthinkingly. This certainly does not amount to a plea of guilty.

The Judge was further somewhat inconsistent, for, after stating that the prisoner pleaded guilty, he proceeds to show that he was not guilty of the charge as framed, inasmuch as he had not made a complaint of an offence under s. 304A of the Penal Code, which was alleged in the charge.

The Judge committed an error, therefore, in convicting the prisoner without a trial. We therefore set aside the conviction and sentence, and direct that the prisoner be tried according to law, and that the Judge conform to the procedure laid down in Ch. XIX., Code of Criminal Procedure.

Conviction set aside.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice McDonell.

THE EMPRESS *v.* KASSIM KHAN

AND

THE EMPRESS *v.* MUSSAMUT DAHIA AND ANOTHER.¹

Criminal Procedure Code (Act X. of 1872), ss. 118, 119—Penal Code (Act XLV. of 1860), s. 191.

Neither the words "shall answer all questions" in s. 118 of the Code of Criminal Procedure, nor the words "shall be bound to answer all questions" in s. 119 of the same Code,

¹ Full Bench References made by *Mr. Justice Pontifex* and *Mr. Justice Field*, in Criminal Reference No. 36 of 1881, and by *Mr. Justice Mitter* and *Mr. Justice Maclean*, in Criminal Appeal No. 790 of 1880.

1881.

IN THE
MATTER OF
THE PETITION
OF GOPAL
DHANUK,
7 Cal. 96.

1881.

April 13.

7 Cal. 121.

1881. constitute "an express provision of the law to state the truth" within the meaning of s. 191 of the Penal Code.

EMPRESS v. KASSIM KHAN. EMPRESS v. MUSSAMUT DAHIA, 7 Cal. 121.

Ss. 118 and 119 are merely intended to oblige persons to give such information as they can to the police, in answer to the questions which may be put to them, and they impose no legal obligation on those persons to speak the truth.

In Kassim Khan's case, it appeared that the accused was a witness for the prosecution in a criminal trespass case tried by the Deputy Magistrate of the Sudder Sub-division of Midnapore, and he there stated on oath that some previous information which he had given to the police was false. The police-officer who conducted the case for the prosecution applied for and obtained sanction to prosecute the witness under s. 193 of the Penal Code. The accused witness was tried by the Joint-Magistrate, who discharged him, on the ground that the statement made by him on oath could not be used against him as a defendant, and that there was no prospect of proving that the accused's statement to the police was actually false. The Magistrate of the District referred the case to the High Court, under s. 296 of the Code of Criminal Procedure, in order that the proceedings of the Joint-Magistrate should be quashed, and a re-trial of the accused ordered. The reference came on before Mr. Justice Pontifex and Mr. Justice Field, who referred the matter to a Full Bench in the following terms :

"FIELD, J.—The question submitted to the Full Bench I understand to be this : Can a person be convicted under s. 193 of the Penal Code for giving false evidence, the words alleged to be false having been spoken to a police-officer engaged in making an investigation under the provisions of the Code of Criminal Procedure ?

"The definition of giving false evidence (s. 191) is,—

Whoever—

- (1) being legally bound by an oath,
- (2) or by any express provision of law to state the truth, or
- (3) being bound by law to make a declaration upon any subject,

makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence."

"It will probably be admitted that (3) has no application to the present case, and that it is concerned only with that class of cases, of which the declaration to be made by a person obtaining a marriage-license is an example.

"Ss. 118 and 119 of the Code of Criminal Procedure empower a police-officer making an investigation to examine persons acquainted with the facts of the case under inquiry, and enact that such persons *shall answer* all questions relating to such case, put by such officer, except criminating questions. Such answers may be reduced to writing, but they are not to be signed by the person making them, nor are they to form part of the record, or be used as evidence.

"These provisions of the Code of Criminal Procedure require the persons examined to *answer* the questions put to them, but they contain no express provision that such persons *shall state the truth*. This seems to take the case at once out of (2).

"Then as to (1), can a police-officer administer an oath? The Code of Criminal Procedure does not provide for the administration of an oath by a police-officer, but does not expressly prohibit it. In the case of accused persons, an oath is expressly prohibited. It has never been usual for police-officers to administer an oath. Then, were ss. 4 and 5 of the Indian Oaths Act, X. of

1873, intended to alter this practice? Consider the words 'who may lawfully be examined before any person having by law authority to examine such persons,' in s. 5. My own view is that the practice was *not* meant to be altered.

"If, as a matter of fact, no oath was administered by the police-officer, I think there is an end of the question.

"The accused in this case gave certain information to the police. Before the Magistrate he swore that this information was false. The District Magistrate desired to have him punished under s. 193 of the Penal Code for giving false evidence in his statement made to the police. It is suggested that he can be convicted on an alternative charge of giving false evidence, *either* in his statement made to the police, *or* in that made to the Magistrate.

"The Joint-Magistrate discharged the accused without drawing up a charge, or calling upon him to plead to it, on the ground, as it would seem, that there was no other evidence besides these two contradictory statements. The Magistrate of the District asks us to quash the Joint-Magistrate's proceedings, and order a re-trial.

"I do not concur with the case of *Nim Chand Mookerjee*.¹ There is, as I have above pointed out, no provision of law which binds a person to state the truth in answer to a question put by a police-officer, and unless a person is legally bound by an oath, or by an express provision of law, to state the truth, the offence of giving false evidence cannot be committed."

"PONTIFEX, J.—I agree. The man might possibly be tried for making a false charge, or giving false information to a public officer."

The Empress v. Mussamut Dahia and Chedee Dhanuk was an appeal from a judgment and sentence passed upon them by the Sessions Judge of Tirhoot. The facts of the case are set out in the reference to the Full Bench made by Mr. Justice Mitter and Mr. Justice Maclean, the terms of which are as follows:—

"A woman of thirty years of age, called Guniya, was drowned in a well; she was the daughter of the appellant, Dahia.

"Information was given at the thana by a chowkidar on the 8th September, that Guniya had accidentally fallen into the well. The head-constable enquired into the case, and the appellant, Dahia, made a statement that her daughter had fallen into the well.

"On the 12th September, the same chowkidar reported that there was a rumour that the deceased had been pushed into the well by a boy called Mahadeo; and on the 13th September, Dahia made another statement to the head-constable, which is marked B on the record. In this statement she distinctly stated that she had seen Mahadeo push her daughter into the well.

"Mahadeo was sent up on a charge of murder, but it was found to be false. In those proceedings, Dahia gave evidence before the Magistrate to the effect that her daughter fell into the well accidentally. Mahadeo was discharged, and proceedings taken against Dahia and three others. They were committed on charges under s. 211, but the Judge added charges under s. 193, and, in concurrence with the assessors, has convicted Dahia and her relative Chedee under that section.

1881,

EMPRESS

v.

KASSIM

KHAN,

EMPRESS

v.

MUSSAMUT

DAHIA,

7 Cal. 191.

¹ 20 W. R., Cr. Rul., 41.

1881.

EMPRESS

v.

KASSIM

KHAN.

EMPRESS

v.

MUSSAMUT

DAHIA,

7 Cal. 121.

"We think it is sufficiently proved that Guniya fell into the well, and that Mahadeo did not intentionally push her in. It is also, we think, clear that Dahia falsely told the head-constable that she had seen Mahadeo push her daughter into the well. The head-constable proves her statement to him. The case against the appellant Chedee is similar, except that the head-constable proves only the record he made of Chedee's statement, and not the words of that statement.

"We entertain considerable doubts whether, on the facts stated above, a conviction for an offence under s. 193 of the Penal Code can be sustained. The Judge relies upon the decision of this Court in *Nim Chand Mookerjee's case*,¹ in which this passage occurs at page 43 :—

"But it is not necessary under s. 194 that the false evidence which is given should be the evidence given in a Court of Justice. S. 191 provides that whoever is bound by any express provision of law to state the truth upon any subject, and makes any statement which is false, and which he knows or believes to be false, is said to give false evidence. Now, under s. 119 of the Code of Criminal Procedure, a police-officer, making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him by such officer; and it would be a complete offence of giving false evidence as defined by s. 191, taking into consideration the provisions of s. 118 of the Code, if a false statement had been made by such person."

"As we are not prepared to follow this decision, we should be glad to have an authoritative ruling on the point which we would put in the form of this question—

"Whether the words 'shall answer all questions' in s. 118, or the words 'shall be bound to answer all questions' in s. 119, Criminal Procedure Code, constitute an express provision of law to state the truth within the meaning of s. 191, Penal Code?"

Mr. G. C. Kilby for the Crown.—Under s. 118 of the Criminal Procedure Code, the accused was bound to answer all questions put to him. If he refuses to answer, he may be punished under s. 179 of the Penal Code, and the accused cannot be said to have answered the questions put to him within the meaning of the section if he gives answers which are intentionally false. Besides, being "bound to answer" in s. 119 of the Criminal Procedure Code, must mean bound to answer truly. He is legally bound to speak the truth, and if he does not, he is punishable under s. 191 of the Penal Code. A person who gives information, or who is examined under ss. 118 and 119 of the Criminal Procedure Code, is a witness. He is called so in the marginal notes to those sections. [PONTIFEX, J.—I see no reason why he should be called so.] He is punishable under s. 193 for giving false evidence.

Cur. ad. vult.

The judgment of the Full Bench was delivered by

GARTH, C.J.—We think it plain that, neither the words "shall answer all questions" in s. 118 of the Criminal Procedure Code, nor the words "shall be bound to answer all questions" in s. 119 of the same Code, constitute "an express provision of law to state the truth" within the meaning of s. 191 of the Penal Code.

Ss. 118 and 119 are, in our opinion, merely intended to oblige persons to give such information as they can to the police in answer to questions which may

¹ 20 W. R., Cr. Rul., 41.

be put to them, and they impose no legal obligation on those persons to speak the truth, unless we import the word "truly" in each section after the word "questions," which we clearly have no right to do.

Investigations in a Police Court are not, as a rule, conducted with the same care and accuracy as proceedings in a Court of Justice; and we think that it would be extremely dangerous to the liberty of the subject, if information thus loosely taken by a police-officer could be made the subject of a prosecution for giving false evidence.

It may be that, in some cases, the giving of false information may be made the subject of a different charge under other sections of the Penal Code; but this is a matter upon which we are not now called upon to give an opinion.

1881.
EMPRESS
v.
KASSIM
KHAN.
EMPRESS
v.
MUSSAMUT
DAHIA,
7 Cal. 121.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

IN THE MATTER OF GYAN CHUNDER ROY AND OTHERS (PETITIONERS) v. PROTAB CHUNDER DASS (OPPOSITE PARTY).¹

1881.
April 6.
7 Cal. 208.

False Charge—Dismissal of Complaint—Prosecution under s. 211 of Penal Code (Act XLV. of 1860)—Criminal Procedure Code (Act X. of 1872), ss. 144, 147, 468, 470, and 471.

Where a charge had been preferred against a person, and the Magistrate before whom it was heard, after hearing the statement of the complainant, but not those of his witnesses, dismissed the complaint, and subsequently, on the application of the person charged, granted him leave under s. 470 to prosecute the complainant for bringing a false charge.

Held that the proceedings were not irregular, and that the Magistrate was justified in acting as he had done.

Held also that there is a distinction in the proceedings to be adopted when a sanction is given under s. 470, and the institution by the Court of its own motion of proceedings under s. 471.

*Syed Nissar Hossein v. Ramgolam Sing*² dissented from.³

In this case, the petitioner, Gyan Chunder Roy, made a complaint to the police, which, after investigation, was reported to the Magistrate as false. Gyan Chunder then repeated his complaint before the Magistrate, who examined him under s. 144 of the Code of Criminal Procedure, and dismissed the complaint under s. 147. A fortnight later, the person accused applied to the Magistrate, and obtained sanction to prosecute the complainant for having falsely charged him. Proceedings were thereupon commenced before another Magistrate, who on the 20th December committed the petitioner to the Court of Session. The petitioner then applied to the High Court to have the order dismissing his complaint set aside, and the order sanctioning the criminal prosecution, and the proceedings taken thereunder, quashed, on the ground that the Magistrate was not competent to dismiss the complaint, or to sanction the prosecution [under s. 211 of the Indian Penal Code] without first examining all the witnesses offered to prove it.

A rule was accordingly issued, calling on the opposite party to show cause why these orders should not be set aside.

¹ Criminal Motion, No. 2 of 1881, against the order of T. E. Coxhead, Esq., Officiating Magistrate of Dacca, dated 18th November 1880.

² 25 W. R., Cr. Rul., 10.

³ See, however, *In the matter of Sokhina Bibee*, ante, p. 335.

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Mr. *M. Ghose*, Mr. *Evans*, Baboo *Doorga Mohun Dass*, and Baboo *Lall Mohun Dass*, in support of the rule.

The *Advocate-General* (Mr. *Paul*), Mr. *Branson*, and Baboo *Baikunt Nath Dass*, showed cause.

The judgments of the Court (CUNNINGHAM and PRINSEP, JJ.) were as follows:

CUNNINGHAM, J.—The question raised in this case is the competence of a Magistrate, under s. 147 of the Criminal Procedure Code, to dismiss a complaint; and, under s. 468 of the Code, to sanction the prosecution of the complainant, for making a false charge, without hearing the complainant's evidence. I see no reason to question the legality of the Magistrate's proceeding. S. 147 empowers the Magistrate to dismiss the complaint, if, after examining the complainant, there is, in his judgment, no sufficient ground for proceeding; and there is nothing in s. 468 to indicate that any particular proceeding on the part of the Court giving the sanction is essential to its validity—such as, for instance, is necessary in the case of a Court committing a case, or sending it for inquiry, under s. 471. I am unable to concur in the opinion expressed on this point in *Syed Nissar Hossein v. Ramgolam Singh*.¹ The application must be rejected.

PRINSEP, J. (after stating the facts as above, continued).—Several cases decided by this Court have been cited by Mr. *M. Ghose* in support of his contention; but it appears to me that, with the exception of one case, *Syed Nissar Hossein v. Ramgolam Singh*,¹ none of them are precisely in point.

There is clearly a distinction between a sanction given under s. 470 of the Criminal Procedure Code, and the institution of proceedings by a Court of its own motion, which is provided for by s. 471. The case now before us is one coming under s. 470, which refers to private prosecutions, under leave obtained, for certain offences specified in ss. 467, 468, and 469. Before sanction to prosecute can properly be given, it is necessary that the proceedings on the original complaint should have terminated in a regular manner. The Court should then consider, as has been pointed out in the cases of *The Queen v. Mahomed Hossain*² and *Radha Nauth Banerjee v. Kangalee Mollah*,³ whether there are good grounds for the application made to it, or whether it has been made solely for the purpose of oppressing and harassing an adversary, and preventing him from taking any further legal steps to which he may be entitled, as has been pointed out also in the case of *The Queen v. Baijoo Lall*:⁴ "It is by no means in every instance in which a party fails to prove his case that the Judge who has decided against such party is justified in exercising the power given him by this section. So long as it is a case as to which there is any possible doubt, or in which it is not perfectly certain that the Judge's decision must be upheld in the event of there being an appeal in the civil suit, the Judge acts indiscreetly and wrongly, if, the moment he has given his judgment in the civil suit, he exercises the power given him by this section. At the same time, if, in the course of the civil trial, the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he, on consideration, thinks it necessary to proceed at once, of course it may be right to do so. Judges should, however, bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the civil suit; and they should be careful not to lend themselves to such suggestions too readily. They should also recollect that, when they proceed under s. 471, the responsibility for the

¹ 25 W. R., Cr. Rul., 10.

² 16 W. R., Cr. Rul., 37.

³ Marsh. 407.

⁴ I. L. R., 1 Cal. 450; see p. 455.

prosecution rests upon the Judge entirely; such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party, and merely sanctioned by the Court under s. 468." In the cases cited before us—that is to say, *The Queen v. Gour Mohun Singh*,¹ *Ashrof Ali v. The Empress*,² and *In re Russick Lall Mullick*³—prosecutions were ordered simply on the report of the police that the complaints made had, on investigation, been found to be false. In all these cases, and also in the case of *The Empress v. Karimdad*,⁴ recently decided by Garth, C.J., and Field, J., on the 9th December 1880, the Court has pointed out the impropriety of acting solely on the report of the police, and without having considered the statement of the complainant, or the evidence tendered by him. In the cases of *The Queen v. Heera Lall Ghose*⁵ and *In re Gangoo Singh*,⁶ the Magistrate had commenced to hear the evidence tendered by the complainant, and closed the proceedings summarily without hearing all the witnesses cited, so as to make the order of discharge an improper order within the terms of s. 215, expl. iii., of the Code of Criminal Procedure. These are cases very different from the case now before us, in which, after hearing the complainant, the Magistrate was fully competent to dismiss the complaint, and so put an end to all proceedings before him.

In *In re Choolhaie Telee*,⁷ the Magistrate ordered a prosecution for a false complaint after he had passed an order of dismissal under s. 147; but in that case he took upon himself to direct the institution of a prosecution acting under s. 471, and he was, therefore, under the terms of that section, bound to make such preliminary enquiry as might be necessary before directing a prosecution to be instituted; and the Court there held that he was bound to give the complainant an opportunity of showing that there were no grounds for instituting such a prosecution. That, however, is a very different case from the present one, in which the responsibility of instituting a criminal prosecution was accepted by a private party, the proceedings on the original complaint had regularly terminated, and from what had already taken place before him, the Magistrate was satisfied that the leave asked for should be granted.

I concur in the view of the law expressed by Jackson, J., in *In re Biyogi Bhagut*.⁸ In that case, however, the order was set aside, on the ground that the order of dismissal under s. 147 had not been properly passed, because the complainant had not been examined.

It was certainly open to the complainant in the case now before us, if he thought proper, to apply for an order under s. 298 that a further inquiry into his complaint might be made, notwithstanding the order of dismissal; but he did not think it proper to do so, nor has he at any time, until the lapse of some six weeks, and after, on proceedings taken against him, he has been committed to the Court of Session for making a false complaint, thought proper to take any steps to have his complaint re-tried, or to have any witnesses examined.

The fact that he has taken no action in the matter seems to me to distinguish the present case from *Syed Nissar Hossein v. Ramgolam Singh*.⁹ But, even if this were not so, I am not disposed to concur in the view laid down by the learned Judges in that case when they say that it was "clearly illegal on the part of the Assistant Magistrate and Magistrate to give sanction under s. 211 of

1881.

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¹ 16 W. R., Cr. Rul., 44.² I. L. R., 5 Cal. 281.³ 7 C. L. R. 382.⁴ I. L. R., 6 Cal. 496.⁵ 13 W. R., Cr. Rul., 37.⁶ 2 C. L. R. 389.⁷ *Ibid* 315.⁸ 4 C. L. R. 134.⁹ 25 W. R., Cr. Rul., 10.

1881.

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the Penal Code without giving the petitioner an opportunity of adducing evidence to prove that the charge which he made was a true one."

On these grounds, I am unable to find anything illegal in the proceedings which have already taken place ; and I accordingly concur in discharging this rule.

Rule discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

WOOD (PETITIONER) v. THE CORPORATION OF THE TOWN OF CALCUTTA (OPPOSITE PARTY).¹

1881.

May 31.

7 Cal. 322.

Justice of the Peace—Disqualifying Interest—Summons issued at instance of, and determined by, a Servant of the Prosecutor—Evidence, Refusal to hear—Finality of Assessment—Beng. Act IV. of 1876, ss. 75, 77, 78, 79, 346, and 351—High Courts' Criminal Procedure Act (X. of 1875), s. 147.

A, alleged to have carried on business in Calcutta without having taken out a license under Beng. Act IV. of 1876, was summoned at the instance of the Corporation by B, a servant of the Corporation, and also a Justice of the Peace. The case was subsequently heard by B, and it was shown that notice of the assessment under class ii., sch. 3, had been duly served on A, and that, though he then denied his liability to take out any license, and stated that he carried on no business as alleged, he had not appealed against the assessment under s. 79. It was further shown that the assessment had been confirmed by the Chairman of the Corporation, but that the amount had not been paid. A thereupon tendered evidence to show that he was not liable to take out any license ; but B refused to hear such evidence, and, convicting A, sentenced him to pay a fine. On an application, under the above circumstances, to the High Court under s. 147, Act X. of 1875,—

Held that the finality of the decision of the Chairman referred to in s. 79 has only reference to the class under which a particular person, who is admittedly bound to take out a license under s. 75, should be assessed, and not to the case where the liability to take out a license at all is denied, this being a question which can only be determined judicially after taking evidence by a competent Court in a prosecution under s. 77, and that, therefore, the refusal of B to hear the evidence tendered by A on this point was illegal.

Held also that the proceedings and ultimate conviction of A were illegal, inasmuch as B, being a servant of the prosecutor, i.e., the Corporation, had such an interest as might give him a bias in the matter, and that consequently he ought not to have sat as Justice of the Peace, either at the granting or upon the hearing of the summons.

In this case the petitioner, J. Wood, was summoned at the instance of the Corporation of the Town of Calcutta, on the 29th March 1881, for not having duly taken out a license for the year 1880, for the trade or profession carried on and exercised by him, as a boarding-house-keeper at No. 5, Wood Street, in the town of Calcutta, under s. 75 of Beng. Act IV. of 1876, and, being convicted by Mr. O. C. Dutt, a Justice of the Peace, was fined Rs. 60.

It appeared that on the 31st January 1881, one Mr. O'Brien Moore, a License Inspector of the Corporation, assessed the petitioner as a boarding-house-keeper, under class ii., sch. 3, of Beng. Act IV. of 1876, and caused a notice to be served upon him to pay the required license-tax for the past year, viz., 1880. The petitioner thereupon informed the License Inspector that he was not liable to take out a license, as he was not a boarding-house-keeper, and had not carried on any such business in the year 1880. This denial was not accepted, and the assessment having been confirmed by the Chairman, he was informed under s. 79 that he must pay Rs. 50 as his license-tax, or appeal against the assessment

¹ Criminal Motion, No. 113 of 1881, against the order of Mr. O. C. Dutt, Honorary Magistrate of Calcutta, dated the 29th March 1881

within fourteen days after depositing that amount, as required by that section. No appeal having been preferred on the expiry of the fourteen days, *i.e.*, on the 28th February 1881, an application was made to Mr. O. C. Dutt, a Justice of the Peace, who was also employed as the Collector of Taxes under the Corporation, and a summons being granted, the case was heard on the 29th March 1881 by the same Justice of the Peace. At the hearing, the petitioner, through his pleader, admitted the receipt of the notice of assessment under s. 79, but contended that he was not liable to take out a license, as he was not a boarding-house-keeper. Mr. O. C. Dutt thereupon examined Mr. Moore on behalf of the prosecution, who proved that the petitioner was assessed by the Chairman under class ii. as a boarding-house-keeper, carrying on business as such during the year 1880, and that, the notice of assessment having been given, the petitioner did not appeal against that assessment, nor was the amount assessed paid. The petitioner then tendered evidence to prove that he was not a boarding-house-keeper, and had not carried on the business of one in the year 1880; but Mr. O. C. Dutt refused to hear it; and, convicting the petitioner, fined him Rs. 60.

The petitioner, accordingly, applied to the High Court under s. 147 of Aft X. of 1875 to have the record called up, and the conviction quashed.

Mr. Sale for the petitioner.—The conviction is bad, because Mr. O. C. Dutt, being a Collector of the Municipality (*i.e.*, a servant of the Corporation, who is the prosecutor) has such an interest in the case as to disqualify him from trying it, and even the consent of the accused would not cure the disqualification—*The Queen v. Bholanath Sen.*¹ The principle is clearly laid down by Mr. Justice Norman in *The Queen v. Mukta Sing*,² that if the Judge has any personal or pecuniary interest in the subject of the charge, he is disqualified from trying it, and this principle has been frequently acted upon—*Dimes v. The Grand Junction Canal Co.*³ It is not necessary to show that there is the probability of a Magistrate being influenced by his position, but even if there be the slightest possibility of his decision being affected thereby, it would be sufficient to disqualify him from hearing the charge. The Chairman, moreover, has no power to decide the question as to whether a person is a trader or not, or liable to assessment under the Aft, for s. 79 refers solely to the case of a person, who is admittedly properly assessable, having been assessed under a wrong class, and not to that of a person who denies that he is liable to be assessed at all, for this is a question which can only be determined judicially, and the Chairman has no authority given him to determine it. S. 78, too, provides that the Chairman shall determine under which of the classes every person to whom a license may be granted shall be assessed, and therefore points to the same conclusion; besides, s. 77 is a semi-penal one, and as such must be construed strictly. The Magistrate had, therefore, no right to shut out the evidence tendered, but should have tried the question as to whether the petitioner was liable to assessment at all, and this cannot now be tried on affidavit.

Mr. Sale then proceeded to argue that there was evidence that the petitioner carried on no trade, when he was stopped by the Court.

Mr. W. C. Bonnerjee (Officiating Standing Counsel) for the Corporation (*contra*).—The case having been brought up under s. 147 of Aft X. of 1875, the Court must be satisfied from the circumstances of the case that there has been a substantial injustice done, and not merely that there has been an irregularity in the proceedings. Mr. O. C. Dutt had no personal or pecuniary

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¹ 1 L. R., 2 Cal. 23.² 3 H. L. Cas. 795.³ 4 B. L. R., Ap. Cr., 15.

I. L. R., Cal. 44.

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interest in the case whatever, and on that ground it could not be contended that he was incapacitated from dealing with the case, merely because he was connected with the Municipality in the way he was. The finding of the Magistrate must also be taken to be correct, *vis.*, that the decision of the Chairman was to be final. When the Legislature considered that cases under the Act should be dealt with by independent persons, it specifically enacted that such was to be the procedure; for instance, s. 79 provides that appeals under it are to be heard and determined by not less than three Commissioners *other than* executive officers of the Commissioners. It would seem clear, therefore, that the Legislature never intended to preclude persons in the position of Mr. O. C. Dutt from dealing with cases like the present. Were the contention of the other side to be upheld, then the Act would practically become unworkable, and there must have been numerous cases decided previous to this, in which the proceedings were illegal, for formerly the Justices of the Peace were all members of the Municipal Corporation, and similar cases were heard and determined by them. If the Court, however, considers that the exclusion of the evidence tendered by Wood has vitiated the Magistrate's decision, the case may be sent back to be tried on its merits.

Mr. Sale in reply pointed out that, in *Dimes v. The Grand Junction Canal Co.*,¹ it was held that, under such circumstance, the decision was voidable on objection being taken, and not absolutely void. He also referred to *The Queen v. Gibbon*.²

The following judgments of the Court (*Mitter and Maclean, JJ.*) were delivered:—

MITTER, J. (after stating the facts as above, continued).—Mr. O. C. Dutt refused to hear the evidence that was tendered on behalf of the petitioner, on the ground that, the Chairman's assessment having become *final* under the last para. of s. 79, the question, whether he was liable to take out a license under s. 75, could not be re-opened. One of the grounds upon which the conviction has been questioned is, that this view of the law is not correct.

The other ground upon which the conviction has been questioned is, that Mr. O. C. Dutt, by reason of his connection with the Corporation of the town of Calcutta as their collector of taxes, was incompetent to try this case.

I am of opinion that the proceedings and the ultimate conviction are illegal. In the first place, it seems to me that Mr. O. C. Dutt was not right in convicting the petitioner without allowing him to substantiate his defence by evidence. The construction put upon the word "*final*" in the last para. of s. 79 is, in my opinion, not correct. The decision of the Chairman or Vice-Chairman has reference only to the *class* under which a particular person, who is *admittedly* bound to take out a license under s. 75, should be assessed. The decision referred to herein is what is referred to in s. 78, which is as follows:—

"The Chairman, or some officer authorized by him in that behalf, shall determine under which of the classes mentioned in the third schedule every person to whom a license may be granted shall be assessed; and the Chairman may, in his discretion, remit the payment of license-tax either in whole or in part to any person classified under classes 5 or 6 of the third schedule." The language of the section does not authorize the Chairman to determine (when the fact is denied) whether a particular person is bound to take out a license under s. 75. He shall determine *under which of the classes* mentioned in the third schedule every person to whom a license may be granted shall be assessed.

¹ 3 H. L. Cas. 795.

² L. R., 6 Q. B. Div. 168.

Therefore, if the Chairman be of opinion that a particular person is liable under the Act to take out a license, and if that person denies his liability, the question can only be determined *judicially*, i.e., after taking evidence by a competent Court in a prosecution under s. 77.

S. 346 of the Act says that "the Commissioners may direct any prosecution for any public nuisance whatsoever, and may order proceedings to be taken for the punishment of any person offending against any of the provisions of this Act." It was under the provisions of this section that the prosecution in this case was commenced. Certainly, before a conviction could be had, the prosecutor was bound to prove that the accused had offended "against any of the provisions of this Act." If the view of the law taken by Mr. O. C. Dutt is correct, it is not for the Magistrate before whom the accused is prosecuted to determine that question; but he is bound to accept the decision of the Chairman, who virtually stands in the position of a prosecutor. It is clear to me that this view is not warranted by any of the provisions of the Act in question. The conviction is therefore bad upon this ground.

As to the other objection, it is clear upon the authorities—*The Queen v. Meyer*,¹ *The Queen v. Milledge*,² *The Queen v. Gibbons*³—that if Mr. O. C. Dutt had been a member of the Corporation, he would have been disqualified, not only to take part in the final hearing, but also to issue the original summons.

Whether the principle upon which these cases has been decided should not be applied to the case of a servant of the Corporation sitting as a Judge, is the question which we have to decide with reference to this objection. The reason of the rule is, that a person who, by his interest, pecuniary or personal, is likely to have a bias in the matter of the prosecution, ought not to sit as a Judge. Having regard to the reason of the rule, I think that the principle of the cases cited above should be extended to the case of a person who is connected with the Corporation in the same way as Mr. O. C. Dutt.

The proceedings and the conviction must, therefore, be quashed.

MACLEAN, J.—The petitioner, J. Wood, was convicted before Mr. O. C. Dutt, Justice of the Peace, of having exercised the trade, profession, or calling of a boarding-house-keeper in 1880, without having taken out a license as required by s. 75, Beng. Act IV. of 1876. A fine of Rs. 60 was imposed under s. 77 of the Act.

The record has been called up to this Court under s. 147, Act X. of 1875, on the petitioner's application. His chief ground for invoking the interference of this Court is that he was not allowed to enter into a defence shewing that he did not exercise a boarding-house-keeper's calling in 1880; but objection is also taken to Mr. O. C. Dutt's competency to deal with the case, as, besides being a Justice of the Peace, he occupies a post, as collector of taxes, under the Corporation of Calcutta, the prosecutor in the case.

To commence with the first point, the case stands thus: By some unexplained interpretation of the law it seems to be the practice for the officers of the Corporation to take the initiative, and assess persons who may be considered fit subjects for assessment. This does not seem to be what the law intends. The law requires every person, who exercises a specified profession, trade, or calling, to *take out* a license yearly (s. 75), and it renders such persons liable to fine for exercising the specified profession, &c., *without a license* (s. 77). There

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is nothing which calls upon the Corporation to assess a person who has not applied for a license.

Now, Wood has admittedly not applied for a license of any sort, and if he exercised the calling of a boarding-house-keeper without a license, he is justly liable to a fine under s. 77. But, as in all criminal cases, the onus of proving that Wood exercised the calling lay upon, and has not been discharged by, the prosecutor. According to the prevailing practice, Inspector Moore "assessed" Wood as a boarding-house-keeper at the close of January 1881, and the Chairman "determined the class" of the license Wood was to take. I have no doubt this was not any part of the Chairman's duty under s. 78, in the absence of any application from Wood. The absurdity of assessing any one for 1880, in February 1881, becomes apparent on reference to s. 76. A license taken out in 1881 would take effect for that year. However, Wood was informed of the class under which he had been assessed (s. 79) on the 14th February 1881, and though he would have been perfectly justified in disregarding the notice of an officious and illegal assessment, he went to the office of the Corporation and made some enquiries, but up to the 28th February he made no appeal.

The period of limitation prescribed by s. 351 would have expired on the 28th February, and on that date Inspector Moore applied for a summons, which was issued by order of Mr. O. C. Dutt, and the case came on before him on the 29th March. At the trial Mr. O. C. Dutt adopted a course which had the effect of closing Wood's mouth. He held (following, he says, legal opinion) that no appeal having been preferred under s. 79, the Chairman's decision was final—that is to say, Wood not having taken out a license was not entitled to go into evidence to shew that he was not in 1880 a boarding-house-keeper, because the Chairman had, in 1881, *ex parte* determined that he was to be assessed under sch. 3. The point seems to me to be so utterly untenable that it is waste of time to discuss it. The simple issue for trial under s. 77 was, whether Wood had exercised a particular trade or calling or not, and whether the Chairman had assessed him or not, or whether he had appealed or not, had no conceivable connection with that issue. The proceedings on the 29th March must, therefore, be set aside on this ground.

As to the other point, as far as I have been able to discover, Mr. O. C. Dutt is not a member of the Corporation, but he holds the office of collector under the Corporation, being remunerated by a percentage on bills issued for collection of taxes. He has, it is admitted, no interest in the collection of license-tax or carriage or horse-tax. He had, therefore, no personal interest in the result of this case against Wood, but he is undoubtedly a servant of the prosecutor—*i. e.*, the Corporation; and, in my opinion, his sitting as a Judge in the case was illegal. If he had been a member of the Corporation, he would have been absolutely disqualified from sitting, and even from issuing a summons; see *The Queen v. Milledge*¹ and *The Queen v. Gibbon*.² But although these cases do not, I think, directly establish that a servant of the Corporation is disqualified to act as a Justice of the Peace, the principle seems to me to apply with greater force to a Justice who is a servant, than to a Justice who is a member, of the Corporation. On this ground also, therefore, the proceedings must be set aside.

Conviction quashed.

Attorney for the petitioner: Mr. E. J. Fink.

Attorney for the opposite party: *The Government Solicitor.*

¹ L. R., 4 Q. B. Div. 332.

² L. R., 6 Q. B. Div. 168.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF RIASAT ALI, *alias* BABU MIYA,
alias BODIUZZUMA.

1881.

June 3.

THE EMPRESS *v.* RIASAT ALI, *alias* BABU MIYA, *alias* BODIUZZUMA.¹

7 Cal. 352.

Forgery—Attempt to commit forgery—Indian Penal Code (Act XLV. of 1860), ss. 465 and 511.

A person cannot be convicted of an attempt to commit an offence under s. 511 of the Indian Penal Code, unless the offence would have been committed if the attempt charged had succeeded.

A prisoner, who was charged with attempting to commit forgery of a valuable security, was found guilty by the jury of attempting to commit forgery. The jury explained their finding by saying that the prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Company, and that one of these forms had actually been printed, and the proof corrected by him; that the prisoner had had an intention of making such addition to the printed form as would make it a false document; and that he did this dishonestly and with intent to commit fraud. The Sessions Judge sentenced the prisoner to rigorous imprisonment for one year under ss. 465 and 511 of the Indian Penal Code for attempting to commit forgery.

Held that the conviction was wrong, and must be set aside.

In this case the prisoner was charged with cheating under ss. 417, 419 of the Indian Penal Code; with attempting to cheat under the same sections, and s. 511; with abetment of forgery under ss. 109, 116, and 465; and with attempting to commit forgery of valuable securities for the purpose of cheating, ss. 467, 468, and 511. The prisoner pleaded not guilty. From the evidence it appeared that the prisoner had given orders to the Burdwan Press to print one hundred receipt forms similar to those formerly used by the Bengal Coal Company; that he corrected one proof of those forms, and was suggesting further corrections in a second proof in order to assimilate the form to that at present used by the Company, when he was arrested by the police. The prosecution alleged that the prisoner intended to make use of these receipts, and represent them to be those of the Bengal Coal Company for the purpose of cheating. The Sessions Judge considered that there was no ground for proceeding on the first and second charges, as there was in his opinion no evidence of deception having been used when the printer of the Burdwan Press agreed to receive the money, and to print the forms; and on those two charges he directed the jury to return a verdict of not guilty. On the other two charges, the jury were unanimous in finding the prisoner guilty of an attempt to commit forgery; not guilty of an attempt to forge a valuable security; and not guilty of abetment of forgery. When asked to explain the facts upon which they found the prisoner guilty, the jury said that the prisoner did order the receipt forms to be printed; that, though the form actually printed was not a document within the meaning of s. 29 of the Penal Code, the prisoner had an intention of making such addition to it as would make it a false document; and that he did this dishonestly, and with intent to commit fraud. The prisoner was sentenced, under ss. 465 and 511 of the Penal Code, to be rigorously imprisoned for one year. The prisoner appealed to the High Court.

Moonshee *Serajul Islam* for the prisoner.

No one appeared for the Crown.

¹ Criminal Appeal, No. 61 of 1881, against the order of *W. H. Page, Esq.*, Officiating Sessions Judge of Burdwan, dated the 9th December 1880.

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The judgments of the Court (GARTH, C.J., and PRINSEP, J.) were as follows :—

GARTH, C.J.—The prisoner in this case was charged with an attempt to commit forgery, and the facts proved were that he gave orders to the Burdwan Press to print one hundred receipt forms similar to those which were formerly used by the Bengal Coal Company ; that he corrected one proof of those forms, and was suggesting further corrections in a second proof in order to assimilate the form to that now used by the Company, when he was arrested by the police. The jury found him guilty of an attempt to commit forgery, “in that he dishonestly, and with the intent to commit fraud, caused a document to be printed with the intention of making such an addition to it as would make it a false document.”

Assuming this finding of the jury as to what the prisoner actually did to be correct, the question is, whether he could be legally convicted of an attempt to commit forgery ? The definition of forgery in ss. 463 and 464 of the Indian Penal Code, so far as it is necessary to refer to it for our present purpose, is as follows : S. 463 says, “Whoever makes a false document, or part of a document, with intent to commit fraud, commits forgery.” And by s. 464 a person is said to “make a false document, who dishonestly makes or executes a document, or part of a document, with the intention of causing it to be believed that such document, or part of a document, was made, sealed, or signed by, or by the authority of, a person, by whom, or by whose authority, he knows that it was not made, sealed, or signed.”

Now, in this case the jury have not found that the receipt form in itself was a false document. If they had, they must have found the prisoner guilty of forgery, and not of the attempt to commit it. They considered, and rightly considered, as it seems to me, that, without the addition of a seal or signature purporting to be the seal or signature of the Bengal Coal Company, the printed form would not be a false document. Their view, as I understand it, was, that the commencing to print or write a document, which, when completed, was intended to be a false document, amounted, if coupled with the intent to defraud, to an attempt to commit forgery.

But it has been suggested that the printing and correcting of a form, which is intended by additions, which are to be made to it, to be a false document, is in itself the making of a part of a false document within the meaning of s. 464, and therefore amounts to forgery. If this were so, it seems to me that the mere printing or writing of a single word upon a piece of paper, however innocent the word might be, would be the making a part of a false document, if it were coupled with an intention to add such other words to it as would make it eventually a false document. In my opinion, this is very far from the meaning of s. 464 ; and I think that such a construction of the section involves a misconception, not only of the word “make,” but also of the sense in which the phrase “part of a document” is used in the section.

I consider that the “making” of a document, or part of a document, does not mean “writing” or “printing” it, but signing or otherwise executing it ; as in legal phrase we speak of “making an indenture,” or “making a promissory note,” by which is not meant the writing out of the form of the instrument, but the sealing or signing it as a deed or note. The fact that the word “makes” is used in the section in conjunction with the words “signs,” “seals,” or “executes,” or makes any mark “denoting the execution,” &c., seems to me very clearly to denote that this is its true meaning. What constitutes a false document, or part of a document, is not the writing of any number of words which

in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it.

Referring then again to the finding of the jury, the question in this case seems to be, whether what the prisoner did amounted to preparation only, or to an actual attempt to commit the offence.

In the case of *Reg. v. Cheeseman*,¹ Lord Blackburn thus defines an attempt to commit a crime. He says: "There is no doubt a difference between the preparation antecedent to an offence, and the actual attempt; but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime:" and in *M'Pherson's case*,² Cockburn, C.J., says: "The word 'attempt' clearly conveys with it the idea that, if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged." It seems to me that this definition of an attempt to commit an offence is a sound one, and applying it to the present case, the question is, whether what the prisoner did amounted to an attempt to make a false document.

I have already said that, in my opinion, the printed form was not in itself a false document, and that it would not have become a false document, or part of a document (according to the definition in s. 464), until the seal or signature of the Bengal Coal Company had been forged upon it, so as to make it appear that such seal or signature was that of the Bengal Coal Company. The prisoner, therefore, would not be guilty of the offence of forgery until the printed form had thus been converted into a false document; and for the same reason, I think that he would not be guilty of an attempt to commit forgery until he had done some act towards making one of the forms a false document. If, for instance, he had been caught in the act of writing the name of the Company upon the printed form, and had only completed a single letter of the name, I think that he would have been guilty of the offence charged, because (to use the words of Lord Blackburn) "the actual transaction would have commenced, which would have ended in the crime of forgery, if not interrupted." But as it was, all that he did consisted in mere preparation for the commission of the crime. He was no more guilty of an attempt to commit forgery in having the forms printed, than he would have been of an attempt to commit burglary by having a false key made of the house where he intended to commit the offence.

I think, therefore, that the conviction should be set aside, and the prisoner discharged. He may think himself extremely fortunate that his premature arrest prevented him from completing what he evidently intended.

PRINSEP, J.—I concur in setting aside the verdict of the jury and the sentence passed on the appellant, because, in my opinion, the acts found by the jury to have been committed do not amount to an attempt, but at most only to a preparation to commit a forgery, which might have proceeded no further. I agree in the opinion expressed by the Chief Justice regarding the legal definition of an attempt to commit an offence—*vis.*, that there must be something "commenced which would have ended in the crime if not interrupted." The prisoner must, therefore, be acquitted and released.

Conviction set aside.

¹ Lee & Cave's Rep. 145.

² Dears & B. 202.

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IN THE
MATTER OF
THE PETITION
OF RIASAT
ALI,
7 Cal. 352.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1881.

May 27.

DAMODUR BIDDYADHUR MOHAPATRO AND ANOTHER (PETITIONER)
v. SYAMANUND DEY (OPPOSITE PARTY).¹

7 Cal. 385. *Breach of the Peace—Criminal Procedure Code (Act X. of 1872), s. 530—Omission of Magistrate to record Preliminary Proceeding.*

In order to justify a Magistrate in interfering under s. 530 of the Criminal Procedure Code, it is necessary that he should be satisfied that there exists a dispute concerning land which is *likely to induce a breach of the peace*—i.e., there must be a reasonable apprehension that a disturbance of the peace is likely to occur, rendering it necessary for him to take immediate steps to prevent it, and not merely that it is *probable* a breach of the peace may occur if proceedings under s. 530 be not taken.

Quære.—Whether it is necessary that a preliminary proceeding should first be recorded to give the Magistrate jurisdiction?

THIS rule arose out of a proceeding under s. 530 of the Criminal Procedure Code. It appeared that the Magistrate had, in the first instance, omitted to record a preliminary proceeding, as required by that section, stating the grounds of his being satisfied that a dispute likely to induce a breach of the peace existed. But in his final judgment he stated that he was satisfied that there was a dispute going on; that there had been criminal cases during the past few months between the two parties in connection with the disputed land; and that it was not, therefore, unlikely that, under the circumstances, there might be a breach of the peace. He, accordingly, declared that Rajah Syamanund Dey was entitled to retain possession of the disputed land until ousted by due course of law. The petitioners, accordingly, obtained a rule from the High Court calling on the opposite party to show cause why the order of the Magistrate should not be set aside.

Mr. Branson and Baboo *Umbica Churn Bose* in support of the rule.

Mr. M. M. Ghose and Baboo *Obhoy Churn Bose* showed cause.

The judgment of the Court (*Mitter and Maclean, JJ.*) was delivered by

MITTER, J.—In a proceeding under s. 530 of the Criminal Procedure Code between the petitioner and the opposite party regarding the possession of 1,100 mans of Julpai lands, the Deputy Magistrate of Balasore, on the 14th February last, confirmed the opposite party in possession. The record shows that no preliminary proceeding, stating the grounds upon which the Magistrate was satisfied that a dispute likely to induce a breach of the peace existed, was recorded. Probably on this ground, at the final hearing, objection was taken to the jurisdiction of the Magistrate, and he deals with this question in the final judgment.

One of the grounds upon which this rule was obtained was, that the Magistrate having omitted to record the preliminary proceeding referred to above, the whole proceeding was *ultra vires*, and therefore should be set aside. It has been contended on behalf of the opposite party that, as the final judgment shows that the Magistrate was satisfied of a dispute likely to induce a breach of the peace existing, the mere omission to record a preliminary proceeding, as is required by the 2nd para. of s. 530, is an immaterial irregularity, which would not warrant this Court, under s. 283 of the Criminal Procedure Code, to quash

¹ Criminal Motion, No. 109 of 1881, against the order of Baboo *Gopal Chunder Mookerjee*, Deputy Magistrate of Balasore, dated the 14th February 1881.

the proceedings of the lower Court. On the other hand, it was broadly contended that the omission to record this proceeding is, under *all circumstances*, a fatal error, which would justify this Court in setting aside the proceeding, the provisions of s. 283 notwithstanding. The decision cited before us, *Sheikh Munglo v. Durga Narain Nag*,¹ certainly supports this contention. But there is a decision, *Gour Mohun Majee v. Doollubh Majee*,² which rules the contrary.

Whether the one or the other contention is correct, it is clear to us, upon the authority of the cases cited below, that a Magistrate would have no jurisdiction under s. 530 unless he was satisfied that there exists a dispute concerning land, and which dispute is *likely to induce a breach of the peace*—i.e., there must be a reasonable apprehension that a disturbance of the peace is likely to occur, rendering it necessary for the Magistrate to take immediate action under s. 530 to prevent the apprehended breach of the peace—*Harvey v. Brice*,³ *Dewan Elahee Newoz Khan v. Suburunnissa*,⁴ *Mussamut Anundee Kooer v. Ranee Soonaeet Kooer*,⁵ *Kashi Kishor Roy v. Tarinee Kant Lahori*,⁶ *In re Sutherland*,⁷ *Gour Mohun Majee v. Doollubh Majee*,² *In re Mussamut Zuhoorun*,⁸ *Ranee-gunge Coal Association Limited v. Hem Lall Ghatwal*.⁹

We have considered the finding of the Deputy Magistrate upon this point in his final judgment, and we are of opinion that it is not sufficient to give him jurisdiction under s. 530. It seems to us that what he says is, that it is *probable* that a breach of the peace will occur if a proceeding under s. 530 be not taken. This finding would not give him jurisdiction.

We, therefore, set aside his order, and make the rule absolute.

Rule made absolute.

REVISIONAL CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Tottenham.

IN THE MATTER OF POONA CHURN PAL.¹⁰

Sanction to Prosecute—Presidency Magistrates' Act (IV. of 1877), ss. 41, 42, 43, and 168—General and Specific Sanction—Order of Discharge—Superintendence of High Court—Charter Act (24 & 25 Vic., c. 104), s. 15.

The only course to be pursued where it is sought to set aside an order of discharge made by a Presidency Magistrate is that laid down in s. 168 of Act IV. of 1877, and as by that section there is no appeal allowed to a complainant who is a private individual, it is not open to him, by invoking the aid of the High Court under s. 15 of the Charter, to obtain under the Court's extraordinary powers that which he might obtain had he a right of appeal.

On the 2nd May 1881, Poona Churn Pal obtained liberty, under the provisions of ss. 41 and 42 of Act IV. of 1877, from Mr. Justice Broughton, to prosecute one Dwarka Mohun Dass and his gomasta, Anunto Hurry Pal, on the ground that the former, at the hearing of the suit of *Dwarka Mohun Dass v. Poona Churn Pal*, used as evidence on his behalf two documents purporting to be contracts, which were found by Mr. Justice Broughton not to be ge-

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DAMODUR
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DEY,
7 Cal. 385.

1881.

Aug. 1.

7 Cal. 447.

¹ 25 W. R., Cr., 74.

² 22 W. R., Cr., 81.

³ 4 W. R., Cr., 26.

⁴ 5 W. R., Cr., 14.

⁵ 9 W. R., Cr., 64.

⁶ 3 B. L. R., Cr., 76.

⁷ 9 B. L. R. 229.

⁸ 6 W. R., Cr., 4.

⁹ 24 W. R., Cr., 17.

¹⁰ Criminal Rule, No. 190 of 1881, against an order of F. J. Marsden, Esq., Presidency Magistrate of Calcutta, dated the 9th July 1881.

1881.

IN THE
MATTER OF
POONA
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nuine, and that the latter had affirmed and filed a false affidavit in support of an application for leave to verify the plaint. At the prosecution at the Police Court, the two accused were charged under ss. 471, 193, and 209 of the Indian Penal Code. After summonses were issued, and the parties had appeared, the Magistrate objected that no matter could be gone into which required sanction under s. 41 of the Presidency Magistrates' Act, and that the sanction obtained was a limited sanction. He held, therefore, that the prosecution under ss. 193 and 209 could not be entertained, but that the prosecution might proceed on the charge under s. 471. The complainant not agreeing to waive his right to prove that the accused had fraudulently instituted a false suit and given false evidence at the trial of the suit, the Magistrate ordered the accused to be discharged, and fined the complainant Rs. 50, to be awarded to each of the accused by way of compensation.

A rule *nisi* was applied for and obtained by Mr. Lee on behalf of the complainant, calling upon the Magistrate to show cause, *1st*, why the fines should not be remitted; *and*, why the sanction obtained should not be recognized in so far as it gave leave to prosecute under ss. 41 and 42 of the Presidency Magistrates' Act; *3rd*, and why he should not be directed to record the evidence of the complainant and his witnesses.

Mr. Jackson on behalf of the accused applied for and obtained a rule, calling upon the complainant to show cause why the accused should not be heard, the Court directing that the two rules should be returnable on the same day.

Mr. Lee, at the hearing of these rules, contended that the accused had no *locus standi*, and no claim as of right to appear at the argument of the rule, because this was not an appeal from the Magistrate's decision, but an application to the High Court to exercise its general powers of superintendence under s. 15 of the Charter, and that, inasmuch as the Court had no power to compel the accused to refund the Rs. 50 given to him as compensation, he would have no right to appear to defend at that point of the case. [On Mr. Bonnerjee, who appeared for the Magistrate and the Crown, informing the Court that he had no objection to the accused being heard, the Court decided that, as the accused was present and represented by Counsel, he had a right to appear.]

Mr. Bonnerjee, on behalf of the Magistrate and the Crown, showed cause against the rule, contending that the application was in the nature of an appeal, and, that being so, the petitioner had no *locus standi*, as appeals against acquittals could only be instituted by the Local Government as laid down in s. 168 of the Presidency Magistrates' Act. That the Magistrate had not acted illegally, for the sanction to prosecute was limited and not general, and that the Magistrate had no jurisdiction to hear a complaint of any offences which were not specifically mentioned in the sanction. The prosecution have no right to make this application. S. 147 of the Criminal Procedure Code is not wide enough to allow the High Court to entertain it: *The Empress v. Gasper*.¹ [Morris, J.—S. 147 is for the promotion of justice.] The power of the Court has been curtailed by the Presidency Magistrates' Act.

Mr. Jackson (with him Mr. M. Ghose and Mr. Trevelyan) for the accused.—If the right of setting aside an order exists under s. 147, it exists as well for the public as the Government; but if so, how is it that the Legislature has provided that no appeal from an acquittal shall lie except one presented by Govern-

¹ I. L. R., 2 Cal. 278.

ment: *Empress v. Miyaji Ahmed*.¹ Then, can persons come up to the Court by way of revision when they have no right by way of appeal. The case of *The Corporation of Calcutta v. Bheecunram Napit*² lays down that s. 147 is only applicable to cases of conviction, whereby a defendant is aggrieved; complainants cannot come up under it. Nor will the Court exercise its extraordinary powers under s. 15 of the Charter when there is an appeal: *Rajcoomar Singh v. Dinonath Ghutuck*.³ The case of *In re Balaji Sitaram*⁴ gives the requisites of a proper sanction. The petition on which the rule was obtained is not accurate, and it does not appear that the person signing it was present at the Police Court. The following cases show that, where material facts have been kept from the Court, the Court has always refused to entertain any application founded thereon:—*The Attorney-General v. The Mayor of Liverpool*,⁵ *Wilson v. Callender*,⁶ *Sibnarain Ghose v. Hulodhur Doss*.⁷ As to the question of refund of the fine, the Court has no power to make such an order: *The Queen v. Hadjee Jeebun Bux*.⁸

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Mr. Lee in support of the rule.—The Court has undoubted power to interfere under s. 15 of the Charter, even supposing that the application cannot be made under s. 147 of the Criminal Procedure Code. The application is not made by way of appeal, because there has been no trial, and s. 168 has reference to acquittal, dismissal, or discharge after an enquiry of some sort. The Magistrate refused to do his duty by refusing to take evidence on the first two charges, and by wrongfully interpreting the sanction given by the High Court to be a limited one only. Further, the award of compensation was illegal. S. 242 of the Presidency Magistrates' Act provides that a sum not exceeding Rs. 50 should be allowed for compensation if it appear that there be not sufficient ground for the complaint, but the sanction granted by the Court must be taken to be sufficient ground; nor has the Magistrate power to fine until he has heard the case, or a sufficient portion of it, to enable him to decide that there was no good ground for the complaint. As regards the jurisdiction of the High Court to interfere, see *Chunder Coomar Roy v. Omesh Chunder Mozoomdar*.⁹

The judgment of the Court (*Morris and Tottenham, JJ.*) was delivered by

MORRIS, J.—We are asked to exercise our powers of superintendence under s. 15 of the Charter Act, by remitting certain compensation awarded to two persons, who have been complained against by the petitioner, and by setting aside an order of discharge made by the Presidency Magistrate, and directing the trial of the case to be proceeded with, in the light of a construction which ought to have been put, but was not put, upon an order of sanction to a prosecution made by Mr. Justice Broughton, after judgment passed in a civil suit on the original side of the High Court, in which the petitioner was defendant, and the persons complained against, plaintiffs.

After hearing the learned Standing Counsel in support of the action taken, and orders passed by the Presidency Magistrate, and also Mr. Jackson, who appeared, and whom we permitted to address us, on behalf of the persons who would be affected by any order directing a further trial of the case, and after considering the arguments addressed to us in reply by Mr. Lee, we are of opinion that we cannot properly exercise powers of superintendence under the Charter Act in this matter, and that the application must be rejected.

¹ 1 L. R., 3 Bom. 150.

² 1 L. R., 2 Cal. 290.

³ 1 C. L. R. 352.

⁴ 11 Bom. 34.

⁵ 1 My. and Cr. 210.

⁶ 9 Moore's P. C. Ca. 100.

⁷ 9 Moore's P. C. Ca. 354.

⁸ 1 L. R., 1 Cal. 354.

⁹ 22 W. R., Crim., 78.

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In the first place, s. 168 of the Presidency Magistrates' Act prescribes the course, and it seems to us the only course, which must be taken when an order of discharge made by a Presidency Magistrate is sought to be set aside. The Government alone have a right of appeal, and clearly, as was argued before us, no such special exception would have been made by the Legislature in favour of the Government, if both the Government and private individuals could obtain the same end by an application invoking the aid of the Court under s. 15 of the Charter Act.

Mr. Lee contends that s. 168 of the Presidency Magistrates' Act relates only to cases in which a trial has been had, and that it has no application to a case, such as the present, in which the order of discharge was given in the course of proceedings preliminary to trial. Mr. Lee refers to the fact that, on the day fixed for the trial, when both parties were before the Court, no examination of the complainant and of his witnesses was made, the reason being that the Presidency Magistrate, upon the view which he took of the sanction given by Mr. Justice Broughton, refused to allow the prosecution to proceed on all the charges specified in the summons.

This objection, though, perhaps, started by the Presidency Magistrate himself, was, undoubtedly, taken by Mr. Ghose, the counsel for the accused; and this being so, it seems to us, having regard to the provisions of s. 119, Act IV. of 1877, that the trial, in the sense in which the word 'trial' is used in the Act, had then commenced. By this objection, we understand the accused to have shown cause why they should not be convicted, and their objection prevailing, they were ordered to be discharged.

Then again, in the matter of setting aside the order, which practically amounted to a fine upon the complainant, by which compensation was awarded to the accused, we think that we are powerless to interfere. The award of compensation is a matter which lies entirely within the discretion of the Presidency Magistrate, and from the statement of the facts of the case, which has been presented to us, we are quite unable to say that that discretion has been unreasonably or improperly exercised. The accused were certainly put to a considerable amount of harassment by being brought on two different occasions before the Court, and on neither occasion did the complainant see fit to prosecute his case. On the last occasion, that is to say, on the 9th July, even on the view taken by the Magistrate of the limited character of the sanction given by Mr. Justice Broughton, there was nothing to prevent the complainant from adducing evidence against the accused.

The Counsel for the complainant admits that he refused to go on with the case, in the hope that the Magistrate would allow an adjournment to enable him to refer to Mr. Justice Broughton, and obtain from him an expression of opinion as to the nature of the sanction granted by him. It seems to us that the Magistrate was quite within his right in refusing to allow the trial to stand over, and his order of discharge was in accordance with law.

This order is no bar to further proceedings being taken by the petitioner, if he be so advised, and this renders interference by this Court, under s. 15 of the Charter Act, entirely unnecessary.

This application is dismissed, and the rule discharged.

Rule discharged.

APPELLATE CRIMINAL.

*Before Mr. Justice Cunningham and Mr. Justice Prinsep.*HURSEE MAHAPATRO (PETITIONER) *v.* DINOBUNDO PATRO
(OPPOSITE PARTY).¹

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Tributary Mehals—Mohurbhunj—Jurisdiction—British India.

A British subject, residing in Midnapore, in Bengal, was charged before the Maharaja of Mohurbhunj with having committed the offence of defamation in Mohurbhunj in the Tributary Mehals. On an application made by the accused to the Magistrate of Midnapore, objecting to be tried by the Raja of Mohurbhunj, the Commissioner of Cuttack, who was also Superintendent of the Tributary Mehals, directed that the case should be transferred to Midnapore, and tried by the Magistrate of that district, who had the power of an Assistant Superintendent of the Tributary Mehals. The accused, while being tried, moved the High Court to set aside the proceedings at Midnapore, on the ground that the offence not having been committed within the district, the Magistrate was acting without jurisdiction.

Held that the proceedings were without jurisdiction.

Per CUNNINGHAM, J.—The Tributary Mehals are now, as they were in 1874, a portion of British India, which the Government of India has been pleased to exempt from the ordinary law and jurisdiction of the Courts, and to govern by means of special officials and enactments. Whatever may be the powers of Government as to Mohurbhunj, those powers do not extend to empowering the legally constituted tribunals of a British district to follow in that district, and in the case of residents in it, any procedure, and to exercise any other jurisdiction than that created by the law.

Per PRINSEP, J.—The territory of Mohurbhunj is a part of British India, but at present not subject to any laws not specially extended to it. The Tributary Mehals being British India, and being excluded from the operation of all the laws in force in British India, unless expressly extended to them, the orders of Government conferring powers on particular officers over criminal offences committed within those mehals are *ultra vires*.

THE facts which gave rise to this rule being issued were as follows:—

A complaint was preferred to the Raja of Mohurbhunj by one Dinobundo Patro, the dewan of the Raja, charging the petitioner and two others with libel. Thereupon, the Raja issued summonses and warrants for the attendance of the accused, one of whom, the petitioner, was a ryot of the Raja's, holding lands and residing in Midnapore. The process was sent to the Magistrate of Midnapore for the purpose of being executed, and the petitioner then applied to the Magistrate not to execute the process, not on the ground that the Raja had no jurisdiction to try him, but that, as the Raja was personally concerned, a fair trial would not be held.

The Magistrate, on the 30th June 1880, forwarded the petition to the Superintendent of the Tributary Mehals, an office then held by the Commissioner of Cuttack; and he, on the 12th July, addressed the Raja, requesting him to make over the papers of the case to the Magistrate of Midnapore, who was also vested with the powers of an Assistant Superintendent of Tributary Mehals. Two of the accused were then summoned to appear before the latter officer, and after several witnesses had been examined, he, on the 13th December 1880, framed a charge against them under s. 500 of the Penal Code. This charge was entitled as made by "the Assistant Superintendent of the Tributary Mehals," and was as follows:—

I, J. C. Price, Officiating Assistant Superintendent of Tributary Mehals, hereby charge you, Hursee Mahapatro, Baidi Bagh, as follows: That you, on

¹ Criminal Motion, No. 27 of 1881, against the order of J. C. Price, Esq., Magistrate of Midnapore, dated the 13th December 1880.

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or about the end of Phalgun last, at Baripada, in Mohurbhunj, defamed one Dinobundo Patro, naib of Nyabasan Parganna, by saying that he had taken a bribe of Rs. 5,000 to get the Nyagram Rajah a loan from the Mohurbhunj Maharaja of Rs. 25,000, also by referring to, and confirming the allegations made in, a petition previously submitted to the Maharaja, and thereby committed an offence punishable under s. 500 of the Indian Penal Code, and within the cognizance of this Court. And I hereby direct that you be tried by the said Court on the said charge.

(Sd.) J. C. PRICE,

Asst. Supdt.

The 13th December 1880.

The prosecution then proceeded till the 18th January, when one of the accused was acquitted, the charge as against him being abandoned. The other accused then entered into his defence, and called witnesses, but, previous to judgment being delivered, he moved the High Court to set aside the proceedings as having been without jurisdiction, and obtained the rule which now came on to be argued.

The *Advocate-General* (the Hon'ble G. C. Paul), with him Mr. *Phillips*, appeared to show cause on behalf of Dinobundo Patro, the dewan of the Maharaja of Mohurbhunj. The first question in this case is the jurisdiction of this Court to interfere in the matter. We contend that Mr. Price, as Assistant Superintendent of the Tributary Mehals, is not a Court subordinate to this Court, and therefore not under this Court's powers of control and supervision. He was not acting as a Magistrate, but under a different capacity, *viz.*, that of a political officer, and this Court can only interfere when he is acting as a subordinate Court, as it has no such powers over private individuals. Moreover, this jurisdiction has been exercised under orders from the Local Government for a long series of years, and cannot now be questioned on a rule like this, and this question should not be raised on an application of this kind, especially when nothing has yet been done. We further contend that Mohurbhunj is not British India, but foreign territory, for the Regulations do not show that it is British territory. [CUNNINGHAM, J.—Is the Government represented? We ought to know if the Government concede that Mohurbhunj is not a portion of British India.] We do not appear for the Government on the present occasion, as they have had no notice of the rule.

Mr. *Phillips* followed on the same side.

Mr. *M. Ghose* in support of the rule.—This Court has jurisdiction over all Magistrates who are subordinate, whether they profess to act as such or not. Mr. Price is a Magistrate ordinarily subject to this Court's powers of superintendence, and he is acting as a 'Court,' and trying a case within the jurisdiction of this Court, though he may choose to call himself "Assistant Superintendent of Tributary Mehals," an office unknown to the law. He must show that the law allows him to act as such without being subject to the superintendence of this Court. If a Judge or a Magistrate convicts any subject of Her Majesty, such Judge or Magistrate cannot oust the jurisdiction of this Court by saying that he had convicted, not in his judicial, but in his executive, capacity. It is immaterial how Mr. Price chooses to describe himself in the proceedings, for that will not alter the case or his real character. [CUNNINGHAM, J.—Have you any authority on this point?] There is a well known class of cases where this Court, under s. 15 of the Charter, has set aside proceedings of Magistrates under s. 518 of the Criminal Procedure Code, which are expressly declared by

law to be non-judicial proceedings; see *Banee Madhub Ghose v. Wooma Nath Roy Chowdhry*,¹ *Chunder Coomarr Roy v. Omesh Chunder Mojoomdar*,² *Sree Nath Dutt v. Unnoda Churn Dutt*.³ The principles of these cases apply to the present case, and they were considered by a Full Bench: *In re Chunder Nath Sen*.⁴ And again subsequently considered by all the Judges in *Gopi Mohun Mullick v. Taramoni Chowdhry*.⁵ In *Shurut Chunder Banerjee v. Bama Churn Mookerjee*,⁶ I contended that this Court had no power to set aside, on revision, an order of a Magistrate not made in his judicial capacity; but Morris and White, JJ., decided against me, on the ground that the Magistrate had acted without jurisdiction, and that case has been followed by other Judges. This Court has, therefore, jurisdiction under the Charter to set aside the proceedings of a subordinate Magistrate, which are themselves without jurisdiction. The next question is, whether Mohurbhunj is a part of British India and subject to the Code of Criminal Procedure. If it is not British India, then my client can only be tried under the provisions of the Extradition Act, and by a Court subject to the ordinary jurisdiction of this Court. But if it is not British India, then my client cannot be tried in Midnapore, as that would be contrary to the provisions of s. 63 of the Criminal Procedure Code. [CUNNINGHAM, J.—But we have the power to transfer a case to Midnapore if we choose.] Yes, if Mohurbhunj is British India, and in that case my client would be tried by Mr. Price in his capacity of Magistrate, and have a right of appeal to the Sessions Judge, to which we do not object. He objects to be tried by a Court which the law does not recognize. But I contend that Mohurbhunj is British India; see Hunter's Statistics, Puri and Tributary Mehals; Regs. IV. of 1804, XII. of 1805, ss. 36, 37, XIII. of 1803, s. 13, XI. of 1816, V. of 1818, s. 6, Act XX. of 1850; and *Damodar Gordhan v. Deoram Kanji*.⁷ Mohurbhunj being part of British India, and not included in the Scheduled Districts Act, the orders of the Government empowering Mr. Price, the Raja of Mohurbhunj, and the Commissioner of Cuttack to try cases are *ultra vires*; and if it be contended that Mohurbhunj is not a part of British India, then the Government should have notice before your Lordships decide that question.

The Court accordingly took time to consider, and subsequently directed notice to be served on the Government of Bengal. The case was then re-argued, and Mr. Phillips, Standing Counsel, appeared on behalf of the Government, and contended that Mohurbhunj was not a part of British India. He referred to *Lachmi Narain v. Raja Partap Singh*,⁸ and objected to the jurisdiction of the High Court. Mr. M. Ghose re-argued the whole case, and contended that Mohurbhunj was within British India, and that the trial of the petitioner in Midnapore ought to be set aside.

The judgments of the Court (CUNNINGHAM and PRINSEP, JJ.) were as follows:—

CUNNINGHAM, J.—This case comes before us in the exercise of our powers of criminal revision.

The facts, as set out in the petition of Hursee Mahapatro, are as follows:—

A complaint was preferred to the Raja of Mohurbhunj, charging the petitioner and two others with libel. Thereupon the Raja issued summonses and warrants through the Magistrate of Midnapore for the attendance of the accused, who are residents of that district. The accused petitioned Mr. Price, the Magis-

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¹ 21 W. R., Cr., 26.² 22 W. R., Cr., 78.³ 23 W. R., Cr., 34.⁴ I. L. R., 2 Cal. 293.⁵ I. L. R., 5 Cal. 7; S. C., 4 C. L. R. 309.⁶ 4 C. L. R. 410.⁷ I. L. R., 1 Bom. 367.⁸ I. L. R., 2 All. 1.

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trate of Midnapore, that the case should not be tried by the Raja. The Magistrate forwarded the petition, on the 30th June 1880, to the Superintendent of the Tributary Mehals (a post occupied by the Commissioner of Cuttack); and on the 12th July 1880, he addressed the Raja, requesting him to make over the papers of the case to the Magistrate of Midnapore, "who," it was observed, "has the powers of an assistant to the Superintendent of the Tributary Mehals." This officer, under his usual official seal, summoned two of the accused. They appeared before him; several witnesses were examined; and, on the 13th December 1880, he framed a charge against them under s. 500 of the Penal Code. This charge was entitled as made by "the Assistant Superintendent of the Tributary Mehals."

On the 18th January 1881, the prosecution was abandoned against one of the accused, and Mr. Price directed his acquittal.

The remaining accused then examined his witnesses, and the case was argued. Judgment has not yet been delivered, and the accused has now moved the High Court to set aside the proceedings as having been without jurisdiction.

The question before us is, whether the proceedings before Mr. Price, either as Magistrate of Midnapore or Assistant Superintendent of the Tributary Mehals, have been without jurisdiction; and whether, supposing them to be without jurisdiction, he is, in his capacity of Assistant Superintendent of the Tributary Mehals, amenable to the revision powers of the High Court.

The estate of the Raja of Killa Mohurbhunj forms a portion of territory which was ceded by the Mahrattas to the British Government in 1803; it forms one of a group of estates known as "the Tributary Mehals."

The history of these mehals, as shown by the Regulations, Acts, and orders of Government, and so far as concerns the present enquiry, is as follows:—

Reg. IV. of 1804, after reciting that the province of Cuttack, including Balasore and other dependencies of the said provinces, had been ceded to the East India Company in full sovereignty, and that it was necessary to provide for the administration of criminal justice, formed the province into a 'zilla' with two divisions, and a Magistrate in each; extended the Criminal Regulations of Bengal; but provided that the Court should not have power to take cognizance of cases committed before the 14th October 1803, the date on which the fort and town of Cuttack surrendered to the British arms.

Reg. XII. of 1805 provides for the collection of public revenue in Zilla Cuttack. It recites and, with certain modifications, confirms a proclamation issued by the Commissioners, dated 15th September 1804, regarding the rights of land-owners in the 'Mogulbundi' tract of the zilla, *viz.*, that part in which the land itself was responsible for the revenue; and, after generally extending the Regulations as to the settlement and collection of public revenue, it provides against the implication that any of those Regulations are, for the present, to be considered to be in force in certain enumerated jungle or hill zemindaris occupied by a rude and uncivilized race of people, with the proprietors of which engagements were formed by the late Board of Commissioners for the payment of a certain fixed Government rent or tribute to Government. The same exemption was extended to Mohurbhunj, with the provision that the Collectors should conclude a settlement with the proprietors of that estate for the payment of a fixed annual Government rent on the same principle as that observed in the case of the other hill or jungle zemindars.

Reg. XIII. of the same year deals with the maintenance of order and administration of justice in Cuttack, and (after excluding certain tracts) forms the rest of the district into one zilla, instead of two, as provided by Reg. IV. of 1804.

S. 13 extends the Beng. Regulation as to criminal justice to the zilla, but excludes from its operation certain hill zemindaries and the territory of Mohurbhunj.

Reg. XIV. of the same year, in providing for the administration of civil justice, makes a similar extension of the Beng. Regulation, and contains a similar exemption to that contained in Reg. XII.

By Reg. XI. of 1816, provision was made for trying inheritance-suits 'in certain tributary estates' excepted by Reg. XIV. of 1805, s. 11, from the ordinary law. These suits were to be heard by the Superintendent of the Tributary Mehals, an officer who appears to have been appointed in 1814 (Hunter's Statistical Account of Bengal, Orissa, 196), but of whose appointment no official notification has been brought to our notice. The sub-division of estates was forbidden, and no suit could be taken up, the cause of action in which arose previous to the 14th October 1803, the day on which the fort and town of Cuttack surrendered to the British arms.

An appeal from the Superintendent lay to the Sadr Adawlut, and in some cases to the King in Council.

The relations of the Raja of Mohurbhunj to Government are defined by a 'treaty engagement' executed by the Raja, dated 1st June 1829. By this the Raja engaged with the East India Company always to maintain himself in submission and loyalty; to pay annually as peshkush for the zilla Rs. 1,001; to apprehend fugitives from Orissa; to apprehend and give up for trial, on demand, any ryot who had committed 'an offence' within the Mogulbundi territories; to supply provisions to the Company's troops when 'passing through my territories;' to offer no impediment to subjects of the Company passing through 'my boundaries;' 'to depute a contingent force of my own troops,' and to act with the forces of Government against recusant rajas, receiving only rations.

Act XXI. of 1845 enabled the Governor-General in Council to remove any of the estates mentioned in s. 2 of Reg. XI. of 1816 [including Mohurbhunj], and to place them under the jurisdiction of an officer to be appointed by the Government of Bengal, and to be called 'Agent for the Suppression of Meriah Sacrifices,' and his subordinates.

The agents so appointed were to be guided by instructions from time to time received from the Government of India through the Local Government; and the Government was empowered to prescribe rules for their guidance, and to prescribe the finality of their decisions in civil cases, and the class of criminal cases which they were to submit to the Sadr Court.

Act XX. of 1850, after reciting that certain zemindaries and Mohurbhunj were temporarily exempted by Regs. XII. and XIII. of 1805 from the ordinary revenue and criminal law, and that it was desirable to provide for disputes as to the boundaries of zemindaries, provided that any boundary dispute between the excepted estates and estates subject to the Beng. Regulations should be tried by the Superintendent of the Tributary Mehals, subject to confirmation by the Government of Bengal. On the 24th September 1851, the Lieutenant-Governor

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of Bengal appointed Mr. Schalch, the Magistrate of Midnapore, to be an *ex officio* Assistant to the Superintendent of the Tributary Mehals. In conformity with orders of the Secretary of State, dated 26th July 1860, adoption sanads were granted to the Rajas of these mehals, which are therein described as 'states,' when subsequently the word 'estates' was directed by the Lieutenant-Governor to be substituted. In speaking of them, the Government of India directed that the designation of 'state' as employed by Lord Canning should remain unaltered.

On the 12th December 1870, the Secretary of the Bengal Government addressed the Magistrate as "*ex officio* Assistant Superintendent, Tributary Mehals," informing him that, as *ex officio* Assistant Superintendent of the Tributary Mehals, he was empowered to take up for trial all offences committed within the Tributary Mehals not punishable with death, and to pass sentences not exceeding seven years, submitting his proceedings, in each case, to the Superintendent: trials thus conducted were to be, as far as possible, in accordance with the Criminal Procedure Code.

In 1872, the Government of India vested the Superintendent of the Tributary Mehals with the powers exercised by a Sessions Judge in Regulation Districts, and with power to hear appeals from sentences passed by any subordinate officer in Tributary Mehal cases.

On the 30th April 1873, the Government of Bengal addressed the Superintendent of the Tributary Mehals, in answer to a letter submitting a tabular statement of the powers then exercised by officers in the tributary estate of Orissa, and the powers which, in the opinion of the Superintendent, ought to be exercised in accordance with the spirit of the new Criminal Procedure Code; authorized the Superintendent to exercise the powers of Magistrate of a District, and of a Sessions Judge under s. 15 of the Act; and gave him power to hear appeals from sentences under s. 36. The Magistrates and *ex officio* Assistant Superintendents of Tributary States were invested with the powers of a Magistrate of the first class under ss. 36 and 222 of the Code.

Up to this point the effect of the Acts of the Government, political, executive, and legislative, appears to have been—*1st*, that the Tributary Mehals had become an integral portion of British India within the scope of the general powers of the Government, and subject to any legislative enactment duly passed in their behalf; and, *2ndly*, that they had been expressly exempted from the ordinary law of the country, and were administered by specially appointed officers under special enactments. As to these orders, it is important to remember that, by virtue of s. 25 of the Indian Councils Act, 1861 (24 and 25 Vic., c. 67), no question can arise as to the validity of any rule, law, or regulation made by the Governor-General, or the Local Government, for Non-Regulation Provinces prior to 1st August 1861, on the ground of its having been made otherwise than in accordance with existing law.

We have now to consider whether the position of Mohurbhunj was affected by the Laws' Local Extent Act and Scheduled Districts Act passed in 1874.

It has been urged that, inasmuch as Mohurbhunj is not specified among the Scheduled Districts of Bengal in the first schedule of Act XIV. of 1874, or the sixth schedule of Act XV. of 1874, it is, under s. 3 of the latter Act, subject to the ordinary law in force throughout British India.

This contention, however, proceeds, in my opinion, on a misconception of the import and effect of those measures.

It is obvious from the preamble to Act XIV. of 1874 that the 'Scheduled Districts' specified in the schedules of that Act and Act XV. were not the whole, but merely 'among' the parts, of India which had either never been brought within, or had been removed from, the ordinary jurisdiction of the Courts.

It is indeed clear from the preambles and general language of the Act (s. 3) that the object was to declare, and in some instances consolidate, the existing law, and to clear away uncertainties as to jurisdiction where they existed—not to alter the political position of any district not expressly mentioned in them; and it was, no doubt, with this intention that s. 8 (k) of Act XV. provided that nothing in the Act should affect the operation of any enactment not mentioned in any of the schedules.

Now Regs. XIII. and XIV. of 1805, and Reg. XI. of 1816, Act XXI. of 1845, and Act XX. of 1850, were in force at the time of the passing of the Laws' Local Extent Act. They are not mentioned in the schedule to Act XV. of 1874, and they are, therefore, unaffected by its provisions.

The position of the Tributary Mehals was, accordingly, in my opinion, unaffected by the two measures in question. The subsequent repeal of some of the Regulations and Acts just mentioned would not, owing to the saving clause inserted in Repealing Acts—*e. g.*, s. 1 of Act XVI. of 1874—affect any established jurisdiction or form of practice or procedure, or existing usage, office, or appointment; and we must hold accordingly that the Tributary Mehals are now, as they were in 1874, a portion of British India, which the Government has been pleased to exempt from the ordinary law and jurisdiction of the Courts, and to govern by means of special officials and enactments. If this be so, and if those special enactments have the effect of removing this part of the country from the ordinary criminal supervision of the High Court, it would be questionable whether the High Court has jurisdiction to interfere with the proceedings of the officials appointed by Government to administer the criminal law in the parts of the country so specially circumstanced.

As to the laws now actually in force in Mohurbhunj, it is impossible to deny that the effect of s. 3 of Act XV. of 1874 has been to produce some obscurity as to the position of those parts of India which, not being Scheduled Districts as enumerated in the schedules to the Acts, are yet not administered in complete accordance with the laws declared to be in force throughout the whole of British India, except the Scheduled Districts; and that the difficulty thus occasioned is enhanced by the provisions commonly inserted in subsequent Acts, "that the measure shall extend to the whole of British India, except the Scheduled Districts as defined in Act XIV. of 1874." It might be urged with great cogency that the intention of the Legislature, as gathered from these Acts, and especially from the last para. of s. 1 of Act XIV. of 1874, was, that every part of British India not subject to the ordinary law should be administered in accordance with those Acts, or with a scheme framed under the provisions of 33 Vic., c. 3.

It is, however, unnecessary, for the purpose of the present decision, to come to a precise conclusion as to the legal position of Mohurbhunj, the validity of the various orders of Government concerning it, or the competence of the officers appointed to carry out those orders. The act with which we are concerned was not done in Mohurbhunj by an officer empowered to exercise jurisdiction there, but in Midnapore by a Magistrate empowered to act under the Criminal Procedure Code in an ordinary district and trying a resident of that district. Now, whatever may be the powers of the Government as to Mohur-

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bhunj, there is, in my opinion, no ground for the contention that those powers extend to empowering the legally constituted tribunals of a British district to follow in that district, and in the case of residents in it, any procedure and exercise any other jurisdiction than that created by the law. When, therefore, the Superintendent of the Tributary Mehals proceeded to exercise a power not conferred on him by the order of 1872, in transferring a case from one district to another, and when the Magistrate of Midnapore, dealing in Midnapore with a resident in the district, proceeded to exercise magisterial powers under another style, and to depart in some material particulars from the provisions of the Court as to procedure, these officers seem to me to have been acting without jurisdiction, and their proceedings ought, accordingly, in my opinion, to be set aside.

PRINSEP, J.—One Dinobundo Patro charged Hursee Mahapatro before the Raja of Mohurbhunj with defamation. The accused, apparently, is a ryot of the Raja, holding lands and residing in Midnapore; and process was issued by the Raja through the Magistrate of Midnapore for his attendance at Mohurbhunj. He petitioned the Magistrate of Midnapore not to execute this process, on the ground, not that the Raja had no jurisdiction to try him, but that, as the Raja was personally concerned, a fair trial would not be held. The Magistrate of Midnapore, who also holds the undefined office of Assistant Superintendent of Tributary Mehals, on the 30th June 1880, addressed the Commissioner of Cuttack as Superintendent, and apparently in that capacity his official superior, recommending that the case should be transferred for trial either to Midnapore or Balasore.

On 12th July, the Superintendent of the Tributary Mehals directed the case to be tried by the Magistrate of Midnapore, and requested the Raja to transmit the record to that officer. The trial then took place before the Magistrate of Midnapore, who, in the course of the proceedings, also signs himself as Assistant Superintendent.

The petitioner, having thus succeeded in procuring the transfer of the case to Midnapore, has obtained a rule from this Court, on the ground that the proceedings of the Magistrate of Midnapore are without jurisdiction. I regret that, from the nature of this objection, we have been compelled to have the matter fully argued, for ordinarily such conduct would be deserving of no consideration.

This case has raised points of difficulty regarding the relations of the British Government towards the territory of Mohurbhunj, the jurisdiction of the neighbouring Magistrates and the Commissioner of Cuttack, or, as they are called, Assistant Superintendents and the Superintendent of the Tributary Mehals; and, finally, whether we have any power to interfere either as a Court of revision under the Code of Criminal Procedure, or under other powers conferred on us under the charter of the High Court.

As regards this last point, it is argued that the Magistrate of Midnapore and the Superintendent of the Tributary Mehals having been vested with certain powers by the Government of Bengal, and in the exercise of those powers being in no way subordinate to the jurisdiction of this High Court, we can have no control over their proceedings, and at any rate we can have no control until they shall have terminated in such a manner as to enable us to exercise our authority as in a writ of *habeas corpus*. It is sufficient, however, for the purposes of the present case, that I should state that, in the view that I take of the relations between the Government and Mohurbhunj, it is unnecessary for me to

consider the full extent of this argument. I should, however, be very disinclined to refuse to act on a *prima facie* good objection to proceedings taken by a judicial officer in British territory acting under authority of a very doubtful character, until the person against whom such proceedings were directed had suffered in some way from the consequences of such doubtful jurisdiction. It is our duty to prevent, rather than endeavour to cure, the effect of injuries. If the argument be pressed to its extreme, it would be necessary for a man to be imprisoned, or to have been whipped, or even to be under sentence of death, before we could intervene, a position it would be impossible to accept.

The point which we are really called upon to decide is, whether the territory of Mohurbhunj is a foreign state or British India. I would, however, first of all remark that, even supposing, for purposes of argument, that Mohurbhunj is a foreign state, the Magistrate of Midnapore would have no jurisdiction to try the petitioner, because the offence charged (defamation) being an offence under Ch. XXI. of the Penal Code, and no complaint having been made to him, he has, under s. 142 of the Code of Criminal Procedure, no authority to take cognizance of it. Further, it may be remarked that the Magistrate would not be competent to deliver him to the Raja of Mohurbhunj for trial, inasmuch as the Magistrate is not a political officer, as defined in s. 3 of the Extradition Act (XXI. of 1879), appointed by one of the authorities mentioned in cl. 2. Nor, as far as we are informed, is there any officer who could so act, supposing Mohurbhunj to be foreign territory.

I will now proceed to consider whether the tract of country known as Mohurbhunj is British India as defined by law: and to determine this, it is necessary to consider the manner in which this territory has been dealt with by the Legislature since its conquest by the British in 1803. From the terms of the treaty entered into between the Honourable East India Company and Senab Sahib Roghojee Bhoonsla on 17th December 1803, it appears that "the province of Cuttack, including the port and district of Balasore, was ceded in perpetual sovereignty to the former; and art. 10 refers to certain treaties made antecedently by the British Government with feudatories of the Senab Sahib Sooba, which were then confirmed (see Aitchison's Treaties, Vol. III., pp. 97-98). These treaties were made with several of the chiefs of the Cuttack Tributary Mehals as they are now called, and are reproduced in Aitchison's Treaties, Vol. I., pp. 188 *et seq.* The Chief of Mohurbhunj was not among other chiefs, but that is not material, for it is clear that Mohurbhunj, as well as other Tributary Mehals, was ceded as portion of the province of Cuttack. The terms of Reg. IV. of 1804 and of Regs. XII., XIII., and XIV. of 1805, show that within the term "dependencies of the province of Cuttack" was included the territory of Mohurbhunj.

Reg. IV. of 1804, s. 7, gives the 14th of October 1803 as the date of this conquest, and the commencement of the jurisdiction of the Courts established under that law for the administration of justice in criminal cases and the authority of the police. And it was declared that the general Regulations in force in the provinces of Bengal and Behar should be in force, unless it should be otherwise specially directed in any such Regulation.

In the following year (1805) three Regulations were passed relating to the zilla of Cuttack, namely, Reg. XII., for the settlement and collection of public revenue; Reg. XIII., for the maintenance of peace and the support and administration of the police; and Reg. XIV., for the administration of justice in civil cases: but the territory of Mohurbhunj, together with the estates of other hill or jungle rajas or zemindars, now denominated the Tributary Mehals, was

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expressly excluded from the operation of these Regulations, the concluding portion of each of those Regulations containing a provision to that effect. The power of legislating for the territory of Mohurbhunj was, therefore, clearly asserted by the Regulations of 1805, but it was declared that, for the present, the exercise of such power would be reserved.

The preamble of Reg. XI. of 1816 is to the following effect: "Whereas it is necessary that provisions should be made for receiving, trying, and deciding claims to the right of inheritance or succession in certain tributary estates in Zilla Cuttack, which were excepted by s. 11, Reg. XIV. of 1805, from the operation of the general rules for the administration of civil justice, established in the provinces of Bengal, Behar, and Orissa; and whereas the nature of the tenures by which those estates are held, the character of the inhabitants, and other local circumstances, render it expedient that the estates in question should not be subject to partition, but should descend entire and undivided to the persons respectively having the most substantial claim according to local and family usage, the following rules have been enacted, to be in force from the date of the promulgation of this Regulation in Zilla Cuttack." That law provided for a regular procedure, with a right of appeal first to the Sadr Dewany Adawlut, and ultimately to the King in Council, in the matters above described. This is the first occasion in which I can find mention made of the office of Superintendent of Tributary Mehals.

The next legislative enactment, in which reference is made to the Tributary Mehals, is Aft XXI. of 1845. That was an Aft passed for the suppression of Meriah Sacrifices in the Hill Tracts of Orissa. S. 1 made it "lawful for the Governor-General in Council, by an order in Council, to remove from the jurisdiction and superintendence of the Commissioner and Superintendent of the Tributary Mehals in Cuttack any of the tributary estates specified in s. 2, Reg. II. of 1816 of the Beng. Code, and to place any such estates under the jurisdiction and superintendence of such officer (to be called the Agent for the Suppression of Meriah Sacrifices) and his subordinates, as shall from time to time be appointed by the Government of Bengal on that behalf." It is important, too, to note the terms of s. 6, which provide that it shall be competent for the Governor-General in Council to prescribe such rules as he may deem proper for the guidance of such Agents and subordinates, and to determine to what extent the decision of the said Agents in civil suits shall be final, and in what suits an appeal shall lie to the Sadr Court, and to define the authority to be exercised by the said Agents in criminal trials, and what criminal cases they shall submit for the decision of the Sadr Court.

Thus it appears from the terms of Aft XXI. of 1845 that the Commissioner of Cuttack, as Superintendent of Tributary Mehals, had some power over that territory, the exact extent of which power has not been made known to us; but that power, whatever it was, was not conferred by any legislative enactment. It appears, however, that the Legislature, in empowering the Governor-General in Council to remove that territory from his jurisdiction, thought it necessary specially to empower the Governor-General in Council to pass executive orders, having the force of law, regulating and determining how far the orders of the Agents should be final, in what suits an appeal should lie, what should be their powers in criminal trials, and what cases they should submit for the decision of the Sadr Court.

The preamble of Aft XX. of 1850 is in somewhat the same terms as that of Reg. XI. of 1816, in declaring that the territory of Mohurbhunj, and certain jungle and hill zemindars in the zilla of Cuttack, were temporarily exempted

from the laws in force in other parts of India subject to the Government of Bengal. But it was found necessary to give jurisdiction to some officer of Government to determine disputes regarding the boundaries of those zemindaries. Accordingly, the Superintendent of Tributary Mehals was appointed for this purpose. These are all the legislative enactments specially relating to Mohurbhunj and other Tributary Mehals up to 1874. Act XIV. of that year declared that that Act extends, in the first instance, to the whole of British India within the territories mentioned in the first schedule thereto annexed; and among these schedules are to be found only two from among the Tributary Mehals. Those two mehals, as they are termed, are the mehals of Angool and Bunki, which had been taken under the direct management of Government some years previously in consequence of the misbehaviour of their hill rajas or zemindars.

Act XV. of the same year, which was passed simultaneously with Act XIV., declared that all the Acts mentioned in the first schedule thereto annexed are now in force throughout the whole of British India, except the Scheduled Districts. And s. 6 extended certain other enactments throughout the whole of the territories now subject to the Government of the Lieutenant-Governor of Bengal, except the Scheduled Districts subject to such Government. The term 'British India' has been declared to be thus defined in all Acts made by the Governor-General in Council, unless there was something repugnant to the subject or context thereof. 'British India' shall mean the territories for the time being vested in Her Majesty by Stat. 21 and 22 Vic., c. 106; and that Statute, s. 1, declares "that the government of the territories now in the possession or under the Government of the East India Company . . . shall cease to be vested in, or exercised by, the said Company, and all territories in the possession or under the government of the said Company . . . shall become vested in Her Majesty; . . . and for the purpose of this Act 'India' shall mean the territories vested in Her Majesty as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such rights as aforesaid."

So far then as concerns the terms of the Regulations and Acts of the Government in its legislative capacity, it would seem that the territory of Mohurbhunj is 'British India,' and, unless specially exempted, is subject to the same laws as the rest of British India. But it seems to me that, although Mohurbhunj is British India, and although the Acts of 1874 declared what was the law for British India, inasmuch as the concluding sections of Regs. XII., XIII., and XIV. of 1805, which expressly excluded the Tributary Mehals 'for the present' from the operation of the general law of the country, we cannot rightly hold that the general terms of the Acts of 1874 override the special terms of the Regulations of 1805; and I am confirmed in this opinion on finding that, although there has been a very extensive repeal of the older Regulations and Acts, those parts of the Regulations of 1805 to which I have referred are still in force. So far, then, I am inclined to think that Mohurbhunj is British India, but at present not subject to any laws not specially extended to it.

It is, however, contended that the fact that treaty-engagements were entered into by the British Government with the rajas and zemindars of these Tributary Mehals shows that they were regarded as independent rulers; and we have been referred to a treaty-engagement published at pages 184 and 185 of the first volume of Aitchison's Treaties, Engagements, and Sanads.

Now, as regards the so-called treaty-engagement, it appears to me that there is nothing in its terms which recognized the absolute independence of the Raja of Mohurbhunj from the authority of the British Government. The document

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is headed "Treaty-engagement executed by the Raja of Killa Mohurbhunj, a Tributary Mehal subordinate to Cuttack, in the Sooba of Orissa." By it the Raja engages to maintain himself in submission and loyalty to the Government; to pay annually in perpetuity for himself, heirs, and successors, 1,001 sicca rupees as peshkush for the said Killa; to apprehend and send to the authorities any resident of British territory who may flee into Mohurbhunj; to deliver up any ryot of Mohurbhunj who may commit an offence in British territory; and to refrain from enforcing any claim of his own on any resident of British territory, notifying the circumstances to the authorities, and acting on such orders as he might receive. He further engages to cause rassud, &c., to be supplied to Government troops passing through his territory, and to help them with any further assistance that might be necessary, and that he will depute a contingent force of his own troops with the forces of Government for the purpose of coercion and the bringing of any recusant raja or other person into subjection to the aforesaid Government. Lastly, he relinquishes a claim on account of a ferry.

Now, it is only necessary to consider the terms regarding the deputation of a contingent force of his own troops by the Raja to act with the forces of Government, with a view to determine whether that constitutes any ground for supposing the exercise of an authority independent of the Government. It is notorious that, even in present days, native chiefs in British territory, especially those in distant and jungle portions, do maintain a certain number of armed retainers; and I have no doubt that, at the time of the signing of this engagement, the number of such retainers was larger than that now existing. A body of such men, known as Pykes in Orissa in Government territory, existed even until a recent date. The preamble to Reg. XIII. of 1805 states that it was the practice in the province of Cuttack, when under the Mahratta Government, to vest the immediate maintenance of the peace in certain Sirdar Pykes, also called Kandytes, aided by inferior Pykes, under the orders and control of the said Sirdars, for whose support lands were assigned under the orders and authority of the said Government; and that the general control of the said Sirdars and other Pykes was vested, at the time of conquest of the province of Cuttack by the British arms, in the zemindars, talookdars, farmers, and other holders of land within the limits of their respective estates and farms. This state of affairs, so far as regards the province of Cuttack, with the exception of the Tributary Mehals, was discontinued by that Regulation; and it may fairly be supposed that what existed in 1805 throughout the districts of Cuttack continued in the Tributary Mehals, which were disconnected therefrom in 1805, until 1829, and that this is what was referred to in the treaty-engagement entered into by the Raja of Killa Mohurbhunj on the 1st of June of that year. In other respects—that is to say, as regards the settlement of the peshkush payable by the Raja to the Government—the provisions of the treaty-engagement are clearly within the terms of s. 37, Reg. XII. of 1805; and the other terms are only such as are ordinarily found in kabuliats executed by zemindars and farmers of the Government revenue with Government. I cannot, therefore, regard this engagement otherwise than as an agreement on the part of the Chief or Raja of Mohurbhunj to the terms of the settlement concluded with the Collector of Cuttack under s. 37, Reg. XII. of 1805, such as that officer was deputed to make.

So far, then, as the course of legislation and the Acts of Government with regard to Mohurbhunj up to comparatively recent times, that territory was never even regarded as a foreign state. Government have, from time to time, asserted their power to legislate for it; and, in bringing it within the operation of some laws, have declared that they, for the present, suspended further legislation. The

concession of the right to adopt to the chiefs of the Tributary Mehals under Lord Canning's Proclamation of 1862, and the recent change in the designation of their lands as 'states,' instead of the term 'estates,' which had been used for nearly seventy years, cannot alter their status. On these grounds, I am of opinion that Mohurbhunj is not foreign territory, but that it forms a part of British India at present specially exempted from the operation of the laws in force in British India.

I have already referred to the indefinite character of the authority exercised by the Commissioner of Cuttack as Superintendent of the Tributary Mehals. Up to 1845 some authority was so exercised, but by Act XXI. of that year, power was given to the Governor-General in Council to withdraw it, and he was empowered to confer whatever civil and criminal powers he thought proper on the Agent for the Suppression of Meriah Sacrifices and his subordinates. When that office was abolished, is not very material; it is sufficient to state that the Act was repealed in 1874. But it is clear that the Commissioner of Cuttack, as Superintendent of the Tributary Mehals, and the Magistrates of the districts surrounding that tract of country as assistants to the Superintendent of Tributary Mehals, have, from time to time, been empowered by the Government of Bengal to exercise powers as Criminal Courts of various grades in the Tributary Mehals. We have not been informed under what authority these powers were conferred, and looking at the state of the law which I have already discussed, I am of opinion that the Government of Bengal acted beyond its authority in so investing these officers. I have come to this conclusion, because it was thought necessary by a special legislative enactment (Act XXI. of 1845) to empower the Governor-General in Council to establish Civil and Criminal Courts in the Tributary Mehals, and to define the powers of the several grades of these Courts, and such power has been claimed and exercised by the Government of Bengal without any such authority; and next, because the fact that the Indian Councils' Act, 24 and 25 Vic., c. 67, s. 25, by validating all orders passed by Government in Non-Regulation Provinces, amongst which the Tributary Mehals may be fairly placed, shows that such orders were without the sanction of law, and required legal confirmation. Up to 1861 any such orders are now not open to question, but this does not affect the validity of the orders conferring magisterial powers on the Magistrate of Midnapore over Mohurbhunj.

We have been informed by the Standing Counsel, Mr. Phillips, who, having first appeared for the private prosecutor, appeared for the Government on our intimating that an officer of Government should argue the case before us on behalf of Government, that, as stated in a printed memo. from the Bengal Secretariat that he handed up to us, the Bengal Government determined to pass no permanent or defined rules "on the subject of the relative jurisdiction of the Superintendent, Tributary Mehals, and the hill rajas, regarding the trial of criminal offences," but directed that "the spirit of certain proposed rules should be acted up to in all future cases with certain limitations; and that the Rajas should be informed that they are ordinarily amenable to the Superintendent's Court, subject to such instructions as may, from time to time, be furnished by Government."

On the 12th December 1870, the Secretary to the Government of Bengal informed the Magistrate of Midnapore that, as an *ex officio* Assistant Superintendent of the Tributary Mehals, he was "empowered to take up for trial all offences committed within the Tributary Mehals not punishable with death, and to deliver judgment and to pass sentence of simple or rigorous imprisonment for a period not exceeding seven years;" that his "proceedings will, in each

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case, be subject to the approval and sanction of the Superintendent, Tributary Mehals, to whom they should be forwarded;" and that "the trials should be conducted, as far as possible, in accordance with the provisions of the Criminal Procedure Code."

On the 8th August 1872, the Viceroy and Governor-General in Council sanctioned the proposal of the Lieutenant-Governor of Bengal to vest "the Superintendent of the Tributary Mehals, Cuttack, with the same powers as are exercised by Sessions Judges in the Regulation Districts, and with power to hear appeals from all sentences passed by any subordinate officer in Tributary Mehal cases."

On the 30th April 1873, the Secretary to the Government of Bengal informed the Superintendent, Tributary Mehals, that "the Lieutenant-Governor authorized him to exercise the powers of a Magistrate of a District, the powers of a Sessions Judge under s. 15, Ch. III. of the new Criminal Procedure Code, and gave him power to hear appeals from sentences under s. 36."

But the Tributary Mehals being British India, and being specially excluded from the operation of all the laws in force in British India, unless expressly extended to them, as I have already stated, I can find no authority for those orders of Government conferring powers on particular officers over criminal offences committed within the Tributary Mehals. It appears to me that, until so expressly declared by legislative enactment, there were no penal laws in force in the Tributary Mehals, and that consequently there was no authority to invest officers with certain powers to administer an unknown and uncertain penal law. We have been informed on the authority of Hunter's Statistical Gazetteer, Vol. XIX., p. 198 (an authority not binding on us), that the Penal Code was, by order of the Government of India, dated 18th December 1860, declared applicable to the Tributary Mehals. No such order can be found in the Government Gazette, nor have we on enquiry been able to obtain it from the offices of the Government of India. But it would also seem, from what has taken place in the proceedings now before us, that the jurisdiction of the Raja of Mohurbhunj in Mohurbhunj is admitted, but that jurisdiction is, it is said, subordinate to that of the Superintendent, Tributary Mehals, who can interfere with his proceedings. The Superintendent has been vested with certain powers under the Code of Criminal Procedure, and he has been told by Government that "trials should be conducted, as far as possible, in accordance with the provisions of the Criminal Procedure Code;" but that Code gives the power of withdrawing cases from one Court and transferring them to another, only to a High Court or to the Local Government. If he was acting under the Code, he exceeded his powers; but, as I have before said, I can find no authority for such interference at all.

Next, even supposing the case to have been lawfully withdrawn from the Raja of Mohurbhunj, I can find no authority for the Magistrate of Midnapore trying it either as Magistrate or as *ex officio* Assistant Superintendent of Tributary Mehals in Midnapore.

For all these reasons, I am of opinion that the rule must be made absolute, and that the proceedings taken before the Magistrate of Midnapore, or Assistant Superintendent of Tributary Mehals, must be declared to have been without jurisdiction and of no effect.

Rule absolute.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF KHAMIR.

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July 29.

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Penal Code (Act XLV. of 1860), ss. 114, 372, 479, 498—Discharge by Magistrate—Order of Commitment by Sessions Judge—Omission to call on Accused to show cause against such Commitment—Criminal Procedure Code (Act X. of 1872), ss. 296, 283.

A Sessions Court has no power, under s. 296 of the Criminal Procedure Code, to direct the commitment of a person discharged by a Deputy Magistrate, without first giving such person an opportunity of showing cause against such commitment.

But under s. 296, as amended by Act XI. of 1874, the Court has power to direct the subordinate Court to enquire into any offences for which it considers a commitment should be ordered.

When, however, a trial under such a commitment made by order of a Sessions Judge has been duly held, and no actual failure of justice has been caused by the error of the Sessions Judge, s. 283 of the Criminal Procedure Code would be a bar to the reversal of his judgment.

THE accused in this case was charged before a Deputy Magistrate of the second class, under s. 498 of the Penal Code, with enticing or taking away, or detaining with criminal intent, a married woman. He was, however, discharged by the Magistrate under s. 215 of the Criminal Procedure Code.

The complainant then moved the Sessions Judge to take action under s. 296 of the Criminal Procedure Code, and, after calling for the record, the Sessions Judge was of opinion that the facts alleged against the accused really amounted to abetment of rape and adultery; and he, therefore, directed the Magistrate to commit the accused under ss. 114 and 376 and 114 and 497, and to send him up for trial before the Sessions Court, remarking that, even if the case came under s. 498, the Deputy Magistrate had no jurisdiction to try it, he being only vested with second-class powers. The commitment was made, and the trial held before the Sessions Judge.

The assessors were of opinion that the accused should be convicted under ss. 114 and 497 of the Penal Code; but the Sessions Judge, differing from both the assessors, found that the accused had committed an offence under ss. 114 and 376 of the Penal Code, and sentenced him to four years' rigorous imprisonment.

The prisoner appealed to the High Court.

Baboo *Grish Chunder Chowdhry* for the appellant contended that the Sessions Judge had no power to order the commitment under ss. 376 and 497, as the Magistrate was competent to try the case under s. 498, and had discharged the accused; and, further, that the order for his commitment was made without calling upon the accused to show cause against the order—*Re Bundhoo*,² *Nowab Singh v. Kokil Singh*.³ The commitment ought, therefore, to be set aside.

The judgment of the Court (*Morris and Tottenham, JJ.*) was delivered by

¹ Criminal Appeal, No. 349 of 1881, against the order of *T. M. Kirkwood, Esq.*, Sessions Judge of Mymensingh, dated the 19th May 1881.

² 22 W. R., Cr., 67.

³ 24 W. R., Cr., 70.

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MORRIS, J.—In this appeal it is contended, *first*, that the order under which appellant was committed to take his trial in the Court of Session is, on two distinct grounds, illegal and *ultra vires*; and *next*, that, on the merits, the prisoner ought not to have been convicted.

The case had been instituted against the prisoner under s. 498 of the Penal Code. The Deputy Magistrate, after hearing the evidence for the prosecution, discharged the accused under s. 215, Criminal Procedure Code.

The complainant then moved the Sessions Judge to take action under s. 296, Criminal Procedure Code.

That officer was of opinion that the facts alleged against the accused really amounted to abetment of rape or of adultery; and those offences being triable only in the Sessions Court, he directed the Deputy Magistrate to commit the accused accordingly.

He remarked that, even if the case properly came under s. 498, the Deputy Magistrate had no power to try it, inasmuch as he was vested with only second-class powers. This dictum is opposed to the provision made in sch. iv. of the Criminal Procedure Code in regard to s. 498 of the Penal Code.

It is quite clear, however, that the case before the Deputy Magistrate was one under s. 498; and that he, being duly empowered by law to try such a case, discharged the accused under s. 215. The Sessions Judge had, therefore, no power to order a commitment under ss. 376 and 497. He had, under the proviso added to s. 296, Criminal Procedure Code, by Act XI. of 1874, power to direct the subordinate Court to enquire into these offences, but no more. In ordering the commitment, the Judge unquestionably transgressed the law.

It further appears upon an affidavit made on behalf of the appellant that the order for his commitment was made by the Judge without giving him any opportunity of showing cause against it, which procedure is not in accordance with what the High Court has laid down on this subject; see *Re Bundhoo*,¹ *Nowab Singh v. Kokil Singh*.² It has been submitted that the trial and conviction ought to be set aside for the two reasons above set forth. These are, no doubt, serious irregularities, and more especially the first, which is a direct transgression of the law; and if they had been brought to the notice of this Court before the trial had taken place, the commitment would properly have been quashed; but as the trial has been held, and as we do not consider that any actual failure of justice has been caused by the errors, we are disposed to hold that s. 283, Criminal Procedure Code, is a bar to the reversal of the judgment on these grounds.

(His Lordship then proceeded to consider the merits of the case, and set aside the conviction.)

Conviction set aside.

¹ 22 W. R., Cr., 67.

² 24 W. R., Cr., 70.

VOLUME VIII.

ORIGINAL CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice.

IN THE MATTER OF ABDOOL SOBHAN.

1881.

July 7.

8 Cal. 63.

Transfer of Trial to another District—Refusal by Judges to hear Affidavits in support of Application—Application to the Chief Justice to appoint another Bench to hear and determine case—Interlocutory Order in Criminal matters, Finality of—High Court Charter Act (24 and 25 Vic., c. 104, s. 14).

Where a rule had been obtained on behalf of a prisoner, calling on the prosecution to show cause why the case should not be transferred for trial to some other Court of Session than that in which it was then pending, on the ground that such strong feeling and prejudice existed in the district against the accused as to render it unlikely that he would get a fair trial, a Division Bench of the High Court, duly constituted, consisting of two Judges, refused to allow the affidavits in support of the application to be read, and discharged the rule. Subsequently, an application was made to the Chief Justice to appoint another Bench of the High Court to hear and determine the rule, on the ground that it had not been heard, and that, consequently, the order passed by the Bench discharging it was null and void.

Held that the Chief Justice, having once appointed a Bench under s. 14 of the Charter Act (24 and 25 Vic., c. 104) to hear any particular case, has no power to interfere when the case has been disposed of by that Bench.

Held also that the refusal of the Bench to hear the affidavits read, if an error at all, was simply one of law in the course of dealing with a matter clearly within their jurisdiction; and that, therefore, the decision could not be treated as a nullity, or its legality questioned by the Chief Justice.

Held further that, whether the judgment had been signed or not, previous to the application being made to the Chief Justice, an interlocutory order of such a nature in a criminal matter is not final, but may be reviewed or reconsidered, or a similar application may be entertained, as often as the Court in its discretion may think proper.

In this case an application had been made for the transfer of a trial from Patna to the High Court. The grounds for the application were, that a strong local feeling existed against the prisoner, and that it was likely, therefore, that he would not be able to get a fair trial. Mr. Jackson and Mr. Gasper, on the 27th June, appeared before a Division Bench, consisting of Mr. Justice Cunningham and Mr. Justice Prinsep, in support of a rule which had been obtained, calling upon the Crown to show cause why the case should not be transferred for trial to the High Court in its Original Criminal Jurisdiction, or to some other Court of Session.

Mr. Kilby, Deputy Legal Remembrancer, appeared for the Crown.

Mr. Jackson stated the nature of his application and the grounds upon which it was based. A discussion followed, the result of which was, that the rule was discharged, the learned Judges under the circumstances declining to hear the affidavits read in support of the rule.

An application was then made by Mr. Branson to the Chief Justice sitting alone, that another Bench should be appointed to rehear the rule, upon the

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ground that there had been no vaild hearing before the Criminal Bench ; and this application was founded upon an affidavit made by Mr. Warde-Jones, the attorney for the prisoner, which stated as follows :—

" I instructed Mr. Jackson and Mr. Gasper, Barristers-at-law, to appear before the Divisional Bench, consisting of Mr. Justice Cunningham and Mr. Justice Prinsep, in support of a rule which had been issued by the said Bench on the petition of my client, Moulvie Abdool Sobhan.

" 2. The said Mr. Jackson and the said Mr. Gasper appeared on the 27th instant in support of the said rule.

" 3. The exhibit hereunto annexed, and marked A, is an account of what transpired before the said Divisional Bench on the said 27th instant.

" 4. I was present before the said Divisional Bench without interruption from the beginning to the end of the address of the said Mr. Jackson, and heard and saw all that transpired during the said address.

" 5. I believe exhibit A to be a true and faithful representation of all that transpired before the said Divisional Bench on the said occasion.

EXHIBIT A.

" *Mr. Jackson* opened. He said that this was an application for the transfer of a trial from the district of Patna. The petitioner had been charged with bribery, and he was apprehensive of not getting a fair trial at Patna, on account of the strong local feeling existing against him. Mr. Jackson stated that the rule had been obtained under the misapprehension that the trial at Patna would be by jury. But this did not affect the application ; for assessors are taken from the same class of people as jurors. After discovering his error, Mr. Jackson said that he had at once informed their Lordships of the matter ; and their Lordships, after due consideration, had decided that the rule which had been issued on his client's petition should not be withdrawn. After some further remarks from Mr. Jackson, *Mr. Justice Cunningham* asked Mr. Kilby if Government really objected to the transfer.

" *Mr. Kilby*.—Yes, my lords. A number of Government officers and others are witnesses in the case, and great inconvenience will be caused to many persons by a transfer.

" *Mr. Justice Cunningham*.—But Mr. Jackson's point is, that the chances are that he will not get assessors who will fairly try his case. If he makes that out, we would be inclined to interfere in the matter.

" *Mr. Jackson*.—And moreover we say that the Judge of Patna has himself said that he will be glad if the case is transferred.

" *Mr. Justice Cunningham*.—But is not that a reflection on the Judge ?

" *Mr. Jackson*.—Not in the least, my lords. I desire not to make the slightest reflection on the Judge.

" *Mr. Kilby* then read the letter from the Judge, in which he stated that what he meant by saying that he would be glad if the case were removed from his Court was, that it was likely to be a long trial, and that by trying this case the rest of his work would be interfered with.

" *Mr. Justice Cunningham*.—Well, Mr. Jackson, you have not by any means convinced me that you will not have a fair set of assessors to sit at your client's trial at Patna.

" *Mr. Jackson* said he had not yet placed any of the facts on which he relied before the Court, and desired to read a petition which had been filed in one of the

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Courts at Patna by a number of powerful zemindars of the district, who had nothing whatever to do with the matter which was before that Court. This petition, Mr. Jackson contended, was a most improper one. It indicated the intense local feeling against his client, and was distinctly intended to prejudice a Court of Justice against his client in a matter which was at the time judicially before that Court.

"*Mr. Jackson* then began to read this petition, when he was interrupted by Mr. Justice Prinsep, who said—'But the Judge will take care not to have them amongst the assessors.'

"*Mr. Jackson*.—That would not be sufficient, I submit; for these zemindars are men who can influence a large number of people there.

"*Mr. Jackson* then proceeded to read the petition in support of his application. He had read only the first paragraph, and a portion of the second, when

"*Mr. Justice Cunningham*, after a short consultation with Mr. Justice Prinsep, said: 'We cannot interfere, Mr. Jackson. The Judge of Patna will, no doubt, try the case with great care.'

"*Mr. Jackson*.—But your Lordships have not yet heard a single word of our affidavits.

"*Mr. Justice Prinsep* said that he had read a portion of the petition.

"*Mr. Justice Cunningham* said: 'We have heard you, Mr. Jackson. We cannot interfere.' (Mr. Jackson had not addressed the Court more than ten minutes.)

"*Mr. Jackson* with much warmth said: 'Very well, my lords. Your lordships have chosen to dispose of a matter of the last importance to my client without hearing any of the facts in support of my application. Most of our facts are not contradicted by the other side; and I have two long affidavits in support of my contentions, which your lordships have not allowed me even to read out, and I sit down under protest.'

Mr. Branson in support of the application. The facts of this case have never been before their Lordships. They have not heard the counsel engaged in support of the rule, and the order made is null and void. I therefore ask that a fresh Bench may be appointed to hear the application. [GARTH, C.J.—I should be glad to hear some authority on the point. I do not see how I have power to interfere.] In one instance, Sir Barnes Peacock adopted this course. The case has not been reported, but the facts were, that a Division Bench, consisting of Markby and L. S. Jackson, JJ., who had been appointed to hear the criminal appeals, divided between themselves a number of appeals in which no one was instructed to appear. Each Judge read and decided half the cases, the other Judge concurring in and signing the judgments of his colleague.¹ When Sir Barnes Peacock became aware of this course of dealing with the appeals, his Lordship declared the decisions to be null and void, set aside each of the judgments, and directed the cases to be brought before him; and with another Judge heard the cases again. [GARTH, C.J.—There is this difference between that case and the present one. There the order of the Court was, that the two Judges should sit on the appeals, instead of which the Judges took upon themselves to sit separately, contrary to the orders of the Chief Justice and the rules of the Court. But in the present case the two Judges had heard the case to-

¹ This statement of the facts is not quite accurate. The learned Judges divided the cases between themselves, considering that they were authorized to do so by a rule of Court passed in January 1865 (see *Queen v. Chundra Fugi*, 9 B. L. R. 6), and each passed independent orders on the cases read by him, but did not concur in or sign the orders passed by his colleague.—ED., I. L. R.

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gether, and while Mr. Jackson was proceeding to read the affidavit, they stopped him and rejected the application ; so that there can be no doubt that the Judges were sitting to hear the case in accordance with the order of the Chief Justice and the practice of the Court.] The Judges must give the parties a hearing. They are appointed to hear and determine cases, and cannot determine them without a hearing. Suppose they had said they would not hear the defence, but would act according to the case for the prosecution, could they be said to be acting according to your Lordship's instructions? [GARTH, C.J.—Suppose I did the same thing, who is to set me in order? Is a Division Bench consisting of two Puisne Judges in a different position from a Division Bench consisting of myself and another Judge? In such a case the proper course is to appeal to Government.] Your Lordship is, undoubtedly, above the other Judges of the Court. [GARTH, C.J.—As Chief Justice, I have certain functions to perform in constituting Benches, but having done so, have I power to call them to account?] There is a minute by Sir Barnes Peacock pointing out how the Chief Justice can interfere in such cases. My case is, that there has been no hearing, and that your Lordship has power to direct the case to be heard. He also referred to *The Queen v. Zuhiruddin*.¹

GARTH, C.J.—This was an application made to me by Mr. Branson on Tuesday last in the case of *The Empress v. Moulvie Abdool Sobhan*.

The prisoner is charged with bribery ; and his case stands for trial at the next Criminal Sessions at Patna. A rule had been obtained on his behalf in this Court, calling upon the Crown to show cause why his case should not be transferred for trial either to the High Court in its original criminal jurisdiction, or to any other Court of Session where the jury system prevails.

The ground upon which this rule was obtained (stated shortly) was, that there was such a strong feeling and prejudice existing against the prisoner in the Patna district, that he could not secure a trial there by fair and unprejudiced jurors or assessors.

This rule came on to be heard before the Criminal Bench on the 27th instant (last Monday). Mr. Jackson appeared in support of it, and I find from the affidavits that he stated to the Court the nature of his application, and the grounds upon which he relied in support of it ; that a discussion then ensued, in which the learned Judges appear to have expressed a view against the application ; and upon Mr. Jackson proposing to read his affidavits *in extenso*, they declined to hear them, and informed Mr. Jackson that his application was refused.

Mr. Branson then applied to me on the following morning, as the Chief Justice of this Court, to appoint another Bench to hear the rule, upon the ground that, in point of law, there had been no hearing before the Criminal Bench. He contended that the Judges were bound to allow Mr. Jackson to read his affidavits, and that they could not possibly know the facts without ascertaining what the affidavits contained ; and that, as they had not done so, the decision ought to be treated as a nullity, and that I, as Chief Justice, had the power to refer the case for trial to another Bench.

In support of this view he cited two precedents, to which I shall presently refer, where, as he contended, a similar power had been exercised by the Chief Justice of this Court.

¹ I. L. R., 1 Cal. 219.

I was strongly of opinion at the time that I had no power at all to interfere, but having regard to the novelty and importance of the question, I took time to consider my judgment.

Having done so, I am more than ever satisfied that I have no such power, and that the precedents referred to by Mr. Branson have no application to the present case.

The first of these occurred in the early part of the year 1869.

A Criminal Bench of this Court, consisting of two Judges, had been appointed by the Chief Justice in the usual way, for the purpose of hearing criminal appeals; instead of sitting together to hear these appeals, the Judges thought proper to hear them separately, that is to say, one Judge sitting alone heard some of them, and the other sitting alone heard the rest; but the judgments in all the cases were signed by both Judges. Upon this being represented to the Chief Justice, he considered that, in point of law, there had been no hearing at all of these appeals, because they had not been heard by a legally constituted Court, and one Judge sitting alone had no jurisdiction to hear them. He, therefore, ordered the same Criminal Bench to hear them again; and, upon the Judges of that Bench declining to do so upon the ground that they had been already judicially decided, the Chief Justice sent them to another Division Bench, by whom they were finally determined.

In this view of my learned predecessor I entirely agree. It is the province and duty of the Chief Justice, under s. 14 of the High Courts Act, to determine what Judge or Judges shall decide each case; and, if two Judges are appointed by him to hear an appeal, it is quite clear, I think, that no single Judge has any jurisdiction to hear it.

But here there was no question of jurisdiction. The rule was disposed of by a Court of two Judges duly constituted by myself for that purpose; and the only complaint is, that those Judges, having heard the case up to a certain point, decided it without allowing Mr. Jackson to read certain affidavits.

If they erred at all in this, their error was simply one of law in the course of dealing with a matter which was clearly within their jurisdiction. There is no pretence for saying, as it seems to me, that their decision was a nullity, or that the Chief Justice of this Court has any right to question its legality.

The other precedent referred to by Mr. Branson is *The Queen v. Zuhir-uddin*.¹ In that case a prisoner was committed to take his trial at Patna. On the application of the District Magistrate by letter to this Court, the Judge in the English Department made a summary order transferring the case for trial to Shahabad.

The prisoner then applied to this Court for a rule calling on the Crown to show cause why the order of transfer should not be rescinded, upon the ground that it had been made without notice to him, and that the Judge in the English Department had no power to make it.

This rule was heard by a Full Bench, of which the Judge of the English Department was a member, and with his entire concurrence the rule was made absolute.

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That case, it is clear, has no application at all to the present. It only decides that the transfer of a criminal case from one District Court to another can only be made by the High Court in its judicial capacity.

The reason, as I have already mentioned to Mr. Branson, why the learned Judges in the present case declined to hear the affidavits read, was because they were under the impression that Mr. Jackson had already explained the reasons upon which his application was founded; and because they were led to believe, from what Mr. Jackson himself had stated, that his client's objection was, not to the trial taking place at Patna, but to its being tried before the Sessions Judge there. Mr. Jackson, as I understand, had offered to withdraw his rule, if his client could only be tried by another Judge at Patna, Mr. Tweedie. Under these circumstances, it did seem to the Judges an unnecessary waste of time to have the affidavits read. But if the prisoner's counsel think otherwise, and desire now to be re-heard upon the affidavits, they have only to make a proper application for that purpose.

If the Judges were under a wrong impression as to what Mr. Jackson said or intended, they are willing to be set right; and I can only say that, in expressing their readiness to hear the case again, they have done, as it seems to me, all that they could reasonably do, and what I certainly should have done myself under similar circumstances.

Then Mr. Branson has suggested that I should send the case to be tried by another Bench, on the ground that, before the same Bench, the case would not be heard without some bias. But, in the first place, I think that I have no power to do this; and, in the next place, if I had, I should not exercise it. I find nothing in the case, as it has been presented to me, which would justify either Mr. Branson or myself in supposing that the matter, if heard again, would not be dealt with in perfect fairness.

I would observe, in conclusion, that Mr. Branson seemed to be under the impression that a criminal case of this kind cannot be reconsidered. But in point of fact no judgment has yet been signed; and, even if it had, in my opinion an interlocutory order in such a matter is not necessarily final. It is clearly not a *res judicata*, but may be reconsidered or reviewed, or a similar application may be entertained, as often as the Court in its discretion may think proper.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Wilson.

IN THE MATTER OF THE PETITION OF DHUNNO KAZI AND ANOTHER.

THE EMPRESS *v.* DHUNNO KAZI AND ANOTHER.¹

1881.

Oct. 1.

8 Cal. 121.

Evidence—Duty of Prosecution—Inferences to be drawn on failure to call Witnesses—Misdirection.

It is *prima facie* the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution, and who must be able to give important information.

If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution.

The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth.

No such corresponding inference can be drawn against an accused.

KHORSHED KAZI and Dhunno Kazi were charged, the one with knowingly and dishonestly using as genuine a forged document, and the other with abetment.

The document impugned purported to be a deed of gift in favour of the accused by their father.

The facts of the case were, that one Sadarooddeen, the father of the two accused, died, leaving him surviving two sons and one daughter, who was married; that she, on her father's death, succeeded to one-fifth of the family-property; and, on the 17th August 1878, sold her share to one Badarooddeen, who was prevented from taking possession of the property by the two accused. Badarooddeen then brought a suit, for declaration of his title and for possession, in the Munsif's Court. The accused defended the suit, alleging that their father had executed, during his lifetime, a deed of gift, conveying his whole estate to them. The defendants were committed for trial before the Sessions Court.

In the Sessions Court the evidence relied on by the prosecution as showing that the document was false, was, that it purported to be registered before a certain kazi on the 12th April 1854 under No. 32. The books of the Registration Office showed, however, no such conveyance to have been registered under that number; nor was the person purporting to seal the document as kazi, kazi during the year 1854.

Out of ten attesting witnesses to the document, seven were dead, two were subpoenaed by the defence (but not called), and the third did not put in any appearance at all.

The Sessions Judge, in his charge to the jury, pointed out to them that the Registrar's books showed the registration of no such document as the one alleged to have been registered on the 12th April 1854; and added that, as regards this point, "the evidence clearly showed that the document was not really attested

¹ Criminal Appeal, No. 530 of 1881, against the order of *J. P. Grant, Esq.*, Sessions Judge of Hooghly, dated the 6th July 1881.

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or registered by any official kazi, and that the certificates of such attestation and registration were clearly forgeries." He thus stated to the jury that "he thought it right to bring to their notice that the accused's pleader in the civil suit had adopted the extraordinary precaution of requiring his client to endorse on the document itself a statement that he and his brother tendered it for production in evidence, before he, the pleader, would undertake to put it in."

"That the prosecution might please themselves as to the amount of proof that they put forward, but that it was not required that they should put forward exhaustive proof; any omission on their part being a subject for the consideration of the jury."

As regarded the attestation of the document, he said that, "had the three surviving attesting witnesses been called by the defence, they might have given important evidence. If such evidence would have supported the defence, why was it not called? You are entitled to presume from this mere fact that these witnesses, being cited for the defence, would not, if called, have supported it."

The jury found the first accused guilty under s. 471 of the Penal Code, and the second accused under ss. 491 and 109; and they were sentenced by the Court to rigorous imprisonment for five years and one year respectively.

The prisoners appealed to the High Court.

Baboo *Umbica Churn Bose* for the appellants.

No one appeared for the Crown.

The judgment of the Court (PRINSEP and WILSON, JJ.) was delivered by

WILSON, J.—We think there must be a new trial in this case. The first accused person is charged with knowingly and dishonestly using as genuine a forged document. The second is charged with abetting that offence. The using charged was a using of the document as evidence in a civil suit. In that suit, which was in respect of certain land, the plaintiff derived his title from the sister of the accused by right of inheritance from her father. The document put in on behalf of the accused, and which forms the subject of the present charge, purported to be a conveyance of the property by the father in his lifetime to the accused.

The learned Judge appears to us, looking at his summing up as a whole, to have left the right issues to the jury, which were briefly stated, whether the document was forged, whether it was used with knowledge of that fact, and whether this was done fraudulently or dishonestly.

But in dealing with the evidence bearing upon these issues, the learned Judge seems to us to have directed the jury erroneously upon several material points.

The learned Judge says: "Then I must bring to your notice the circumstance that the accused's pleader in the civil suit adopted the extraordinary precaution of requiring his client to endorse on the document itself a statement that he and his brother tendered it for production in evidence in the suit, before he, the pleader, would undertake to put it in." Whether this conduct on the part of the pleader be usual or unusual, it is no evidence against the accused in the prosecution.

A more serious error is to be observed in the manner in which the learned Judge has dealt with the fact of the non-production of the survivors among those whose names appear as attesting witnesses to the document in question. The learned Judge points out first: "Of the ten, only three survivors; of whom two

have been cited to this Court by the defence, but have not been called by them, and the third has kept out of the way in rather a marked manner." He then, after stating quite correctly that the burden of proof is on the prosecution, proceeds: "But the prosecution may please itself without dictation from any one as to the extent or amount of proof that they will put forward. If they do not put forward enough to satisfy a jury, they have, of course, only themselves to blame; but they are not required to bring exhaustive proof of their case."

He then points out correctly, as it appears to us, that the weight to be attached to the non-production of material evidence by the prosecution must depend upon the circumstances of the case. And he proceeds: "Now this present is a very peculiar case. It is practically a sister prosecuting two brothers, and with the serious offence of forgery. You will at once understand how difficult it is for the prosecution to depend upon the evidence of the purporting attesting witnesses, who are still available. One of these has kept out of the way of both sides, the other two have been secured for the defence, and one of them is in the employ of the accused; but others have not after all been called before you by the defence." And he adds: "You are entitled to presume from this mere fact that these witnesses, being cited for the defence, as they were, would not, if called, have supported it." Later on he says: "The two attesting witnesses snatched from the prosecution, after it had been declared on the appeal in the previous trial by the accused that the prosecution ought to call them, might and should have been called"—*i. e.*, by the defence.

The views expressed in these passages form the foundation for a considerable part of the learned Judge's summing up; and they seem to us to convey erroneous notions of the position of prosecutor and accused in a criminal case.

The only legitimate object of a prosecution is to secure, not a conviction, but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connection with the transactions in question, and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution.

There is no corresponding inference against the accused. He is merely on the defensive, and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses of the case for the prosecution, or to call witnesses, or to meet the charge in any other way he chooses; and no inference unfavourable to him can properly be drawn, because he takes one course rather than another. In the present case, these considerations apply with peculiar force. If the witnesses referred to by the learned Judge are thought by the prosecution to be trustworthy men, the prosecution was bound to call them. If they are thought not to be so, it seems to us specially unreasonable to reproach the accused with not calling them.

On these grounds, we think that the jury has been misled in a manner that must have prejudiced the accused, and the case must be tried again.

As the case has already been twice tried, it seems to us to be better, and it will, we think, be more satisfactory to the learned Judge whose summing up

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we have had to consider, that it should not be a third time tried at Hooghly. We, therefore, direct the new trial to take place at Burdwan.

The Magistrate of Hooghly will make arrangements for the attendance of the witnesses before the Sessions Court at Burdwan, after hearing from the Sessions Judge the date fixed for the trial.

Appeal allowed, and case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Wilson.

1881.
Sep. 22.

IN THE MATTER OF THE PETITION OF KALI CHURN CHUNARI
AND OTHERS.

8 Cal. 154.

THE EMPRESS *v.* KALI CHURN CHUNARI AND OTHERS.¹

Evidence—Memorandum made by Police-officer—Refreshing Witness's Memory—Examination of Witness—Criminal Procedure Code (Act X. of 1872), ss. 119 and 126.

A prisoner on his trial is not entitled to insist that a memorandum made by a police-officer under the provisions of s. 119 of the Code of Criminal Procedure shall, in the course of the examination of such officer, be referred to by the latter for the purpose of refreshing his memory.

*Reg. v. Uttamchand Kapurchand*² distinguished.

In this case it appeared that two of the witnesses for the prosecution had made statements before the Deputy Magistrate who tried the case, which, the accused alleged, were in direct contradiction to certain statements which they had previously made to the police-inspector on a preliminary investigation made by the latter into the circumstances of the case. The accused applied to the Magistrate to send for the inspector's memoranda of the statements, in order that they should be used for the purpose of refreshing the inspector's memory as to the statements made to him. The Deputy Magistrate refused, and the accused (who was convicted) appealed to the District Judge, whose judgment, so far as material for the purposes of this report, was as follows :—

"I think the prisoners in this case were not entitled to have the sub-inspector summoned with the diaries (police)—that is to say, they were not entitled to have the diaries produced in this way. They were at perfect liberty to summon the sub-inspector, and examine him as to statements made before him; and if he had the diaries containing those statements as noted by him, and could not remember without reference to them, it would have been proper to let him refer to them. I gather, however, that when the sub-inspector was examined, the diaries were not at hand. Subsequently, they were sent for and examined by the Deputy Magistrate, and it is to be regretted that they were not before him at an earlier stage; for it seems that Bangshi and Napher, two important witnesses, made very different statements in his Court to what they are represented as having made before the police. Appellants apparently tried to prove this by the sub-inspector, but he could not remember what they had said. The evidence of these two witnesses is conflicting on one or two material points, and I think under all the circumstances it cannot be relied on."

¹ Criminal Motion, No. 229 of 1881, against the order of *W. Macpherson, Esq.*, Officiating Sessions Judge of the 24-Parganas, dated the 6th June 1881.

² 11 Bom. H. C. R. 120.

The District Judge considered that the other evidence on the record was sufficient to convict the prisoners, and dismissed the appeal. The accused then moved the High Court to reverse this decision, on the grounds that the inspector's memoranda should have been sent for and allowed in evidence, and that the accused had been prejudiced in their defence, because the Magistrate had recorded some of the evidence for the defence before the case for the prosecution had closed.

Mr. *H. C. Mendes* for the petitioners.

The judgments of the Court (PRINSEP and WILSON, JJ.) were as follows :—

PRINSEP, J.—In my opinion there is no ground for our interference in this case. The objection raised is, that the Deputy Magistrate refused to require the police-officer to refresh his memory from a statement of the witness which he had recorded under s. 119 of the Criminal Procedure Code. It does not appear that this police-officer, when examined as a witness, desired so to refresh his memory. I think that the accused was not entitled to insist upon the police-officer refreshing his memory by referring to his notes, because, under s. 126, he was not entitled himself to see these notes or any papers prepared in the course of a police-investigation; and s. 119 declares that such notes shall not be treated as part of the record, or be used as evidence. *Reg. v. Uttamchand Kapurchand*¹ is not in point.

As regards the other objection taken, I have not been shown that, in the procedure taken by the Deputy Magistrate, the accused has been any way materially prejudiced in his defence. It seems to me rather that the Deputy Magistrate had very good grounds for examining the witnesses for the defence on the day on which they attended, rather than deferring their examination until some of the witnesses for the prosecution, who were not in attendance, had appeared, so that they might be cross-examined. The application is therefore refused.

WILSON, J.—I entirely agree with Mr. Justice Prinsep with regard to the second point. With regard to the first point, I have a very few words to add regarding the question of refreshing the memory. I entirely agree, if I may say so, with what was decided by the Bombay Court in the case cited before us. What was decided in that case was this, that where a witness comes forward at a trial and makes a statement contradicting his statements previously made to the police, the accused or his pleader is entitled to cross-examine him with respect to his former statement; that if he denies, it may be contradicted, and that one of the ways in which he may be contradicted is by calling the police-officer, before whom he made the statement, who may refresh his memory from his diary. That seems to me to be the whole of the decision of the Bombay Court. But the question now before us is not, whether the witness can be cross-examined as to his previous statement, nor whether the police-officer may be examined to contradict him, nor whether the officer may refer to his diary; but the question is, whether the prisoner has a right to insist that the diary, if not in Court, shall be sent for, or, if it be in Court, shall be referred to for the purpose of refreshing the police-officer's memory. I think the prisoner has no such right. I know of no authority for saying that a witness can be compelled to refresh his memory from any document, unless the document is either in the possession of the party who desires to put it to the witness, or is at least such as he can insist on having produced. This is a document which the law expressly declares that the defence has no right to see. S. 126 says: "Any Criminal Court may send for the police-diaries of a case under enquiry or trial in

1881.

IN THE
MATTER OF
THE PETITION
OF KALI
CHURN
CHUNARI,
S Cal. 154.

¹ 11 Bom. H. C. R. 120.

1881.
IN THE
MATTER OF
THE PETITION
OF KALI
CHURN
CHUNARI,
8 Cal. 154.

such Court, and may use such diaries to aid it in such enquiry or trial." That is the right of the Court. "Neither the prisoner nor his agents shall be entitled to call for them, nor shall he or they be entitled to see them, merely because they are referred to by the Court. But if they are used by the police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer," in either of these two cases the prisoner is entitled to see them; but until this is done, he has no such right. Therefore it seems to me that the decision of the Deputy Magistrate is correct.

I guard against saying anything as to the mode in which a Court should exercise its discretion in permitting the document to be used as indicated in the section. The question as to whether in this case that discretion has been wisely used or not is not before us.

Application refused.

APPELLATE CRIMINAL.

Before Mr. Justice Tottenham and Mr. Justice Broughton.

1881.
Sep. 16.
8 Cal. 166.

IN THE MATTER OF THE EMPRESS ON THE PROSECUTION OF THE BANK OF BENGAL (PETITIONERS) *v.* DINONATH ROY (OPPOSITE PARTY).¹

Presidency Magistrates' Act (IV. of 1877), ss. 167, 170—"Person affected by an Order"—Application for copy of Order and Depositions—Refusal—Specific Relief Act (I. of 1877), ss. 7, 45.

All prosecutors whose charges are dismissed by the Presidency Magistrate are affected by the order of discharge, and are, therefore, entitled under s. 170 of the Presidency Magistrates' Act to obtain copies of the order made by, and of the depositions taken before, the Magistrate.

This was a rule moved for under the Specific Relief Act and under s. 170 of the Presidency Magistrates' Act, calling upon the Presidency Magistrate to show cause why he should not give to the Bank of Bengal, through their constituted attorney, Mr. Macnair, copies of the depositions of the witnesses and the orders recorded in the matter of the Bank's complaint against one Dinonath Roy, who had been discharged by the Magistrate.

Mr. *Bonnerjee* showed cause against the rule.—The Court has no right to issue an order of this sort under the Specific Relief Act. S. 7 says that specific relief cannot be granted for the mere purpose of enforcing a penal law. S. 45 does not give power to the Court to compel a Magistrate to give copies. Before an order can be made under Ch. VIII., certain conditions referred to therein must be complied with. The words 'property, franchise, &c., in s. 45 refer to civil, not criminal, matters. Nine chapters out of the ten composing the Specific Relief Act relate to civil matters. The absurdity of such an order as is now asked for is shown by s. 48, which says that "every order under Ch. VIII. shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court." Can it be said that this order, if granted, could be appealed against by the Magistrate? The words "personal right," in s. 45, refer to civil matters. The Bank is clearly not entitled to an order under the Specific Relief Act. Nor can the Bank be said, under s. 170 of the Presidency Magistrates' Act, to be a person affected by an order under the Act, and therefore entitled to be furnished with a copy of

¹ Criminal Miscellaneous Case, No. 27 of 1881, against the order of *F. J. Marsden, Esq.*, (Chief Presidency Magistrate), dated the 10th September 1881.

the order and depositions. Ss. 167—182 deal with the question of appeals. S. 170 allows a person affected by the order to obtain copies of the order and copies of depositions on payment of costs. Taking the position of the sections, "the person affected" is the person who only is affected by the order of the Magistrate. S. 180 says "that there shall be no appeal from any order of a Presidency Magistrate, except in the cases provided for by this Act, or by any law for the time being in force." Here a complaint is made against the Magistrate; he has been asked under s. 170 to give copies, and he has refused; there is no power to appeal against such an order of refusal. Nor is the Bank of Bengal "a person affected by the order;" no order for compensation has been made against the Bank; the right to set the Local Government in motion in order to get an appeal does not make the Bank "a person affected."

[BROUGHTON, J.—If, Mr. Advocate-General, you can show us that the Bank is "a person affected by the order," we shall have no difficulty in applying the Specific Relief Act.]

The *Advocate-General* (*The Hon. G. C. Paul*) in support of the rule.—Comparing s. 170 of the Presidency Magistrates' Act with s. 276 of the Criminal Procedure Code, it appears that, so far as orders of Criminal Courts go, a copy is furnishable to a person affected by the order of the Court. S. 276 of Act XI. of 1874 does not apply to Calcutta; but s. 170 of the Presidency Magistrates' Act has evidently been taken from that section. There is no public prosecutor in this country. S. 276 lets in the prosecutor, and therefore s. 170 of the Presidency Magistrates' Act ought to have the same effect. We could move the Local Government under s. 167 to allow us to appeal. How can any person bring a suit for malicious prosecution unless he can obtain the order of discharge and the depositions? We are, therefore, affected by the refusal to give us copies.

The judgment of the Court (*Tottenham and Broughton, JJ.*) was delivered by

BROUGHTON, J.—The Chief Presidency Magistrate has been called upon to show cause why he should not give to the Bank of Bengal copies of the depositions of the witnesses and the orders recorded in the matter of their complaint made against Dinonath Roy, who has been discharged by the Magistrate.

This rule is moved for under the Specific Relief Act and under s. 170 of the Presidency Magistrates' Act.

Two questions arise in this matter : *first*, whether, under s. 170 of the Presidency Magistrates' Act, the Bank of Bengal, as the prosecutor in the case, have a right to the copies ; and *second*, whether, supposing that they have a right, and this right has not been acceded to by the Magistrate, the High Court can proceed, under s. 45 and the following sections of the Specific Relief Act, to order the Magistrate to fulfil his duty.

Although the rule has been moved for under the Specific Relief Act, it appears to us to be beyond doubt that the provisions of s. 15 of the High Courts' Charter Act enable the Court to make the order upon the Magistrate, if it ought to have been made. But we think that s. 45 of the Specific Relief Act is wide enough in its terms to apply to a case like this. S. 7 of the Specific Relief Act has been referred to as showing that "specific relief cannot be granted for the mere purpose of enforcing a penal law." It cannot be said, however, that an application to the Magistrate to grant copies of depositions and orders is an application "for the mere purpose of enforcing a penal law." Copies may be required for many purposes.

1887.

BANK OF
BENGAL
v.
DINONATH
ROY,
S Cal. 166.

1881.

BANK OF
BENGAL

v.

DENONATH
ROY,
& Cal. 166.

Then the application must "be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act." If the prosecutor has a right to the copies, his personal right would be injured if they were refused. And it does not appear that the applicant has any other specific and adequate legal remedy.

Then the question is, whether, under s. 170 of the Presidency Magistrates' Act, the applicant is entitled to copies of the depositions and order. S. 170 enacts that—"If any person affected by an order passed under this Act desires to have a copy of such order, or of any deposition or other part of the record, he shall, on applying for such copy, be furnished therewith, provided that he pay for the same, unless the Magistrate, for some special reason, thinks fit to furnish it free of cost." It is contended that this does not apply to a prosecutor, because the Crown is the prosecutor, and not the private individual. There is no doubt that, technically, the Crown is the prosecutor. But, supposing we were to say that on that ground the private individual cannot apply for copies of depositions, the consequences may be very serious. It is said it would be very inconvenient if the Magistrate were to be called upon to furnish those copies in every case. However great the inconvenience may be, it would be a much more serious thing if he were justified in refusing an application for copies. As far as the inconvenience goes, it has not been shown that it would be very great in any case, as the section provides that copies are to be furnished on payment of costs for the same, unless the Magistrate specially directs copies to be furnished without payment. But, supposing the prosecutor, having failed in his prosecution, is not allowed to get copies of the depositions, the consequences may be most serious to him. Take, for instance, the case in which a prosecutor charges the accused with defamation, or with bringing some charge against him which seriously affects his character, and suppose, for some reason which left the character of the prosecutor perfectly clear and untainted, the accused person were to be discharged, then, if the prosecutor were unable, under this section, to get copies of the depositions, it might be said that he had prosecuted a man for charging him with an infamous crime, and yet that the accused had been acquitted, and people would conclude that the prosecutor had been guilty of the crime imputed to him. We think this single instance would show that the consequences of refusing copies would be most serious. No distinction can be made between such a case as this and any other case; the section is perfectly general. A prosecutor who charges another with dishonesty, as in this case, if he cannot sustain the charge, might suffer an unjust imputation, unless by producing a true record of the proceedings he could show that his action was *bond fide*. No distinction ought to be made between the prosecutor in one case and in another. All prosecutors whose charges are dismissed by the Magistrate are, in our opinion, affected by the orders dismissing them, and are entitled under s. 170 to copies of the order and depositions.

The rule will be made absolute.

We direct that the copies be given to Mr. Macnair, attorney of the prosecutors.

Rule made absolute.

APPELLATE CRIMINAL.

*Before Mr. Justice Mitter and Mr. Justice Maclean.*IN THE MATTER OF THE PETITION OF RADOINATH SHAHA.¹THE EMPRESS *v.* RADOINATH SHAHA.

1881.

Sep. 6.

8 Cal. 195.

Excise Act (Beng. Act VII. of 1878), ss. 53, 59, and 64—Beng. Act IV. of 1881, s. 2—Selling Spirituous Liquor without License—Reasons for finding of Magistrate in case of Conviction to be recorded—Criminal Procedure Code (Act X. of 1872), s. 227, cl. (h).

A Magistrate, in cases where no appeal lies, is bound to record a brief statement of his reasons for convicting an accused.

Where a person is arrested, and certain charges are entered against him in the police-book, he should not, on the day of trial, be called upon to meet other charges without previous intimation being given to him of the additional charges.

ONE Radoinath Shaha was arrested on the 12th July 1881, and charged with selling (under s. 53 of Beng. Act VII. of 1878), and having in his possession (under s. 64) imported spirituous liquors without a license.

The prisoner was released on bail, and the case postponed until the 25th July 1881, when the Magistrate tried him summarily on the following charges:—

- 1st.—Refusal to produce license (s. 59).
- 2nd.—Illegal sale of imported liquors (s. 53).
- 3rd.—Illegal possession of imported liquors (s. 64).
- 4th.—Breach of condition of license (s. 59).

The prisoner pleaded not guilty, but was found guilty under ss. 53 and 59, and fined Rs. 100.

No statement, however, of the grounds for his conviction was recorded as required by s. 227, cl. (h), of Act X. of 1872. The prisoner applied to the High Court under the revisional section.

Baboo *Jadub Chunder Seal*, for the petitioner, contended that the conviction under s. 64 was bad, as that section had been repealed by s. 2 of Beng. Act IV. of 1881; and that the whole conviction was illegal, no grounds having been given for the conviction as required by s. 227, clause (h), of Act X. of 1872.

The judgments of the Court (*Mitter and Maclean, JJ.*) were as follow:—

MITTER, J.—The petitioner, it is said, owns a wine-shop, in the village of Chundun Pookur, within the jurisdiction of the police-station of Barrackpore. On the night of the 12th July, he was arrested by the Inspector, A. H. Prichard, and taken to the police-station. There the inspector entered a charge against him for selling, and having in possession, English liquor without a license. He was released on bail, being directed to appear before the Magistrate of Barrackpore the next day, the 13th July, to answer these charges. On his application, the case was postponed to the 25th July, on which date the Magistrate tried him summarily for the following offences:—

- 1st.—Refusal to produce license (s. 59).
- 2nd.—Illegal sale of imported liquors (s. 53).
- 3rd.—Illegal possession of imported liquors (s. 64).
- 4th.—Breach of condition of license (s. 59).

¹ Criminal Motion, No. 223 of 1881, against the order of *Major W. Hopkinson*, Cantonment Magistrate of Barrackpore, dated the 25th July 1881.

1881.
 IN THE
 MATTER OF
 THE PETITION
 OF RADOL-
 NATH
 SHAHA,
 8 Cal. 195.

The petitioner pleaded not guilty to all the charges. But he was found guilty under ss. 53 and 59 of the Act, and fined Rs. 100. It is not stated by the Magistrate whether both the charges under s. 59 were established, or only one of them. Under clause (h), of s. 227 of the Criminal Procedure Code, the Magistrate is required to make a brief statement of the reasons for the conviction. But no such statement has been recorded.* The trial has been indeed too summary; the record and the register kept under s. 227 furnishing no information as to the ground upon which the conviction is based.

Now, as far as the charges one and four are concerned, we think the Magistrate should not have tried the petitioner for them. He was arrested, and a charge was entered against him for selling, and having in his possession, imported liquor without a license. He would, therefore, be prepared to meet these charges alone. It does not appear that, between the 12th of July and the 25th of that month, when the trial took place, the petitioner had any intimation that he would be called upon to meet other charges. In our opinion, therefore, he should not have been tried for the first and the fourth charges mentioned above.

As to the charge under s. 64, probably the Magistrate was not aware that that section has been repealed by Act IV. of this year, s. 2. There remains the charge under s. 53 for the sale of imported liquor without a license. In the absence of the reasons for the conviction, it is impossible for this Court to judge how far this conviction is legal. From the explanation submitted by the Magistrate, it does not appear that there was any evidence of the sale of imported liquor. Be that as it may, we think that, under the circumstances of this case, the conviction should be quashed on the ground that the Magistrate omitted to record briefly the reasons for his finding, which he is required to do under s. 227 of the Criminal Procedure Code. We accordingly set it aside, and direct a re-trial of the petitioner for the alleged offence of selling imported liquor without a license under s. 53. The question, whether the petitioner will be entitled to the refund of the fine or not, will depend upon the result of the re-trial.

MACLEAN, J.—The proceedings, as recorded in the register kept under s. 227, Act X. of 1872, are not sufficient to indicate that the conviction is supported by proper evidence. The brief statement of the reasons for conviction required by clause (h) is entirely wanting, and the explanation contained in the Magistrate's letter of 19th August is not satisfactory.

In the first place, it appears that the accused, so far from not producing a license, produced two. They were, however, for sale of country spirits. It is not alleged that the accused had a license himself for sale of imported liquor, so he could not be punished for not producing it.

The next charge is for selling imported liquor illegally. The record does not show how this charge was proved. But it appears that one Dwarkanath Ghose produced a license, and stated that the accused was his servant. This the Magistrate says he does not believe, having regard to something that passed in his Court in May last. That record is not evidence in this case; but if it were, the presumption is, that the quarrel that occurred there has been followed by an alliance between the two men. If Dwarkanath is selling spirits at two shops under score of one license, he should be proceeded against for any offence he thus commits; and the accused, if he abets that offence, may also be proceeded against as an abettor.

Possession of imported liquor must be dealt with under some section other than s. 64, which has been repealed by Beng. Act IV. of 1881.

The last charge is of a breach of the condition of his license. The record does not specify the condition broken.

Lastly, the conviction should have stated which of the offences was punished, and by what amount of fine, as the penalty under s. 59 cannot exceed Rs. 50 for one offence.

I concur in setting aside the conviction, and directing the Magistrate, if he thinks necessary, to re-try the accused.

Conviction set aside.

1881.

IN THE
MATTER OF
THE PETITION
OF RADOI-
NATH
SHAH,
8 Cal. 195.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF BANEY MADHUB SHAW AND ANOTHER.¹

1881.

THE EMPRESS *v.* BANEY MADHUB SHAW AND ANOTHER.

Nov. 2.

Excise—Sale by Servant—Breach of Condition of License—Beng. Act VII. of 1878, ss. 41, 42, and 59.

8 Cal. 207.

The conviction of servants of a licensed vendor of spirits for a breach of the license is not necessarily illegal.

*In re Ishur Chunder Shaha*² followed.

*The Empress v. Nuddiar Chand Shaw*³ dissented from.

Two servants of a licensed vendor of spirits were charged with having committed two breaches of the conditions of the license, and the maximum fine for each breach was inflicted.

Held that the Magistrate was competent to punish each of the servants separately in this manner.

The excise-officer, to whom a licensed vendor of spirits is bound to produce his license, must be an excise-officer of the higher grades, not any police-officer, who may be exercising the powers of an excise-officer.

THE petitioners in this case were charged before the Chief Presidency Magistrate with having, on the 6th September 1881, at No. 85, South Collingah Street, sold two bottles of imported spirituous liquor, without an additional license, in contravention of s. 53, Beng. Act VII. of 1878; and they were further charged with committing two breaches of the sixth and twelfth conditions of their license under s. 59 of Beng. Act VII. of 1878.

The petitioners were convicted and sentenced each to a fine of Rs. 100, *vis.*, Rs. 50 each for two breaches of license.

Baboo *Surendra Nath Banerjee* for the petitioners.

The *Officiating Standing Counsel* (Mr. *Bonnerjee*) appeared to support the conviction.

The judgment of the Court (*Prinsep* and *Tottenham*, JJ.) was delivered by

PRINSEP, J.—The petitioners in this case are two servants of a licensed vendor of spirits, who have been convicted, each of them, for having, in breach of their license,—*firstly*, sold a bottle of brandy, which was carried off, and not drunk, on the premises; and *secondly*, for having refused, on the demand of the police inspector, to produce their license.

¹ Criminal Motion, No. 269 of 1881, against the order of *F. J. Marsden, Esq.*, Chief Presidency Magistrate of Calcutta, dated the 7th September 1881.

² 19 W. R., Cr. Rul., 34.

³ 1 L. R., 6 Cal. 832; S. C., 8 C. L. R. 152.

1881.

IN THE
MATTER OF
THE PETITION
OF BANEY
MADHUB
SHAW,
8 Cal. 207.

As regards the first breach, an objection is taken that the master, the licensed vendor, was alone liable, and not the servants. Two judgments of this Court have been considered by us on this point :—*In re Ishur Chunder Shaha*,¹ and the other recently delivered by Mr. Justice Pontifex and Mr. Justice Field—*The Empress v. Nuddiar Chand Shaw*.² These decisions are in conflict. Our opinion inclines to the decision in *In re Ishur Chunder Shaha*;¹ and having regard to the fact that that decision was not brought to the notice of the Judges who decided the more recent case, we think that we are justified in following it. We accordingly hold that the conviction of the servants is not necessarily illegal.

The next objection taken is, that, inasmuch as there was only one breach of license in this respect, there should have been only one penalty inflicted; whereas, by reason of the maximum fine having been imposed on each of the servants, the penalty has been doubled. It appears to us that the Magistrate was competent to punish each of the servants separately in the manner he has done, if he found, as he apparently has found, that each of them committed a breach of the license. S. 59 of Beng. Act VII. of 1878 no doubt declares that the amount may be recoverable from the master; but it does not necessarily follow that the servants may not be liable for the full amount prescribed by the law; although, possibly, the master may reasonably object to be saddled with more than one full penalty for the carelessness or neglect of his servant. We, therefore, think that the convictions and fines imposed, as regards this breach of the license, should be sustained.

As regards the other penalties for breach of license in consequence of refusal to produce the same on demand of the Inspector Fitzgerald, we are of opinion that the convictions and fines must be set aside. It has been argued by the learned Standing Counsel, who appears to support the convictions, that, reading ss. 41 and 42 together, the officers empowered under s. 42, among whom the Inspector in the present case is, must be regarded as excise-officers within the terms of the Act, and that it would be impossible for a police-officer so acting as an excise-officer, to discharge his duties, if he had not power to demand the production of a license. But, although he might properly demand the production of the license, and, on refusal to produce it, proceed to arrest or to confiscate as allowed by the Act, it would not necessarily follow that such refusal would render the license-holder or his servants liable to fine under s. 59 for breach of the license, unless it were expressly provided that he or they were bound to produce it. The condition contained in the license is to the following effect: "That he" (the license-holder) "produce for inspection, on demand of any excise-officer above the rank of a head-constable or chuprasi, his license and accounts," &c.

Now, if the term the 'excise-officer' had alone been used in that clause of the license, we should not be disinclined to hold that it should be interpreted to mean an excise-officer within the meaning of the Abkari Act; and therefore a police-officer, like Inspector Fitzgerald, was duly empowered under s. 42 of the Act. Inasmuch as that clause of the license proceeds to declare that the excise-officer must be above the rank of a head-constable or chuprasi, we are of opinion that it was the intention of those who drew up this form of the license that the excise-officer should be an excise-officer of the higher grades; such an officer only, and not any police-officer who may be exercising the powers of an excise-officer. In this view of the terms of the license, we think that the convictions as regards the second breach must be set aside, and the fines, if paid, refunded.

¹ 19 W. R., Cr. Rul., 34.

² I. L. R., 6 Cal. 832; S. C., 8 C. L. R. 152.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF SAMIRUDDIN.

THE EMPRESS *v.* SAMIRUDDIN.¹*Evidence—Dying Statement—Presence of accused—Penal Code (Act XLV. of 1860), s. 300—Frame of Charge.*

1881.

Dec. 14.

8 Cal. 211.

The dying statement of a deceased person must be taken in the presence of the accused; if not so taken, the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory.

A prisoner was charged with "causing the death of A by inflicting a wound on him with a 'chheni,' with the intention of causing bodily injury such as was sufficient, in the course of nature, to cause death, or which he knew to be likely to cause death."

Held that the charge was defective and inexact as regarded the second and third clauses of the definition of murder in s. 300 of the Penal Code. With reference to the second clause, it should have run "likely to cause the death of A, the person to whom the harm was caused." With reference to the third clause, it should have said "ordinary course of nature."

ONE Samiruddin was charged with "causing the death of one 'Baul Mir,' *alias* 'Baber Ali,' by inflicting on him a wound with a 'chheni,' with the intention of causing bodily injury such as was sufficient, in the course of nature, to cause death, or which he knew to be likely to cause death."

The dying statement of the deceased had been recorded by the Deputy Magistrate as a deposition, but it did not appear that the deceased had been examined in the presence of the accused; this evidence was, however, admitted at the trial before the Sessions Judge, although the Deputy Magistrate had not been called to prove the writing taken down by him.

The medical evidence at the sessions trial consisted of the deposition of the native doctor taken before the Magistrate; but no evidence was given to show that the injuries were sufficient, in the ordinary course of nature, to cause death.

The Sessions Judge, concurring with the assessors, found the prisoner guilty under s. 302 of the Penal Code, and sentenced him to death. The sentence was sent up to the High Court for confirmation; and the prisoner also appealed.

No one appeared for the prisoner.

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

FIELD, J.—In this case, one Samiruddin has been convicted of murder by the Sessions Judge of Furreedpore sitting with assessors, and has been sentenced to death. This sentence has been referred for confirmation; and the prisoner has appealed at the same time.

In referring the case, the Sessions Judge forwards a copy of a letter received by him from the Civil Surgeon, and expressing an opinion as to the nature of the wound inflicted upon the person, of causing whose death the prisoner has been convicted. We cannot receive, or in any way act upon, this extra-judicial matter. The only opinion of the Civil Surgeon, which can be considered in judicially dealing with the case, is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected.

¹ Criminal Appeal, No. 59 of 1881, against the order of F. F. G. Campbell, Esq., Officiating Sessions Judge of Furreedpore, dated the 14th November 1881.

1881.

IN THE
MATTER OF
THE PETITION
OF SAMIR-
RUDDIN
S. Cal. 211.

The assessors were of opinion that the prisoner should be convicted of murder. But the value of this opinion is very much diminished when we find that some important matter, which should not have been admitted as evidence, was admitted to influence their minds.

The piece of evidence to which this observation relates is the dying statement of the deceased Baber Ali. This was recorded by the Deputy Magistrate as a 'deposition'; but it does not appear that Baber Ali was examined in the presence of the accused Samiruddin, and unless he were so examined by the Deputy Magistrate exercising judicial jurisdiction, the writing made by such Magistrate could not be admitted to prove the statement made by the deceased. This statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it, he might have refreshed his memory with the writing made by himself at the time when the statement was made.

The prisoner was charged with "causing the death of one Baul Mir, *alias* Baber Ali, by inflicting on him a wound with a 'chheni,' with the intention of causing bodily injury such as was sufficient, in the course of nature, to cause death, or which he knew to be likely to cause death." This charge was probably intended to refer to the second and third clauses of the definition of murder contained in s. 300 of the Penal Code. But it is defective and inexact as regards both clauses. With reference to the second clause, it should have run thus—"Likely to cause the death of Baber Ali, the person to whom the harm was caused." With reference to the third clause, it should have said "ordinary course of nature."

The medical evidence in the case is the deposition of the native doctor, who was not examined in the Court of Session, as we think he should have been. This deposition goes to show that deceased "died from gangrene of the left lung, and pleura brought on by" the injuries observed on his body. The native doctor further says that the wound inflicted on the deceased was sufficient to bring on gangrene.

There is no evidence that the injuries were sufficient, in the ordinary course of nature, to cause death. There is no evidence that gangrene was a likely or probable result of the injuries inflicted, or that death was a likely or necessary result of gangrene. The native doctor was not even asked, and did not say, whether the injuries inflicted were likely to cause death.

Upon the evidence on the record, we think that the prisoner cannot be convicted of murder, or of culpable homicide not amounting to murder. Upon his own confession, and the evidence of the witnesses, Palon Mandal and Holodhur Das, we are satisfied that he wounded or injured the deceased with a 'chheni,' and we think that he ought to be convicted under s. 326 of the Penal Code of causing grievous hurt by a dangerous weapon. We set aside the conviction and sentence for murder: and, convicting the prisoner Samiruddin under s. 326 of the Indian Penal Code, sentence him to ten years' rigorous imprisonment.

APPELLATE CRIMINAL.

*Before Mr. Justice Pontifex and Mr. Justice Field.*THE EMPRESS *v.* KOLA LALANG AND ANOTHER.¹*Construction of Act—Beng. Act VII. of 1878, ss. 15, 17, and 61—Specified Quantity of Spirits—Maximum Amount.*

1881.

Dec. 17.

S. Cal. 548

Penal Statutes must be construed strictly, *i. e.*, nothing is to be regarded as within the meaning of the Statute which is not within the letter, and clearly and intelligibly described in the very words of the Statute itself.

Where, under s. 15, Beng. Act VII. of 1878, the Chief Commissioner of Assam, exercising the powers of the Board of Revenue, fixed, by a Circular Order, the limit at six quart bottles of country spirit as allowable for retail sales, and an accused was charged, under s. 17, with possessing more than that quantity, but the amount he had was less than the amount stated in s. 15,—

Held that he was not guilty of any offence under s. 61, and that no lesser quantity than that specifically mentioned in s. 15 of country spirits, which might have been declared to be the maximum quantity by any such order made under the provisions of s. 15, could be deemed to be the quantity specified in s. 15 within the meaning of s. 61.

THIS was a case referred to the High Court by the Deputy Commissioner of Kamroop. The facts were as follow :—

The accused were sent up, on the 4th October 1881, by the police, on a charge of having in their possession a quantity of distilled country spirits at Sonapur, within the area for which the right of manufacture and sale of native spirits had been farmed out to one Gura Dyal Mohaldar, the quantity being four quart bottles, and one large pot of liquor, found to contain ten quart bottles of spirits,

The Extra Assistant Commissioner, not being satisfied as to what quantity each of the accused had, and being of opinion that, under s. 61, Beng. Act VII. of 1878, any person could lawfully have in his possession twelve quart bottles, directed the accused to be discharged. It appeared, however, from the statement of the accused themselves, that one of them at least was in possession of the pot containing ten quart bottles full.

It also appeared that Beng. Act VII. of 1878 was extended to Assam by the Chief Commissioner with the previous sanction of the Governor-General in Council, and that, under the power contained in the Act to that effect, the Chief Commissioner, who has the same powers as the Board of Revenue, by Circular No. 2E., dated the 12th June 1880, fixed the limit for retail sales of country spirits at six quart bottles.

Upon these facts, the Deputy Commissioner, considering that there had been a failure of justice, referred the case to the High Court, on the ground that the Extra Assistant Commissioner was wrong in holding that the quantity of spirits, specified in s. 15, Beng. Act VII. of 1878, was, for the purpose of the case under consideration, to be considered twelve quart bottles, but that he should have taken it at the amount mentioned in the Circular of the Chief Commissioner, *viz.*, six quart bottles.

No one appeared on the reference.

The judgments of the Court (PONTIFEX and FIELD, JJ.) were as follow :—

FIELD, J.—The question in this case is concerned with the construction of ss. 15 and 61 of the Beng. Excise Act, VII. of 1878. Two persons were charged

¹ Criminal Reference, No. 208 of 1881, from the order made by C. Donovan, Esq., Deputy Commissioner of District Kamroop, dated Gauhati, the 27th October 1881.

1881.

EMPRESS

v.

KOLA

LALANG,

8 Cal. 214.

under s. 61 of this Act with "being in possession of a certain excisable article, to wit six quart bottles of native spirits, being a quantity in excess of the quantity specified in s. 15." Now, s. 15 is as follows: "Unless the Board shall otherwise specially direct, the sale of any excisable article in a larger quantity than is specified below shall be deemed to be a sale by wholesale, and the sale of any other quantity shall be deemed a retail sale: spirituous or fermented liquors, two imperial gallons, or twelve quart bottles." The Chief Commissioner of Assam, exercising the powers of the Board of Revenue, made an order under the provisions of s. 15, declaring that six quart bottles shall be the maximum amount; and the question is, whether any lesser quantity so declared to be the maximum quantity by the Board of Revenue, under the powers conferred by s. 15 of the Act, can be taken to be the quantity specified for each article in s. 15 within the meaning of s. 61. Now, it is a rule that a penal Statute must be construed strictly. The meaning of this rule is, that nothing is to be regarded as within the meaning of the Statute which is not within the letter—which is not clearly and intelligibly described in the very words of the Statute itself. It was said in the case of *Lord Huntingtower v. Gardiner*¹ that "effect must not be given to a penal Statute unless the offence charged comes within the very words of it;" and in the case of *Rex v. Bond*,² ABBOTT, J., said that "it would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the Act of Parliament do not authorize it." Again, Willes, J., said, in the case of *Britt v. Robinson*,³ that criminal enactments are not to be extended by construction, and that, "when an offence against the law is alleged, and when the Court has to consider whether that alleged offence falls within the language of a criminal Statute, the Court must be satisfied, not only that the spirit of the legislative enactment has been violated, but also that the language used by the Legislature includes the offence in question, and makes it criminal." Applying this rule of construction to the present case, we think it impossible to say that any lesser quantity of country spirits, which may have been declared to be the maximum quantity by any rule or order made under the provisions of s. 15 of the Act, can be deemed to be "the quantity specified in s. 15 within the meaning of s. 61." A thing specified is a thing definitely mentioned or designated; and that can scarcely be said to be specified which depends on a rule or order to be made at some future time, and which may never come to the notice of the class of outside persons with which s. 61 of the Act is concerned. For s. 15 is applicable to licensed vendors who would naturally know of any alteration made by the Chief Commissioner as to quantity under that section; but s. 61 applies to the general public who would have no general knowledge of any such alteration. It may be possible that the intention of those who promoted the Act was different; but if this were so, we can only say that adequate language has not been used to effectuate that intention. We think that the order of the Assistant Commissioner was correct, and we decline to interfere.

PONTIFEX, J.—I am of opinion that the order of the Assistant Commissioner is correct, and that we cannot interfere with it.

The charge was under s. 61 of the Beng. Excise Act. The Assistant Commissioner held that the persons charged were not subject to a fine, unless they were in possession of a larger quantity of native spirits than that actually specified in s. 15 of the Act.

¹ 1 B. and C. 297, at p. 299.

² 1 B. and Ald. 390, at p. 392.

³ L. R., 5 C. P. 503, at p. 513.

S. 15 enacts as follows: "Unless the Board shall otherwise specially direct, the sale of any excisable article, in a larger quantity than is specified below, shall be deemed to be a sale by wholesale: spirituous or fermented liquors, two imperial gallons, or twelve quart bottles."

This section applies only to the sale of liquor by licensed manufacturers and vendors.

The language by which legislative authority is deputed to the Board to vary the quantity is peculiar; and, as at present advised, it seems to me questionable whether the legislative authority so deputed empowers the Board (or in this case the Chief Commissioner) to lessen the quantity which is to constitute a wholesale sale even with respect to the licensed manufacturers and vendors mentioned in the section. And, apart from the peculiar language by which this legislative authority is deputed, it would seem, on general grounds, questionable. For though the Legislature might reasonably depute its authority for the purpose of relaxing the penal obligation of its own Act, it is scarcely reasonable to suppose that it would, even if it could, depute its authority to render its Act more stringent, to impose severe restraints without debate, and after having itself carefully considered and specified what quantity should be deemed to constitute a wholesale sale.

But, however this may be, I can find no authority deputed to vary the quantity so as to affect the general public under ss. 17 and 61, and to render them liable to a penalty for possessing a smaller quantity than that actually specified by the Legislature in s. 15.

According to the well-known rule, a Statute imposing penalties must be construed strictly; and the Assistant Commissioner was therefore, in my opinion, right in refusing to impose a fine in this present case.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

THE EMPRESS *v.* SODDANUND MAHANTY AND OTHERS.¹

Stamp Act (I. of 1879), ss. 37, 40—Arbitration—Award—Evading Payment of Stamp-duty.

Six persons acted as arbitrators in a dispute between two of their fellow-villagers, and delivered their award in writing. Subsequently, the award was filed in evidence by one of the disputants in a civil suit in the Court of the Munsif of Cuttack, who, on the ground that the document bore no stamp, impounded it, and forwarded it to the Collector, who ordered the writer to be prosecuted. The Deputy Magistrate, to whom the case was referred, summoned the six persons who had acted as arbitrators, and fined them Rs. 25 each. On a reference to the High Court by the District Magistrate,—

Held that the conviction was illegal, and should be set aside.

Held also that the procedure laid down in s. 37 of the Stamp Act must be strictly followed; and that, before a prosecution can be instituted under s. 40, the Collector is bound to form an opinion as to whether the offence was committed with the intention of evading payment of the proper duty.

In this case the accused were six persons who had acted as arbitrators in a dispute between two of their fellow-villagers respecting a plot of land, the value of which was not above Rs. 50. One of the disputants having afterwards filed

¹ Criminal Reference, No. 218 of 1881, from the order made by R. H. Pawsey, Esq., Magistrate of Cuttack, dated the 12th November 1881.

1881.
EMPRESS
v.
KOLA
LALANG,
8 Cal. 214.

1881.
Dec. 14.
8 Cal. 259.

1881.

ENTRESS

v.

SODDANOND

MAHANTY,

3 Cal. 239.

the award in the Court of the Munsif of Cuttack, that Judge held that the stamp payable was Rs. 5, which, with the penalty, amounted in all to Rs. 55. This sum not having been paid, the Munsif, on the 20th June 1881, impounded the document, and sent it to the Collector, who ordered a criminal prosecution. The Deputy Magistrate, to whom the case was referred, summoned the six members of the punchayet, and fined them Rs. 25 each. The case was referred by the Magistrate to the High Court.

The judgments of the Court (PONTIFEX and FIELD, JJ.) were delivered as follows :—

FIELD, J.—In this case six persons have been convicted under s. 61 of the Indian Stamp Act (I. of 1879) under the following circumstances : These six persons were members of a punchayet, who decided a matter relating to a small piece of land, acting as arbitrators, or umpires, between two of their fellow-villagers. This decision, or arbitration, was reduced into writing, but the writing was not stamped. One of the persons at whose instance it was made having subsequently resorted to the Civil Court, this written award was filed in the suit. This paper may possibly have been an award within the meaning of art. 10, sch. i. of the Stamp Act ; and, as it had not been stamped, the Munsif before whom it was filed proceeded to impound it ; and subsequently, in accordance with the provisions of s. 35 of the Stamp Act, he forwarded the paper to the Collector. The Collector upon this made an order that the writer of the document be sent to the Deputy Magistrate for trial under the Criminal Code. The Deputy Magistrate upon this summoned the six persons who had acted as arbitrators, and imposed upon them a fine of Rs. 25 each, making a total of Rs. 150.

It appears to us that this conviction is illegal, and must be set aside. When the Munsif forwarded the award to the Collector under the provisions of s. 35 of the Stamp Act, the course which the Collector ought to have pursued was that laid down by s. 37 of the Act, the language of which section is imperative : "He shall adopt the following procedure." If the Collector was of opinion that the instrument was chargeable with duty, and was not duly stamped, his course was to require the payment of the proper duty, or the amount required to make up the same, together with a penalty (see cl. b of s. 37). If this duty and penalty had been paid, then, according to the provisions of s. 40, such payment would not have been a bar to the prosecution of any person who appeared to have committed an offence against the stamp law in respect to the instrument under the proviso to s. 40 ; a criminal prosecution could not have been instituted unless it appeared to the Collector that the offence was committed with an intention of evading payment of the proper duty. It appears to us to be clear from the provisions referred to that it was the intention of the Legislature in the first place to compel the payment of the stamp-duty together with a penalty. By the payment of the stamp-duty, the revenue would be protected from loss ; and the exaction of a small money-penalty would be a sufficient punishment in the large majority of cases in which the omission to stamp at all, or stamp duly, arises from negligence, inadvertence, or ignorance of the provisions of the stamp law. The severer proceeding of a criminal prosecution is intended for those cases only in which there is an intention to evade the stamp law ; and, before a criminal prosecution can be instituted, it is incumbent upon the Collector to form an opinion whether it appears to him that such intention existed. Now, in the present case, the Collector did not adopt the procedure provided by the Act. He did not call upon the parties concerned to pay the stamp-duty together with the penalty prescribed by cl. b, s. 37. Had he done so, there is no reason to suppose that it would not have been paid. The penalty required by the Munsif was apparently higher than it should

have been under the Stamp Act; and it may well have been that the Collector would have required a smaller sum, and that this smaller sum would have been paid by the parties concerned. Thus, if the duty, as assessed by the Collector, together with the penalty, had been paid, a criminal prosecution could not have been instituted, unless it appeared to the Collector that there had been an intention of evading the proper duty. It is quite possible that the Collector might have been satisfied that no such intention existed, and that the exaction of the stamp-duty and the stamp-penalty may have appeared to him a sufficient vindication of the interests of the public revenue. We may observe that, as the arbitrators did not claim any benefit under the award, and could receive no advantage from the non-payment of the stamp-duty, it is not easy to see how they could have had an intention of evading the stamp law. The Stamp Act is a fiscal enactment, and must be strictly construed; and before any person can be punished for an offence relating to the stamp-revenue, the procedure prescribed by the Act must be strictly followed. "If," said Lord Mansfield in *Hartley v. Hooker*,¹ "a new offence is created by Statute, and a special jurisdiction out of the course of the common law is prescribed, it must be followed. If not strictly pursued, all is a nullity, and *coram non jure*." We are, therefore, of opinion that, as the course of procedure prescribed by the Act was not followed in this case, the prosecution before the Deputy Magistrate was unwarranted, and the conviction is bad in law. We reverse the conviction, and direct that the fines, if paid, be refunded.

PONTIFEX, J.—I am of the same opinion.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Maclean.

THE EMPRESS v. SHASTI CHURN NAPIT.²

Escape from Custody while being taken before a Magistrate—Subsequent Conviction for such Escape—Penal Code (Act XLV. of 1860), ss. 224, 225.

An escape from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour is not punishable under either s. 224 or s. 225 of the Penal Code.

ONE Shasti Churn Napit was arrested preliminary to being brought up before a Magistrate for the purpose of being bound over under s. 505 of the Criminal Procedure Code to be of good behaviour. Before he was produced before the Magistrate he escaped from custody.

He was, however, re-arrested and tried before the same Magistrate for this escape, and was sentenced to six months' rigorous imprisonment under s. 244 of the Penal Code.

The Magistrate of the District was of opinion that the conviction was illegal, inasmuch as s. 224 was not applicable, the man not being in custody for 'an offence'; and that s. 225 would not apply, as the custody was only preliminary to asking for an order to furnish security. He therefore referred the matter to the High Court.

¹ 2 Cowper 523.

² Criminal Reference, No. 29 of 1882, and Letter No. 306, from the order of H. Mosley, Esq., Officiating Magistrate of Murshedabad, dated Berhampore, the 24th February 1882.

1881.

EMPERESS

v.

SODDANUND

MAHANTY,

8 Cal. 339.

1882.

Feb. 28.

8 Cal. 331.

1882.

EMPRESS

v.

SHASTI

CHURN

NAPIT,

8 Cal. 331.

The opinion of the Court (MITTER and MACLEAN, JJ.) was given by

MITTER, J.—The conviction seems to be illegal. Assuming that Shasti Napit was legally arrested under s. 94 of the Criminal Procedure Code, he was not lawfully detained in custody for any offence, and could not therefore be punished under s. 224 of the Penal Code; nor could he have been punished under s. 225A, as he had not failed to furnish security for good behaviour.

The conviction must be set aside, and the warrant for his imprisonment cancelled.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1882.

Feb. 28.

8 Cal. 393.

IN THE MATTER OF THE PETITION OF TEACOTTA SHEKDAR AND OTHERS.

TEACOTTA SHEKDAR AND OTHERS v. AMEER MAJEE, HAFIZ PAKAR, AND OTHERS.¹

Transfer of Class of Cases from Subordinate Magistrate—Criminal Procedure Code (Act X. of 1872), s. 48—Notice to the Parties before the Transfer is made.

Before a Magistrate of a district can transfer a case from a Court subordinate to him to any other Subordinate Court, notice of such intended transfer should be served upon the parties, so as to enable any or either of the parties to come forward and show cause why such transfer should not be made.

A CRIMINAL case pending in the Court of a Deputy Magistrate was transferred to the Sub-divisional Officer by an order of the Officiating Magistrate of the District under s. 48 of the Criminal Procedure Code. The complainants in the case applied to the High Court to have the order of transfer set aside, on the grounds (i) that the order could not be made under s. 48; (ii) that it should not have been passed without notice of the intended transfer first having been given to them; (iii) that the Court to which the transfer had been made was a long distance from their homes.

Mr. *Mendies* for the petitioners.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The petitioners state that a criminal case, in which the petitioners were complainants, and Ameer Majee and others were defendants, was pending in the Deputy Magistrate's Court of Jungipore. This case was transferred to the Sub-divisional Officer of Lallbagh by an order of the Officiating Magistrate of the District, purporting to have been passed under s. 48 of the Criminal Procedure Code. The petitioners have applied to this Court to set aside the order of transfer, on the grounds (i) that it is not warranted by s. 48; (ii) that it should not have been passed without any notice to them, they being entitled to be heard in the matter; and (iii) that it would be extremely inconvenient to them to attend the Court at Lallbagh, which is at some distance from their homes.

By the order of the Officiating Magistrate referred to above, he directed that "all criminal cases occurring in Chuckla Ramchundrapur, and all cases, if there be any, or any shall arise occurring near there and connected with the

¹ Criminal Motion, No. 38 of 1882, against the order of H. Mosley, Esq., Officiating Magistrate of Murshedabad, dated the 31st December 1881.

disputes there going on," be withdrawn from the jurisdiction of the Sub-divisional Officer of Jungipore, and be tried by the Sub-divisional Officer of Lall-bagh.

It is doubtful whether the Officiating Magistrate's order is warranted by s. 48; but, even supposing that he had the power of transferring the case at the stage in which it was under this section, he is clearly in error in exercising this power without giving the plaintiffs any notice or giving them any opportunity to be heard in the matter; see the case of *In the matter of Jaffer Ali*,¹ also *Umrao Singh v. Fakir Chand*.² The order of the Officiating Magistrate transferring this case is, therefore, quashed, and the Sub-divisional Officer of Jungipore will now proceed to dispose of it in accordance with the law.

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APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF GIRIDHARI MONDUL AND ANOTHER.

1881.

GIRIDHARI MONDUL *v.* UCHIT JHA.³

Dec. 7.

Prosecution for False Charge—Penal Code (Act XLV. of 1860), s. 211—“Sanction to Prosecute”—Criminal Procedure Code (Act X. of 1872), s. 468.

8 Cal. 435.

A Magistrate should not direct a prosecutor to be put upon his trial under s. 211 of the Penal Code without first giving him an opportunity of obtaining a judicial enquiry into the charge originally preferred by him.

The sanction to prosecute, contemplated in s. 468 of the Criminal Procedure Code, is not a direction to prosecute, but is a permission granted to a private person to exercise his own unfettered discretion as to whether he will take proceedings or not.

On the 25th May 1881, a complaint was made by one Chumroo Mondul to a Joint-Magistrate, whilst on tour, that a dacoity had taken place in the house of his brother, Giridhari. The Joint-Magistrate proceeded to the spot and held a preliminary enquiry in his executive capacity under s. 115 of the Code of Criminal Procedure, at which Chumroo stated that he recognized one Uchit Jha and others amongst the dacoits. On the 28th May, the Joint-Magistrate forwarded, for information, to the District Magistrate and Superintendent of Police, a memorandum of his proceedings. On the same day, the District Magistrate recorded his concurrence in the proceedings of the Joint-Magistrate; but no final orders were passed on the case. Subsequently, one Badhri Dosadh was suspected of being implicated in the dacoity, and Giridhari Mondul was sent for to identify certain property found with Badhri Dosadh. He, however, failed to identify the property, and Badhri was discharged. On the 13th July, the District Magistrate, without examining either the complainant or his witnesses, and without entering into any judicial enquiry into the charge of dacoity against Uchit Jha, passed the following order: “Uchit Jha to bring a case under s. 211 of the Penal Code.” And on the 30th August 1881, the Magistrate directed the District Superintendent of Police to conduct the prosecution. The Monduls applied to the High Court under s. 297 of the Criminal Procedure Code to have the order of the 13th July set aside, and asked for an order that the dacoity-

¹ Criminal Motion, No. 302 of 1877, dated the 26th February 1877.

² I. L. R., 3 All. 749.

³ Criminal Motion, No. 28 of 1881, against the order of *A. Weekes, Esq.*, Magistrate of Purneah, dated the 13th July 1881.

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case should be proceeded with, and that the case under s. 211 against them might be postponed till the dacoity-case had been disposed of.

Mr. Wood and Baboo Anund Gopal Palit, for the petitioners, contended that the Court had no right to pass the order without first proceeding with the charge against Uchit Jha; that Giridhari Mondul had not mentioned that he recognized Uchit Jha at the dacoity; and that Uchit Jha had never been put upon his trial or even summoned to appear in Court.

Mr. Kilby for the Crown.

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by FIELD, J.—The facts of this case are as follows: On the morning of the 25th May last, Mr. Pratt, the Joint-Magistrate of Purneah, was riding along in a portion of the district, when one Chumroo Mondul came to him, and complained that a dacoity had been committed on the previous night in the house of his brother, Giridhari Mondul. Mr. Pratt immediately proceeded to the spot, and made, what we must assume to be, a preliminary enquiry under the provisions of s. 115 of the Code of Criminal Procedure, or what is commonly called a local investigation, conducted, not in his judicial capacity as Joint-Magistrate, but in his administrative or executive capacity as a police-officer. To this conclusion we are led by several facts. In the first place, there is no record of the examination of witnesses taken down in the manner directed by the Code of Criminal Procedure for proceedings of a judicial nature. In the second place, Mr. Pratt did not proceed to dispose definitively of the case of dacoity; and this he would probably have done if he had been acting as a judicial officer. In the third place, he forwarded, by a memorandum of the 28th May, his proceedings to the Magistrate and the District Superintendent of Police for information; and this is only consistent with the supposition that Mr. Pratt conceived himself to be acting in his administrative or executive capacity, and as a police-officer. It appears that the local enquiry made by the Joint-Magistrate extended over the days intervening between and including the 25th and 28th May. On the 28th May, Mr. Pratt recorded, with some care, the investigation which he had made, and the conclusion to which he was led; and, as has been already observed, this record was forwarded to the Magistrate of the district. Upon the same day, Mr. Weekes, the Magistrate, recorded certain observations, expressing his concurrence generally with the conclusion at which the Joint-Magistrate had arrived, but no final orders were passed upon the case. It would then appear that, in the course of some other proceedings held before the police, or before some of the magisterial authorities, one Badhri Dosadh made certain statements as to having taken part in certain dacoities, and having received, and being in possession of, certain property taken in those dacoities. Giridhari Mondul, in whose house the dacoity of the 25th May is said to have taken place, was upon this sent for, together with certain members of his family, and they were examined by the Joint-Magistrate on the 13th June. These witnesses did not, however, identify any of the property produced by Badhri Dosadh as property taken on the night of the 25th May. The Joint-Magistrate, after examining Giridhari Mondul and the members of his family, released Badhri Dosadh on fifty rupees bail; and, by an order, dated the 28th June, he transferred the case of Badhri Dosadh to the District Magistrate for orders. On the 6th July, the District Magistrate, Mr. Weekes, took up the case, and made the order that Badhri Dosadh be released from bail. Meanwhile, it would seem that no judicial proceedings were being taken upon the original charge of dacoity made by Chumroo Mondul to the Joint-Magistrate on the morning of the 25th May, and no final orders had been

passed upon the report of the preliminary enquiry submitted by the Joint-Magistrate, Mr. Pratt. We then find that, on the 13th July, the District Magistrate took up this case, and made the following order: "Nunhoo directed to bring a case under s. 211 of the Penal Code." Nunhoo is an *alias* for one Uchit Jha, whose name had been given by Chumroo Mondul and Giridhari Mondul as that of a person recognized by his voice or otherwise at the time of the dacoity. There is nothing on the papers before us to show that Uchit Jha was arrested, or that any enquiry of a judicial nature, conducted with judicial formalities, was ever made into the charge of dacoity made against this Uchit Jha and certain other persons who had been mentioned by Chumroo Mondul and his brother Giridhari Mondul as persons present at the time of the dacoity. It has been repeatedly pointed out by this Court that it is not a fair course towards a prosecutor to direct him to be placed upon his trial under s. 211 of the Penal Code without having first given him an opportunity of having a judicial enquiry into the charge originally preferred by him. In the present case, it is clear that Chumroo Mondul and his brother Giridhari had no opportunity of producing witnesses and establishing before an officer acting in a magisterial capacity the charge of dacoity which had originally been made on the morning of the 25th May. We think that, under these circumstances, if the order of the 13th July, which has been already quoted, was intended as a sanction under s. 468 of the Code of Criminal Procedure, it was made without proper discretion, and in opposition to what has been repeatedly laid down by this Court as the proper course to be pursued in these matters. But, upon a full consideration of the case, it appears to us that this order cannot properly be considered as a sanction within the meaning of s. 468. There had been no judicial proceeding, and the offence, if any, committed under s. 211 was not committed before or against a Court. It has been decided that, in the case of a complaint made to the police, the sanction required by s. 468 is not necessary. It is [further to be observed that, if this order of the 13th July was intended as a sanction under s. 468, it is expressed in an improper manner: "Nunhoo directed to bring a case under s. 211." In the *mofussil* the effect of such a direction upon a person in complainant's position of life would be, that he would feel himself constrained to carry out the direction so conveyed to him by the Chief Magistrate of the District. The sanction contemplated by s. 468 is something very different from this, inasmuch as it leaves a private prosecutor free to exercise his own unfettered discretion as to whether he will proceed or not. We find a further order, dated the 30th August, in which the Magistrate instructs the District Superintendent of Police to direct the prosecution. We cannot suppose that the District Magistrate intended to assume in this case the functions of a public prosecutor, or that the prosecution under s. 211 was intended to be inaugurated and conducted as a prosecution on behalf of Government. This being so, we are of opinion that this further order that the District Superintendent should direct the prosecution was calculated to prejudice still further the accused persons against whom Nunhoo was directed to bring a charge under s. 211. The proceedings in the dacoity-case not being proceedings before a Court, no sanction under s. 468 was requisite; and regarding these proceedings, as proceedings merely before a police-officer, we think that the order of the Magistrate directing Nunhoo to institute a case under s. 211, and the further order directing the District Superintendent of Police to take charge of that prosecution, were made without jurisdiction, and must be set aside. We have been asked further to direct that the private prosecution instituted by Uchit Jha should determine, or, at least, that the proceedings taken upon that prosecution should be stayed until there has been a judicial enquiry into the charge of dacoity. We think that we have not

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jurisdiction to make an order to this effect; and that, if Uchit Jha is disposed, at his own instance, to proceed with the charge under s. 211 of the Penal Code, we cannot interfere to prevent him. At the same time we think it proper to observe that, if Chumroo Mondul and Giridhari Mondul desire that the original charge of dacoity should be judicially enquired into, it is not competent to the District Magistrate to refuse a judicial enquiry into that charge as originally made on the morning of the 25th May.

Order set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice O'Kinealy.

IN THE MATTER OF SREENATH KUR.

THE EMPRESS *v.* SREENATH KUR.¹

1882.
Feb. 7.
8 Cal. 450.

Penal Code (Act XLV. of 1860), ss. 167, 466, 471—Code of Criminal Procedure (Act X. of 1872), ss. 445, 446, 453—Separate Trials—Offences of the same kind—Amendment of Charge.

The prisoner was committed for trial on fifty-five charges, including three charges under ss. 167, 466, and 471 of the Penal Code. At the trial before the District Judge sitting with assessors, the Court informed the prisoner that the trial would be confined to the three charges last mentioned. The prisoner was convicted on these, but the Court allowed evidence to be adduced by the prosecution on all the remaining charges, and in respect of these the prisoner was acquitted. On appeal to the High Court,—

Held that the District Judge should have exercised the powers conferred on him by ss. 445 and 446 of the Code of Criminal Procedure, and then have proceeded to hold separate trials; that he should not have tried together the charges under ss. 167 and 466 of the Penal Code, as the offences were not of the same kind within the meaning of s. 453 of the Code of Criminal Procedure; but the convictions on these charges were upheld, as it did not appear that the prisoner had been prejudiced by the mode of trial adopted.

In this case the prisoner, who had been committed for trial on fifty-five charges, was convicted of two offences under s. 167 of the Penal Code, and also under ss. 466 and 471, which he is said to have committed while accountant of the Judge's Court of Mymensingh. The first conviction related to a cheque for Rs. 405-9-6 of money on deposit in Court, drawn in favour of one Kisto Kant Ghose, as agent for Deno Nath Roy. As accountant, the prisoner had charge of all the books and papers connected with his department. He was bound to see, among other things, that the deposit registers were properly kept up, and, as a fact, most of the entries in these registers were in his handwriting. In connection with re-payments, his duties were as follows: On receipt of the local Court's application, usually made by rubokari, he verified the item by looking at his register, and made out a letter to the Accountant-General, asking him to sanction the re-payments. When this officer's sanction was accorded, the prisoner referred to the rubokari to find the name of the payee. He then filled up the cheque, entered the payee's name in it, and, having obtained the Judge's signature, delivered the documents to the person entitled to receive payment. All matters connected with these re-payments were under the immediate control of the prisoner, were disposed of by him alone, and no other officer of the Court ever filled up the cheques, or presented them for signature to the Judge.

¹ Criminal Appeal, No. 695 of 1881, against the order of *R. F. Rampini, Esq.*, Officiating Sessions Judge of Dacca and Joint Sessions Judge of Mymensingh, dated the 3rd October 1881.

The charge against the prisoner in connection with the cheque was, that, with intent to injure, he framed this cheque in a manner which he knew to be incorrect. The real payee's name was Koonja Kishore Laha, nephew of Makadassy, and instead of his name, the name of Kisto Kant Ghose, on behalf of Deno Nath Roy, was entered in the cheque. Looking to the fact that the prisoner always, as part of his duty, filled up the cheques—that the entry containing the wrong payee's name was proved to be in his handwriting—that Kisto Kant Ghose was a poor man, a mukhtar's mohurir, related to the prisoner, and living with him—and that the proceeds of this cheque were traced to the joint-possession of the peon and the prisoner, the High Court thought that there could not be any possible doubt of the prisoner having committed the offence of which he had been found guilty by the Court of Session.

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Intimately connected with this portion of the case, were the charges laid against the prisoner in regard to a document, which purported to be a certified copy of a rubokari, dated the 8th of March 1880, requesting the District Judge to obtain sanction for the payment of a lapsed deposit. That this rubokari had been tampered with, the original schedule erased, and a new schedule entered, was not seriously denied: indeed, the marks of the erasure were plainly visible. But it was urged before the High Court that there was not sufficient evidence to bring the act home to the accused. But the writing in the schedule was sworn to be similar to that of the prisoner, the document was received from him, and the false entry was made only for the purpose of supporting the scheme for obtaining the money drawn by the cheque. The High Court thought this evidence sufficient to convict the prisoner of having forged the document; but, as there was nothing to show he ever used it, their Lordships considered that the conviction under s. 471 of the Penal Code should be set aside. The last charge was based on a second cheque. It was similar to that laid on the cheque previously mentioned. The documents were of the same kind, and the evidence in support of both charges was almost identical. The High Court was of opinion that the prisoner had been properly convicted on this charge also.

Mr. A. M. Bose (with him Baboo Kally Churn Banerjee), who appeared for the prisoner, argued that the prisoner had been prejudiced by the mode of trial adopted in the Sessions Court; that he had been tried upon charges under ss. 167, 466, and 471 of the Penal Code, which were not in respect of offences of the same kind (s. 452, Code of Criminal Procedure, *illus.*); and that the Judge should have ordered the Government Pleader to select any items he wished, and amend his charge under ss. 445 and 446 of the Code of Criminal Procedure.

The *Advocate-General* (Mr. G. C. Paul), who appeared for the Crown, said there had not been any irregularity committed, as the charges were of the same kind; and that, even if there had been, the prisoner had clearly not been prejudiced—s. 167 of the Evidence Act.

Cur. ad. vult.

The judgment of the Court (MORRIS and O'KINEALY, JJ.) was delivered by

O'KINEALY, J. (who, having stated the facts of the case, the charges brought against the prisoner, and the decision of himself and MORRIS, J., on the merits, as above set out, continued).—We have had some trouble in dealing with this case, owing to the manner in which it has been tried by the lower Court. On the preliminary inquiry before the Deputy Magistrate, the proceedings were allowed to cover a very large number of transactions. The prisoner was com-

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mitted for trial on fifty-five charges, and with other persons who were accused of having more or less assisted him in obtaining money from the Government treasury. These irregularities were perceived by the Sessions Judge; but, instead of exercising the powers conferred on him by ss. 445 and 446 of the Code of Criminal Procedure, and then proceeding to hold separate trials, he adopted the somewhat unusual course of informing the prisoner that he would acquit him of all the charges except those already mentioned, and that to these the trial would be confined. Having come to that determination, he failed, unfortunately, to act up to his own convictions; and, under the excuse of giving Government an opportunity of appealing, if necessary, against the acquittals on the other charges, he allowed evidence in regard to them to be adduced by the prosecution. On the other hand, it must be admitted that the Judge recorded the evidence bearing on the selected charges in a compact and succinct form, and it was in respect of them, and of them only, that the prisoner was examined, and called upon to give any explanation. The selection, too, of these particular charges, seems to have been the best that could have been made in favour of the prisoner. Both the cheques referred to transactions of the same date; so that this circumstance greatly facilitated the defence of the prisoner, where so much—indeed, we may say, his innocence or guilt—turned upon the state of his accounts. Moreover, the charges were confined to acts arising out of two, and only two, transactions of a similar kind, in which the prisoner succeeded in dishonestly and fraudulently obtaining Government money by means of false documents, and had he been tried at one trial, as he should have been, for obtaining the money, then all the evidence in connection with the present charges would have been properly admitted against him.

In this Court it has been contended, on behalf of the prisoner, that he should have been tried separately for offences under ss. 167 and 466 of the Penal Code, and that he was prejudiced by the irregular manner in which the trial was held in the lower Court. In reply, the Advocate-General asserted that the charges under ss. 167 and 466 were of the same kind, and, even if this were not so, still the prisoner had not shown how, or in what manner, he had been prejudiced by the irregularities which had occurred at the trial.

We are of opinion that offences under ss. 167 and 466 are not of the same kind as defined in s. 453 of the Code of Criminal Procedure. There are several points in which they differ. They are not even in the same chapter of the Code. S. 167 requires that the accused should be a public servant, but not that he should be actuated by any dishonest or fraudulent intention; while s. 466 requires the latter, but not the former. The offences seem to us, therefore, to be different, and not of the same kind, although the same individual may possibly commit both in the same transaction. But we are also of opinion that nothing has been brought to our notice which would support the contention that the prisoner has been prejudiced in his defence by the proceedings in the lower Court. As we have already stated, the selection of the charges to be tried was made in the interest of the prisoner, and the transactions out of which they arose are of the same state and kind, and only two in number. Moreover, no objection of this kind was pressed on the lower Court. We, therefore, confirm the convictions of the prisoner, except as to that for using a forged document, which we set aside. The sentences will stand, but instead of the third sentence being entered up on the two convictions—*vis.*, under ss. 466 and 471 of the Penal Code—it will be entered up on s. 466 of the Penal Code only.

Convictions, except that under s. 471, upheld.

CRIMINAL REFERENCE.

*Before Mr. Justice Cunningham and Mr. Justice Tottenham.*EMPRESS *v.* TEGHA SINGH.¹

1882.

Mar. 7.

8 Cal. 473.

Arms' Act (XI. of 1878), s. 19, cl. f, and ss. 25, 30—Arms in a Temple—Confiscation of Arms used for purposes of Worship—Inspector specially empowered—License to possess Arms—Criminal Procedure Code (Act X. of 1872), s. 579, and sch. iv.—“Offences against other Laws.”

A collection of fire-arms, consisting of four small cannons, four pistols, and thirty-one muskets, had been kept as objects of worship in a Sikh temple in Patna for upwards of two centuries. The Mohunt of the temple neglected to take out a license in respect of these arms under Act XI. of 1878. A police-inspector, who was appointed to see that the provisions of the latter Act were obeyed, searched the temple on information received, and, having found the arms, prosecuted the person who had charge of the temple. The latter was convicted by the Deputy Magistrate of Patna under s. 19, cl. f, of Act XI. of 1878, and sentenced to pay a fine of Rs. 50, or to be rigorously imprisoned for two months. The Deputy Magistrate also ordered the arms to be confiscated, and directed that their value and the fine should be divided between the informer and the police-inspector. On a reference from the Sessions Judge of Patna—

Held, with reference to Act X. of 1872, s. 579, and the last heading to sch. iv. of the same Act, and to s. 19, cl. f, of Act XI. of 1878, that the proceedings of the police-inspector and the conviction of the accused were not illegal.

There is nothing in the Arms' Act to exempt the custodians of a temple from complying with the requirements of the Arms' Act, either by taking out a license, or obtaining exemption under s. 27.

S. 25 of the Arms' Act appears to refer to cases in which the Magistrate considers that arms, whether under a license or not, are possessed for an illegal purpose, or under circumstances such as to endanger the public peace.

S. 30 of the Arms' Act appears to contemplate the presence of some specially empowered officer besides the officer conducting the search.

THIS was a reference under s. 296 of the Code of Criminal Procedure from the Sessions Judge of Patna. The terms of the reference are as follows:—

There is, in the city of Patna, a famous Sikh temple, called the Har Mandir. It is said to be built on the site of the birthplace of Guru Govind Singh, and his cradle, and a book bearing his signature, are preserved in it. The latter was the subject of a law-suit, which is reported in the number of the Indian Law Reports for the current month, p. 767.² In the temple there were some old fire-arms, one or two of which might, perhaps, come within the definition of cannon. The police-inspector describes them as “four little cannons.” There were also four jingals, four pistols, and thirty-one guns (muskets). These weapons had been in the temple for about two centuries, and this fact alone shows that they could not be of much use in warfare. They are kept in the temple, as the Deputy Magistrate admits, as objects of worship. There is a police-inspector appointed to see that the Act is obeyed, and some one told him that there were unlicensed fire-arms in the temple. He made a search and found them, and sent up the man who was, in the absence of the Mohunt, in charge of the temple. The Deputy Magistrate convicted him under s. 14 (more correctly s. 19, cl. f) of the Act, and sentenced him to pay Rs. 50 fine, or to be rigorously imprisoned for two months. He also ordered that the fire-arms should be confiscated, and that their

¹ Criminal Reference, No. 240 of 1881, and Letter No. 549, from the order made by H. Beveridge, Esq., Sessions Judge of Patna, dated the 20th December 1881.

² *Dhurrum Singh v. Kissen Singh*, 1. L. R., 7 Cal. 767.

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value and also the fine should be divided between the Inspector and the informer. It appears to me that the Deputy Magistrate's proceedings are illegal for the following reasons :—

(1.)—The only witness examined was the police-inspector, Digam Lal, but his evidence was inadmissible, as he had no right to search the temple. He is appointed under the Act, but that does not empower him to search houses without a Magistrate's warrant. He had no warrant from a Magistrate under s. 25, nor could he have got one without the Magistrate's having reason to believe, not only that there were weapons, but also that they were in the temple for an unlawful purpose. S. 30, under which the Inspector presumably acted, only refers to the Code of Criminal Procedure, and gives no authority to the police to search in non-cognizable cases. Now, the mere possession of arms is a non-cognizable offence, though the going armed may, under s. 13, be cognizable, that is, the police may arrest a person so doing without a warrant, and disarm him. S. 17, cl. *d*, has also no application to the present case, nor can I find any other section or rule which empowers the police to make a search without a Magistrate's warrant. If Digam Lal's proceedings were illegal, his evidence should, I think, be rejected, and then there is no evidence, except Tegha Singh's statement, and he does not say that the weapons are cannons.

(2.)—The man who has been convicted is the temporary manager of the temple. He has not been charged with being in possession of the weapons, but with having them under his control. This probably is not correct, for it is not likely that he has power to remove them, or otherwise dispose of them. He is only ex-officer in charge of them, and it is perhaps doubtful if he can be personally fined and be sent to jail in default. It is perhaps only the property of the temple which can be attached in realization of the fine.

(3.)—I doubt if the Act applies to temples. Its language is wide enough to include them ; but it might, I think, be argued that its provisions must be held to be controlled by, what I presume, is the higher authority of the Queen's Proclamation of 1858. That document declared that no one should be molested or disquieted by reason of his religious faith or observances and strictly charged all in authority under the Queen to abstain from interference with the religious belief or worship of any of her subjects. Admittedly, the fire-arms are in the temple as objects of worship, and have been so for many years, and it certainly is an interference with the Sikh religion to insist on their being licensed, and to order their confiscation. The Deputy Magistrate says that the Mohunt should have taken out a license for the weapons, and it would have been better for himself if he had done so, but, if the weapons are really cannons, no Magistrate, and not even the Local Government, could have given him a license.

Finally.—Even if the Magistrate's proceedings are not illegal, his order should, I think, be set aside, on the ground that the punishment is too severe. A nominal fine was all that should have been inflicted.

No one appeared on the reference.

The judgment of the Court (Cunningham and Tottenham, JJ.) was delivered by

CUNNINGHAM, J.—With reference to s. 579 of the Criminal Procedure Code, and the concluding heading of the fourth schedule (" offences against other laws"), and s. 19, cl. *f*, of the Arms' Act, XI. of 1878, we are not satisfied that there has been any illegality in the proceedings, either of the police-inspector in this case, or in the conviction of the accused.

S. 25 of the Arms' Act appears to refer to cases in which the Magistrate considers that arms, whether under a license or not, are possessed "for an illegal purpose," or, under circumstances such as to endanger the public peace, neither of which conditions is suggested as existing here. It is not clear from the Sessions Judge's reference whether the police inspector was specially empowered under s. 30. That section appears to contemplate the presence of some specially empowered officer besides the officer conducting the search.

There is nothing in the Act to exempt the custodians of the temple from complying with the requirements of the Act, either by taking out a license, or obtaining exemption under s. 27.

On the other hand, they may well have imagined that the Act did not extend to weapons which were objects of interest, or worship, rather than 'arms' in the proper sense of the word.

We set aside so much of the Deputy Magistrate's order as refers to the division of the value of the fire-arms and the fine imposed between the informer and the inspector, and we direct that the case be submitted for such orders as the Government of Bengal may be pleased to pass.

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APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF AMERUDDIN.

AMERUDDIN v. FARID SARKAR AND ANOTHER.¹

Committal on two Separate Charges—Trial as for one Offence—Criminal Procedure Code (Act X. of 1872), s. 454—Separate Trial.

1882.

Mar. 10.

8 Cal. 481.

Where persons are charged with rioting and also with causing hurt, although they may be tried as for one offence under s. 454 of the Criminal Procedure Code, it is not illegal to try them for both offences separately.

FARID SARKAR, Ali Sarkar, and Nizamdi, were charged with the offence of rioting by entering forcibly into a cutcherry: the case was tried in a regular manner, the evidence being recorded in full. Farid Sarkar and Ali Sarkar were also charged by one Ameruddin, a peon, with having caused him hurt at the time of the riot. This latter case was tried summarily under s. 227 of the Criminal Procedure Code.

The Magistrate recorded but one judgment in both cases, and sentenced the accused in the first case to two months' rigorous imprisonment under s. 147 of the Penal Code; and the accused in the second case to a fine of Rs. 50 under s. 323 of the Penal Code.

The prisoners in the rioting case appealed to the Sessions Judge, and the accused who had been fined applied, on motion to the Sessions Judge, to have the finding and sentence set aside.

The Sessions Judge held that, under s. 454 of the Criminal Procedure Code, there should have been but one trial, and, himself treating the whole matter together, reversed the convictions.

¹ Criminal Motion, No. 323 of 1881, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensingh, dated the 16th September 1881.

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Ameruddin applied to the High Court to have the order of the Sessions Judge set aside.

Baboo *Bama Churn Banerjee* for the petitioner.

Baboo *Bykunt Nath Dass* for the accused persons.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—Farid Sarkar and Ali Sarkar and others were charged with the offence of rioting by entering forcibly into a zemindar's cutcherry. Against the first two there was a separate complaint by one Ameruddin, a peon in that cutcherry, of having caused hurt to him in the course of the rioting, which formed the subject-matter of the first-mentioned case. The Magistrate convicted the accused persons in both cases. He recorded one judgment, in which he says that he tried the riot-case regularly, and the hurt-case summarily. The punishment awarded in the latter case was a fine of Rs. 50 each. Both cases went before the Sessions Judge—the former by way of appeal, and the latter by way of motion. The Judge, holding that, under s. 454 of the Criminal Procedure Code, there should have been one trial, treated the whole matter together, and reversed the conviction. Although we are inclined to agree with the Judge that, under s. 454, there could have been one trial, yet it does not seem to us that it was illegal to try the two cases separately; therefore the Judge had no jurisdiction to reverse the conviction in the hurt-case. His order, so far as it relates to this case, must be cancelled.

We have perused the record of the summary trial made under s. 227 of the Criminal Procedure Code, and, as we find it is not open to any objection, we direct that the order of the Magistrate, adjudging Farid Sarkar and Ali Sarkar to pay a fine of Rs. 50 each, be restored.

Application granted.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF NOBIN CHUNDRANIKHYA.

THE EMPRESS v. NOBIN CHUNDRANIKHYA.¹

1882.
Feb. 20.
8 Cal. 560.

Criminal Procedure Code (Act X. of 1872), s. 349—Acquittal of Prisoner—Withdrawal of Pardon granted to Approver after Judgment of Acquittal—Conviction on Trial improperly originated—Power of High Court to set aside.

At a sessions trial, the Judge, after acquitting the prisoner, passed an order withdrawing a pardon already granted to an approver (who had given his evidence as such approver before the Sessions Court), and ordered his commitment. The approver was charged, tried, and found guilty. *Held*, by MITTER, J., that the order withdrawing the pardon and committing the approver was contrary to the provisions of s. 349 of the Criminal Procedure Code, the words "before judgment has been passed" being words inserted in the section to put a limit to the time within which the power of withdrawal of the pardon conferred in the Court of Session may be actually exercised; and that therefore the trial of the approver was illegal.

The power of directing commitments conferred upon the Sessions Court by s. 349 of the Criminal Procedure Code can be exercised only before judgment has been passed.

¹ Criminal Appeal, No. 20 of 1882, against the order of T. D. Beighton, Esq., Officiating Sessions Judge of Mymensingh, dated the 14th November 1881.

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Held, by MACLEAN, J., that it is not necessary that the order should be made before judgment is passed, but that it must appear to the Judge, before he passes judgment, that the conditions of the pardon have not been complied with ; and that, in the present case, it was impossible to hold that, because the actual order of commitment of the accused was written (although in the judgment) after the acquittal, therefore it did not appear to the Judge before passing judgment that there were grounds for his order.

Per MACLEAN, J.—The High Court may, without reference to the Local Government, set aside a conviction made upon a trial improperly originated.

RAMKRISTO, Nobin Banikya, and others, were charged with abetment of the murder of one Muddun Banikya. Before the Deputy Magistrate, Nobin made a confession, and a pardon was tendered to him under s. 347 of the Criminal Procedure Code. At the trial before the Sessions Judge, Nobin gave his evidence as an approver, which was substantially the same in effect as his evidence before the committing officer ; but the Judge, concurring with the assessors, acquitted the accused, and after the formal finding acquitting the prisoner (although in the judgment) added an order to the effect that the pardon granted to Nobin should be withdrawn, and he, Nobin, put upon his trial for the murder of Muddun, and stating therein that he was of opinion that Nobin had wilfully concealed essential facts, and had given false evidence against Ramkristo, who, the Judge held, was innocent.

Nobin was then tried for the abetment of the murder of Muddun, and at this trial his deposition in the former trial was used against him ; the Judge, differing from the assessors, found him to have been present when the murder was committed, and sentenced him to transportation for life.

Nobin appealed to the High Court.

Mr. *M. Ghose* (with him *Baboo Anando Gopal Paulit*), for the appellant, contended (i) that the pardon could not be withdrawn by the Sessions Judge at the stage at which it was withdrawn ; (ii) that he had no jurisdiction to withdraw the pardon at all, and, even had he the power, he was not justified in so doing under the circumstance of the case ; (iii) that, assuming the Judge had jurisdiction having regard to the last clause of s. 349 of the Criminal Procedure Code, the statement used against Nobin was inadmissible in evidence ; (iv) that it never was intended that the last clause in s. 349 of the Criminal Procedure Code should override the provisions of the Evidence Act ; and (v) that the last clause of s. 349 can be read consistently with s. 24 of the Evidence Act. *1st.* The Judge had no power to cancel the pardon after verdict ; the object of the limitation in s. 349, as to the time when this power is to be exercised, is to prevent Judges from being influenced by the result of the trial. An approver does not undertake to secure a conviction, nor is it a condition of his pardon that he is to be believed. He is *prima facie* unreliable unless corroborated in material particulars. The power must be exercised before the Court has made up its mind one way or the other, otherwise an approver may be committed in every case in which he fails to secure a conviction. *2nd.* Assuming the Judge had jurisdiction to revoke the pardon, he was not justified in doing so under the circumstances of the case ; the falsity of the deposition ought to appear on the face of it. I contend that the prisoner apparently told the truth, and that there was no reason for holding that he had given false evidence. [MITTER, J.—But you contend on the merits that we ought not to believe his statement if it is admissible in evidence against him, how can you then ask us to hold that he did not give false evidence?] For the purposes of my present contention only I ask your Lordships to hold that the prisoner stated what was apparently true. If he told the truth, his pardon was improperly cancelled ; and if he did not,

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then he ought not to be convicted on the basis of his own deposition. [MACLEAN, J.—Have we any power to interfere if we hold that his pardon was improperly withdrawn?] I submit this Court can then set aside the conviction, and hold that the pardon had become final. [MACLEAN, J.—Are you aware of the case of the *Empress v. Srinobin Bhutia*¹ from Darjeeling, decided on the 17th March 1880, in which WHITE, J., and myself held that the pardon ought not to have been withdrawn, and we then recommended the Local Government to pardon the prisoner?] That case was undefended, and the question was not argued. Whatever may be the case in England, here the pardon is provided for by Statute, and your Lordships are competent, without referring the matter to the Local Government, to set aside the conviction. As regards the fourth contention, the learned Counsel cited *The Dean of Ely v. Bliss*² as showing that a later Act does not repeal by implication a previous Act; and that, therefore, s. 349 of the Criminal Procedure Code could not override the Evidence Act. The words of a general Code cannot, without express words of modification, override a particular Code: Wilberforce's Statute Law, p. 326. The general rule touching the repeal of laws is "*leges posteriores priores contrarias abrogant*;" but subsequent Acts in the affirmative giving new penalties and instituting new methods of proceeding do not repeal former penalties and methods of proceeding without negative words. In *Fitzgerald v. Champneys*³ it was held that a general Act of Parliament does not repeal a prior special Act without express word of reference. See also *Escott v. Mastin*⁴ and *Evans v. Rees*.⁵ The statement made by Nobin is not admissible under the Evidence Act, and this Act, being a prior Act, is not repealed by implication by s. 349 of the Criminal Procedure Code. [MITTER, J.—We reserve our opinion as to whether the statement can be read, and subject to this you can read it.]

Mr. Branson (with him Baboo Kalichurn Banerjee) for the Crown.—As regards the withdrawal of the pardon, the order was in accordance with the provisions of s. 349, because this section only requires that the Court of Session should come to the conclusion that the accused has not conformed to the conditions under which the pardon was tendered before the judgment has been passed, and, if this condition be fulfilled, the actual order directing the commitment may be passed at any time.

Mr. Ghose, in reply.—If it was simply intended that before judgment is passed it must appear to the Judge that the prisoner had not conformed to the conditions of his pardon, and that the Judge might revoke the pardon at any time, then in every case, after any length of time, a Judge might exercise the power by simply recording that, during the trial, it had appeared to him that the approver had not conformed to the conditions of his pardon. If the construction contended for were correct, then a Magistrate might, after trial, and even after an approver's evidence had been acted upon by the Sessions Court, revoke a pardon, on the ground that it had previously appeared to such Magistrate that the approver had not told the whole truth—a result which could never have been intended. On the merits I contend that the deposition of the prisoner, on which the conviction mainly rests, was improperly obtained by the police, and ought not to be believed even as against himself.

The following judgments were delivered by the Court (MITTER and MACLEAN, JJ.):—

¹ Cr. Ap. No. 811 of 1879.

² 2 John. & Hem. 31, at p. 54.

³ 9 C. B. (N. S.) 391.

⁴ 2 DeGex M. & G. 459.

⁵ 4 Moore's P. C. 104.

MITTER, J.—The appellant has been convicted of the offence of abetment of murder (ss. 114 and 302 of the Penal Code) of a person named Muddun Banikya, and sentenced to transportation for life. The assessors were for acquitting the appellant. That, on the night of Friday the 8th Jolst last (20th May), Muddun was murdered in his hut while asleep, and on the following morning his corpse was discovered with a *ram-dao* lying near it, is proved beyond the possibility of a doubt. It appears that the appellant was suspected of having committed this murder, and was arrested by the police on the 22nd May, and challaned on the 30th May. On the 31st May the appellant made a statement to the Deputy Magistrate in charge of the Sub-division within which the murder was committed, confessing his guilt, and implicating one Ramkristo Banikya and four other Mussulmans of his village. On the 7th June the Deputy Magistrate, under s. 347 of the Criminal Procedure Code, tendered pardon to the appellant, who, having accepted the tender, was examined as a witness in the case, which was prosecuted against Ramkristo and the aforesaid four Mussulmans. The case was ultimately committed for trial in the Sessions Court. In the Sessions trial, which was held by Mr. Kirkwood, the appellant was examined as a witness on the 27th July. His evidence was substantially the same which was given by him before the committing officer. On the 28th July, after the first witness for the defence had been examined, the assessors intimated to the Judge that, in their opinion, the evidence adduced on behalf of the prosecution was not sufficient to warrant a conviction. The Judge, concurring in that opinion, stopped the trial; and on the following day delivered his written judgment, acquitting the persons then on their trial. At the end of the judgment he recorded an order, directing the Magistrate to commit the appellant to be tried for the murder of Muddun, as it appeared to him that the appellant, having been guilty of wilful concealment of essential facts, and of giving false evidence against Ramkristo, had not conformed to the conditions under which the pardon had been tendered to him. This order was passed under s. 349 of the Criminal Procedure Code. The appellant was ultimately committed and convicted as stated above. The present Sessions Judge, Mr. Beighton, in support of his conclusion, relies chiefly upon the appellant's statements made from time to time while under pardon, and thinks they are corroborated by the fact that the *ram-dao*, which was found lying near the corpse of the murdered man, is proved to have been purchased by the appellant from a blacksmith, named Ram Gopaul, about fifteen or sixteen days before the occurrence.

The learned Counsel who appeared for the appellant before us contended (i) that the order of Mr. Kirkwood under s. 349, Criminal Procedure Code, directing the appellant to be committed, having been made after the judgment was passed, was not warranted by the provisions of that section; (ii) that, notwithstanding the express provision of s. 349, Criminal Procedure Code, the statements of the appellant, while under pardon, should not have been allowed to be put in evidence, inasmuch as these statements, amounting to a confession of guilt on the part of the appellant, are not relevant under s. 24 of the Evidence Act; (iii) that the finding of the Sessions Judge is against the weight of the evidence in the record.

It has been urged by the learned Counsel who appeared before us to support the conviction that Mr. Kirkwood's order under s. 349, Criminal Procedure Code, is in accordance with the provisions of that section, because it is clear from his judgment that it appeared to him before it was passed that the appellant had not conformed to the conditions under which the pardon was tendered; that the section only requires that the Court of Session should come to

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this conclusion before the judgment has been passed; and that, if this condition be fulfilled, the actual order directing the commitment may be passed at any time without any limitation.

I am of opinion that the order of Mr. Kirkwood, withdrawing the pardon to the appellant, and directing him to be committed, was passed contrary to the provisions of s. 349 of the Criminal Procedure Code. It appears to me that the words, "before judgment has been passed," have been inserted in the section with a view to put a limitation in respect of the time within which the power of the withdrawal of the pardon conferred in the Court of Session may be actually exercised. This intention of the Legislature would not be attained if we put upon the section the construction for which the learned Counsel who appeared in support of the conviction contends. According to his contention, a person to whom a pardon has been tendered under the provisions of s. 347 may be ordered to be committed by the Court of Session after the lapse of any length of time, provided it would appear that, before the judgment was passed, it had come to the conclusion that he had not conformed to the conditions under which the pardon was tendered. It seems to me that this is not a reasonable construction. It frustrates the very object for which this limitation of time is laid down. In my opinion, the power of directing commitment conferred by the section in question upon the Court of Session can be exercised only before the judgment has been passed. In this case, therefore, Mr. Kirkwood, after passing the judgment in the case in which the appellant was examined as a witness under the provisions of s. 347 of the Criminal Procedure Code, had no power to withdraw the pardon granted to him, and direct his commitment. The subsequent trial of the appellant is consequently illegal. The conviction cannot, therefore, stand. In this view which I take of this question of law, it is unnecessary for me to express any opinion upon the other objections urged before us against the validity of the conviction. I would, therefore, reverse the conviction, and direct his release.

MACLEAN, J.—The appellant, stated in the record to be twenty years of age, was placed before the Magistrate, charged on his own confession with abetment of the murder of one Muddun Banikya. The Magistrate thought proper to tender to him a pardon under s. 347 of the Criminal Procedure Code, with a view to procuring the conviction of four other persons also charged with the murder. The appellant accepted the pardon, and was examined before the Magistrate on the 7th June last. The other persons were committed for trial, and the appellant gave his deposition on the 27th July. On the 28th July, the assessors, at the close of the evidence of the first witness for the defence, intimated that they had made up their minds, and did not wish to hear further evidence. The Judge expressed his concurrence, but no finding was recorded on that day. On the following day the assessors' opinions were recorded, and judgment delivered, acquitting the persons under trial. At the close of his judgment the Judge recorded that the appellant had not conformed to the conditions under which the pardon was tendered (s. 349, Criminal Procedure Code), and he directed that the appellant should be committed for trial for the offence in respect of which the pardon was so tendered. The appellant was thereafter committed, and has been tried before a different Judge and assessors. The assessors would have acquitted him, but the Judge has convicted him of abetment of murder, and sentenced him to transportation for life.

Before dealing with the merits of the case two matters have to be disposed of, which Counsel for the appellant have urged against the proceedings before and at the trial.

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In the first place, it was urged that the order of the Judge, dated 29th July, directing the commitment of the appellant, was not made before judgment was passed, and is, therefore, illegal with reference to s. 349 of the Procedure Code. Counsel for the prosecution urged against this view of the case that it is not necessary that the order should be made "before judgment is passed," as the section requires only that it shall have "appeared to the Court of Session before judgment is passed" that the conditions under which pardon was tendered have not been conformed to. I think the correct view of the section is, that it must appear to the Judge before he passes his judgment that the conditions of pardon have not been complied with, and reading the judgment in this case it is abundantly clear that it did so appear to him. It is impossible to hold that because the actual order for commitment of the accused was written (although in the judgment) after the acquittal, therefore it did not appear to the Judge before passing judgment that there were grounds for his order. The judgment prior to signature must be taken as a whole, as representing the view taken by the Judge of the whole case, and nothing would justify us in dealing with it paragraph by paragraph, and founding any conclusion upon the order in which they come. I therefore reject this objection.

The next objection is, that the statement of the appellant under pardon, *viz.*, his deposition on 27th July, was improperly used in evidence against him, although the last clause of s. 349 (Criminal Procedure Code) directs that it may be put in evidence against him. The argument in support of this objection is, that, by s. 24 of the Evidence Act, a confession made by an accused person is irrelevant, if it appears to the Court to have been caused by inducement, threat, or promise, &c., and that there is thus a conflict between the Evidence Act, s. 24, and the later Act, s. 349. The appellant's Counsel asked us to read the last section as if it contained the words "provided it is otherwise admissible in evidence." I must say that, in my opinion, Counsel asked us to reduce the last clause of s. 349, Criminal Procedure Code, to an absurdity. I can see no connection whatever between the two sections. The deposition or statement made by the appellant under pardon was not a confession made by an accused person. The appellant was not an accused person on the 27th July. He had ceased to be so on the 7th June, when pardon was tendered and accepted. Holding this opinion, I decline to waste any time in considering what are called canons of construction on supposed inconsistencies between an earlier and a later Act.

(The learned Judge, after stating the facts of the case, continued.)

In the present case the first point for consideration is, whether the same statement, condemned as false in part and in other respects untrustworthy by the Judge who tried the first case, and again condemned in many respects by the Judge who tried this case, can be accepted as justifying the appellant's conviction.

I entertain a very strong opinion that the story told by the appellant is in the main true, and that Muddun Banikya was murdered with the prisoner's *ddo*, and with his knowledge and consent. I share the belief expressed by the two Judges who considered the case, that, as regards Ramkristo Banikya, the statement is false. My impression is that, the *ddo* having been found by the body of Muddun Banikya, the case was so strong against the appellant that he was induced to make such statements as would, while implicating himself in a minor degree, secure, it was thought, the conviction of Ramkristo. Appellant was evidently in the hands of the police from the 22nd to 31st May; and considering his youth and the pressure to which he was evidently subjected both by the

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finding of the *ddo* and by the steps taken against his family who were put under restraint, I can quite understand his yielding.

I confess, however, that I cannot justify his prosecution. The Judge who directed this committal did so on two grounds—*firstly*, that he had concealed something essential; *secondly*, that he had given false evidence. This last ground would have justified his trial for that offence, but nothing has transpired at his trial to show that his evidence was false as regards his own share in the crime. If it is false in that respect, he must be acquitted, on the ground that he had nothing to do with the murder. It was not to be expected that he should prove his own perjury, and therefore his silence cannot be unfavourably construed. As for the concealment of essential particulars, I am unable to discover it. It rather seems that he has stated false particulars. The result, therefore, of my consideration of the case is, that this trial has properly ended in a conviction, but it is a trial which ought not to have taken place.

But I have, on a previous occasion, held that this Court had no authority to set aside a conviction in a trial properly held. In the case I refer to, there was much that resembles this case. The appellant had accepted a pardon. The Judge considered his statement false, and ordered his trial. The Bench of which I was a member held that the appellant's statement was not false, and that the conditions of the pardon had really been complied with. The proper course we then thought to be to uphold the conviction, and refer the case to the Local Government with a view to pardon, which was done, and the pardon was granted. On re-consideration, however, I think this Court may itself set aside a conviction made upon a trial improperly originated, and on this ground I would direct the release of the appellant.

Appeal allowed, and conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

BRADLEY v. JAMESON.¹

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8 Cal. 580.

Criminal Procedure Code (Act X. of 1872), ss. 297, 518—Injunction—Review of Order—Revival of Order which has been quashed—High Court, Superintendence of—Reference—Charter Act, 24 and 25 Vic., c. 104, s. 15.

On the 7th of June 1881, the Assistant Commissioner of Hylakandi, in Sylhet, passed an order under s. 518 of the Criminal Procedure Code, that the manager of a certain tea garden should discontinue holding a market on Thursdays until further notice. On the 25th of August 1881, the Assistant Commissioner reviewed this order, and, having come to the conclusion that he had no power to issue a permanent injunction, struck the case off the file, at the same time referring the matter to the Deputy Commissioner. The latter declined to interfere, informing the Assistant Commissioner that he saw no illegality in his order. Thereupon the Assistant Commissioner passed an order declaring that his order of the 7th of June 1881 remained in full force. On a reference to the High Court, made by the Officiating Sessions Judge of Sylhet under s. 297 of the Code of Criminal Procedure,—

Held that the Magistrate having, on the 25th of August 1881, set aside his order of the 7th of June 1881, and struck the case off the file, he had no power to revive it without a fresh proceeding.

¹ Criminal Reference, No. 241 of 1882, Letter No. 1116, from the order made by *W. F. Meres, Esq.*, Officiating Sessions Judge of Sylhet, dated the 13th December 1881.

Held, also, that the Magistrate had no power to pass a perpetual injunction under s. 518 of the Code of Criminal Procedure.

*Gopi Mohun Mullick v. Taramoni Chowdhurani*¹ followed.

Held, also, that orders made under s. 518 of the Code of Criminal Procedure not being orders made in a judicial proceeding, the High Court had no power to deal with them under s. 297 of the Code of Criminal Procedure; but the order of the 6th of September 1881 being illegal, the High Court would set it aside under s. 15 of the Charter Act, 24 and 25 Vic., c. 104.

*In the matter of the Petition of Chunder Nath Sen*² followed.

THIS was a reference under s. 297 of the Code of Criminal Procedure (Act X. of 1872) by the Officiating Sessions Judge of Sylhet, the terms of which are as follows:—

“The facts of the case are, that the managers of Phencha Cheera and Katti Cheera Tea Estates have established two markets on the same day of the week close to each other. The Phencha Cheera Market is the older of the two. The Sub-divisional Officer of Hylakandi, on the 7th of June 1881, has ordered that the Katti Cheera manager should discontinue holding his market on Thursdays, until further notice. The reasons which he gives in his order for passing it are as follows: ‘All persons bringing articles for sale must pass through Phencha Cheera Bazar, and if they sell their wares there, instead of at Katti Cheera, it will be open for some ill-disposed person to raise a row between the coolies of each garden by alleging that the Setakandi coolies are stopping the supplies of the Katti Cheera coolies.’ The Assistant Commissioner subsequently reviewed this order on the 25th August 1881, remarking that he had no power to pass a permanent injunction, and ‘struck the case off the file,’ referring the matter to the Deputy Commissioner of Cachar. The Deputy Commissioner, however, declined to interfere, and informed the Hylakandi Magistrate that he saw no illegality in his order. The Assistant Commissioner, on receipt of this communication, passed the following order on the 6th of September 1881: ‘Inform Messrs. Bradley and Jameson that the Deputy Commissioner declines to interfere as Collector, and that, therefore, my order under s. 518, Criminal Procedure Code, remains in force.’

“The above order and the order directing the discontinuance of the Katti Cheera market on Thursdays appear to me to be bad in law: *firstly*, because the Assistant Commissioner had no power to pass an injunction without any limit as to time; and, *secondly*, that he could not legally revive his order of the 6th September without further enquiry.”

The case was not argued.

The judgment of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

CUNNINGHAM, J.—We think that the Magistrate, having, on the 25th August 1881, set aside his order of June 7th, 1881, and struck the case off the file, had no power to revive it (without a fresh proceeding) by his order of 6th September, and that he had no power, under s. 518 of the Criminal Procedure Code, to pass a perpetual injunction: see *Gopi Mohun Mullick v. Taramoni Chowdhurani*.¹ Orders under s. 518 not being judicial proceedings, we have no power to deal with the present case under s. 297; but we infer from the judgment in *In the matter of the Petition of Chunder Nath Sen*,² that the order being, in our opinion, illegal, we can deal with it under the Charter. We, therefore, set it aside.

Orders set aside.

¹ I. L. R., 5 Cal. 7.

² I. L. R., 2 Cal. 293.
I. L. R., Cal. 52.

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JAMESON,
8 Cal. 589.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

1882.

Mar. 15.

8 Cal. 616.

IN THE MATTER OF THE PETITION OF MUNSHI SHEIKH AND OTHERS.

THE EMPRESS *v.* MUNSHI SHEIKH AND OTHERS.¹*Confession of an Accused Person—Examination of the Accused—Question and Answer—Recording Examination—Statement of Accused—Criminal Procedure Code (Act X. of 1872), s. 346.*

The confession of an accused person was recorded in a simple narrative form instead of in the shape of question and answer as required by the Code of Criminal Procedure, s. 346. There was nothing in the character of the confession, or in the circumstances of the case, to lead to the inference that the accused had been prejudiced by the error.

Held that the error did not affect the admissibility of the statement in evidence.

In this case the appellants were, with others, convicted of voluntarily causing grievous hurt, and were sentenced to six years' rigorous imprisonment by the Sessions Judge of the 24-Parganas. The appellants had previously confessed the crime when examined by the Magistrate, but these confessions were not recorded in the form of question and answer, but were written out in a narrative form. The learned Judge directed the jury that, if they considered those confessions to have been voluntary, genuine, and credible, they might convict the appellants on those confessions alone. The jury found the prisoners guilty. The latter appealed to the High Court.

Baboo *Boido Nath Dutt* and Baboo *Tara Prosonno Sen* for the appellants.

The judgment of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

CUNNINGHAM, J.—We are of opinion that there has been no misdirection in this case. The main ground urged before us in appeal is, that the confessions of two of the accused were recorded in a simple narrative form instead of in the shape of questions and answers. If we could infer from the character of the confessions, or from the circumstances of the case, that this mode of recording the confessions had resulted in any prejudice to the prisoners, we should, of course, deem it necessary to direct a new trial. But there is nothing from which we can draw this inference; and we, therefore, think that, having regard to the concluding paragraph of s. 346, we are not at liberty to hold that there has been a misdirection, merely because the Judge allowed these confessions to go to the jury.

With regard to the accused, Munshi Sheikh, the question does not arise, because the Judge told the jury that, as far as he was concerned, they must, before convicting him, satisfy themselves that there was sufficient evidence to justify his conviction independent of the confession.

We think, therefore, that, as far as the matter of the irregularity of the mode of recording the confessions goes, the conviction must be upheld.

Conviction upheld.

NOTE.—A similar point was decided by a Full Bench of the High Court, consisting of GARTH, C.J., and KEMP, JACKSON, MACPHERSON, and AINSLIE, JJ., on the 26th of March 1877, in Criminal Appeal, No. 67 of 1877, the case of *Titu Maya v. The Queen*.

The decision was given on a reference to the Full Bench made by MACPHERSON and BIRCH, JJ., the terms of which are as follows :—

¹ Criminal Appeal, No. 94 of 1882, against the order of *H. Beverley, Esq.*, Additional Sessions Judge of the 24-Parganas, dated the 14th December 1881.

"In this case the prisoner has been convicted of murder, the offence having been committed on the 10th of September last. He was committed by Mr. Luttman-Johnson, the Magistrate of Cachar, for trial before the Sessions Court. In the course of the enquiry preliminary to commitment, the prisoner was twice examined by the Magistrate. If the statements made by him on the occasions of these examinations are admissible in evidence, the conviction can be supported. But if those statements are not admissible, then there clearly is no evidence to warrant conviction. The question is, whether the statements made by the prisoner on those two examinations are, under the circumstances, admissible.

"The first examination of the accused was on the 21st of September. The Magistrate, in his own hand, recorded fully in English each question and answer, and at the end he signed the memorandum, and added, 'Note—The police connected with the case were carefully excluded from the Court, and the accused was given every opportunity of correcting any of his statements. His manner was that of a person speaking the entire truth.' And this Note is initialled by the Magistrate, and dated the same 21st of September. Simultaneously, a mohurir, in the presence of the Magistrate, recorded in the vernacular all the answers given by the prisoner; but the questions put are not recorded in the vernacular. At the end of this vernacular record, the Magistrate certifies, 'Taken in my presence and hearing, and contains accurately the whole of the statement made by the accused person,'—and this certificate is signed and dated by the Magistrate. To this the Magistrate appends a note—'The clerk has unfortunately omitted questions. They are, however, entered fully in my memorandum,'—and this he signs. After that, a few words seem to have been added on the same day by the prisoner. They are recorded by the Magistrate in his own hand in his memorandum, and simply signed by him: and they are recorded by the clerk in the vernacular, and initialled by the Magistrate.

"On the 12th of October, the prisoner was further examined by the Magistrate. The questions and answers are fully recorded both in the English memorandum and in the vernacular, and the record is duly attested by the Magistrate. But neither the record of the examination of the 12th October, nor the previous record of the examination of 21st September, were signed by the accused person, as required by s. 346. Nor is there anything to show that the record of the examination, every question and every answer, was shown or read to the accused, as directed by the first clause of s. 346.

"In this particular case, we have no doubt that the examination of the accused was, in fact, carefully conducted by the Magistrate, and that all the questions and answers are accurately recorded, as regards the first examination, in the Magistrate's English memorandum, and, as regards the second examination, in both the vernacular and English. The error is one which, in our opinion, does not prejudice the prisoner, unless we are bound to hold as matter of law that the mere omission to comply with the provisions of s. 346 does prejudice him. The Bombay High Court apparently considers that such an error necessarily does prejudice the prisoner, and is incurable, and that the statement of the accused, unless recorded strictly as directed by s. 346, is inadmissible, see *Reg. v. Bai Ratan*;¹ but the last clause of s. 346 seems to contemplate the admissibility of such records, although not strictly in form, provided the error does not prejudice the prisoner. The following cases bearing on the subject are reported: *Queen v. Nussuruddin*,² *Queen v. Kala Chand Pal*,³ *Queen v. Chunder Bhuttacharjee*,⁴ *Queen v. Wusir Mundul*,⁵ *Reg. v. Daya Anand*,⁶ *Reg. v. Deva Dayal*,⁷ *Reg. v. Shivya*.⁸ As the question is of great importance, and opinion seems divided, we think the matter should be referred for the decision of a Full Bench.

"The questions referred for the opinion of the Full Bench are: *First*, whether the omission to obtain the signature or attestation of the accused person, as directed by s. 346, necessarily prejudices the prisoner within the meaning of the last clause of that section, and renders the record inadmissible? *Secondly*, whether the omission to obtain the signature, &c., of the accused person, as required by s. 346, or the omission to record in the vernacular the questions put to the accused person, or both these omissions taken together, necessarily render the record inadmissible, even although it appears from the Magistrate's certificate that, taking the English memorandum together with the vernacular, the whole of the questions and answers are fully recorded? *Thirdly*, whether the

¹ 10 Bom. H. C. Rep. 166.

² 21 W. R., Cr., 5.

³ 24 W. R., Cr., 29.

⁴ *Id.* 42.

⁵ 25 W. R., Cr., 25.

⁶ 11 Bom. H. C. Rep. 44.

⁷ *Id.* 237.

⁸ I. L. R., 1 Bom. 219.

1877.

TITU MAYA

v.

THE QUEEN,

8 Cal. 618a.

1877. defect can be cured by taking further evidence now, supposing that it can be proved that, in fact, the record was duly read to the accused person?
TITU MAYA Baboo Jey Govind Shome for the prisoner.
 v. Baboo Juggodanund Mookerjee for the Crown.
THE QUEEN, The opinion of the Full Bench was delivered by
 8 Cal. 618n.

GARTH, C.J.—As regards the first point stated for our opinion, it now appears that the statement made by the prisoner does purport to bear his signature, and in the absence of any evidence to the contrary, and there being no defect in the certificate endorsed by the Magistrate in compliance with the directions of s. 346, we must take it that the signature is that of the accused person. Then, secondly, as to the omission on the part of the Magistrate to record in the vernacular the questions put to the prisoner, it is clear that, in this instance, the prisoner is not, and cannot have been, prejudiced in any way by the omission. The questions were of such a nature that it is perfectly immaterial to the sense and meaning of the prisoner's statement whether they were recorded or not.

The case will go back to the Bench, which referred it, for disposal.

APPELLATE CRIMINAL.

Before Mr. Justice McDonell and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF UTTOM KOONDOO AND ANOTHER.

THE EMPRESS v. UTTOM KOONDOO AND ANOTHER.¹

Penal Code (Act XLV. of 1860), ss. 411, 413—Offences of Different Kinds—Criminal Procedure Code (Act X. of 1872), ss. 283, 453—Defect in Procedure—Reduction of Punishment—Course to be followed at trial.

A prisoner cannot be tried at the same trial for receiving or retaining (s. 411, Penal Code), and habitually receiving or dealing in (s. 413), stolen property. The proper course is to try the accused first for the offences under s. 411; and, if he is convicted, to try him under s. 413, putting in evidence the previous convictions under s. 411, and proving the finding of the rest of the property, in respect of which no separate charge, under s. 411, could be made or tried by reason of the provisions of s. 453 of the Criminal Procedure Code.

UTTOM KOONDOO and Krishno Moni Telani were committed on seven separate charges of dishonestly retaining stolen property (s. 411), and of habitually dealing in stolen property (s. 413 of the Penal Code).

The Sessions Judge tried these seven charges together, and recorded the following finding: "Concurring with the assessors, the Court finds that Uttom Koondoo and Krishno Moni Telani are guilty of the offences specified in the first seven headings of the charge, *viz.*, that they dishonestly retained stolen property belonging to Nobin Ghose, Mudun Shaha, Meer Jhan, Sonatun Ghose, Naba Kumar Chatterjee, Tamizudden, and Porashoola, knowing, or having reason to believe, the same to be stolen, and thereby committed an offence punishable under s. 411 of the Penal Code; and the Court directs that the said Uttom Koondoo be sentenced to rigorous imprisonment for five years, and Krishno Moni Telani to rigorous imprisonment for three years. Further, that Uttom Koondoo pay a fine of Rs. 100, and in default suffer rigorous imprisonment for one year."

The prisoners appealed against this order to the High Court.

No one appeared on either side at the hearing.

¹ Criminal Appeal, No. 143 of 1882, against the order of *T. Peterson, Esq.*, Sessions Judge of Jessore, dated the 1st January 1882.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by 1882.

FIELD, J. (who, after setting out the facts, continued).—There is no finding or sentence under s. 413 of the Penal Code. The Sessions Judge erroneously speaks of the “seven headings of the charge.” There were seven distinct charges, not seven headings of one charge. Upon conviction on a single charge under s. 411, three years is the maximum term of imprisonment that could have been directed. Regard being had to the provisions of s. 453 of the Code of Criminal Procedure, the prisoner could not have been charged and tried at the same time for more than three offences of the same kind. The Sessions Judge was, therefore, wrong in trying the seven charges together. The appellants do not, however, complain of this irregularity in procedure; and it does not appear that the irregularity has occasioned a failure of justice either by affecting the due conduct of the prosecution, or by prejudicing the prisoners in their defence (s. 283, Code of Criminal Procedure). We, therefore, think it unnecessary to set aside the proceedings of the Sessions Judge, and direct a new trial; but the conviction and sentence must be set aside, and the prisoners will be convicted upon the three charges concerned with the property of (i.) Nobin Ghose, (ii.) Meeajan, and (iii.) Porashoola. For the first and second offences, the prisoners will be sentenced each to one year’s rigorous imprisonment in respect of each charge. For the third offence, Uttom Koondoo will be sentenced to three years’ rigorous imprisonment, and Krishno Moni Telani to one year’s rigorous imprisonment. We think a sentence of fine unnecessary.

We may observe that the prisoners could not be tried at the same trial for receiving or retaining (s. 411), and habitually receiving or dealing in (s. 413), stolen property; these two offences not being offences of the same kind (s. 453, Code of Criminal Procedure). The proper course would have been to try the accused first for the offences under s. 411, and then, if he were convicted, to try him for the offence under s. 413, putting in as evidence the previous convictions under s. 411, and proving the finding of the rest of the property in respect of which no separate charge, under s. 411, could be made or tried by reason of the provisions of s. 453, Code of Criminal Procedure. As, however, the punishment awarded under s. 411 is, in our opinion, sufficient, it is unnecessary to proceed further under s. 413. The appeal will be dismissed, the conviction and sentence being altered as above directed.

Sentence altered.

CRIMINAL REFERENCE.

Before Mr. Justice McDonell and Mr. Justice Field.

MAILAMDI FAKIR v. TARIPULLA PRAMANIK.¹

Record of Inferior Court—Explanation of Order Passed—Criminal Procedure Code (Act X. of 1872), s. 295—Indefinite Period of Imprisonment in Default of Security, Order for.

1882.
April 25.
8 Cal. 644.

Where a Sessions Judge has, under s. 295 of Act X. of 1872, called for the record of an inferior Court, he is, before referring the case to the High Court for orders, bound to call upon the inferior Court for an explanation of the order passed, and should submit such explanation, together with the rest of the record, to the High Court.

An order directing an accused “to be imprisoned until he gives security” is bad; a definite period for such imprisonment, not exceeding one year, should be stated in the order.

¹ Criminal Reference, No. 90 of 1882, Letter No. 120, from the order made by C. A. Kelly, Esq., Sessions Judge of Pubna and Bogra, dated the 19th April 1882.

1882.
MAILAMDI
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v.
TARIPULLA
PRAMANIK,
8 Cal. 644.

ONE Mailamdi Fakir charged Taripulla Pramanik under s. 352 of the Penal Code with assault.

The case was tried summarily by a Bench of Honorary Magistrates, who convicted him, and sentenced him to a fine of Rs. 10, and in default to fifteen days' rigorous imprisonment; and further bound him over to enter into a personal recognizance in Rs. 100, with two sureties for a like amount, to keep the peace for one year, and in default to simple imprisonment until the order was complied with.

The Sessions Judge, after expressing his opinion that the order was bad, without calling upon the Honorary Magistrates for an explanation, referred the case to the High Court.

No one appeared for the parties.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

McDONELL, J.—There has been great delay on the part of the Sessions Judge in making this reference. The explanation of the Honorary Magistrates, who sat on the Bench and are alive, ought to have been submitted. The record says that the charge was under s. 352; and there is no serious contention that anything else was intended. So much of the order as directs the accused to be imprisoned until he gives security is bad, and a definite period not exceeding one year should have been inserted in this part of the order.

Under all these circumstances, we think it will be sufficient to set aside so much of the order as requires recognizance and security to keep the peace, and we set aside this portion accordingly.

Order varied.

CRIMINAL REFERENCE.

Before Mr. Justice McDonell and Mr. Justice Field.

ABASU BEGUM v. UMDA KHANUM AND ANOTHER.¹

1882.
April 20.
8 Cal. 724.

Recognizance to keep the Peace—Form of Summons under s. 492 of the Criminal Procedure Code (Act X. of 1872).

The words of s. 492 of the Code of Criminal Procedure are directory, and not imperative; and an omission to insert in a summons under that section the amount of the recognizance and security required will not invalidate any subsequent proceedings binding over the parties to keep the peace.

ON the 27th October 1881, an Assistant Magistrate passed an order, under s. 491 of the Criminal Procedure Code, calling upon certain persons to appear and show cause why they should not be bound down to keep the peace; the amount of the bond, the term for which it was to be in force, the number of sureties required, and the amount in which they were to be bound, were not stated in the summons.

The Sessions Judge considered the order to be illegal, inasmuch as s. 492 of the Code of Criminal Procedure had not been complied with, and referred the following question to the High Court: Whether the provisions of s. 492 of the Criminal Procedure Code (in regard to the amount of the bond, the term for which it is to be in force, the number of sureties required, and the amount in which they

¹ Criminal Reference, No. 80 of 1882, from the order made by G. E. Porter, Esq., Sessions Judge of Gya, dated the 1st April 1882.

are to be bound), should be strictly adhered to, or whether a simple order to show cause, without specifying any of the particulars required by the section, is sufficient?

Baboo *Romesh Chunder Bose*, Baboo *Ram Churn Mitter*, and Baboo *Jogesh Chunder Dey*, for the different parties concerned by the order.

The opinion of the Court (McDONELL and FIELD, JJ.) was delivered by

FIELD, J.—In this case, one Umda Khanum has been required to give rupees one thousand as recognizance, and two sureties in rupees five hundred each, to keep the peace for the term of one year, and one Bahadoor Lall has been required to give rupees two hundred as recognizance, and two sureties in rupees one hundred each, to keep the peace for the same term.

The Sessions Judge of Gya has referred the case to this Court to have the order quashed, on the ground that the summons, issued under ss. 491, 492 of the Code of Criminal Procedure, did not, as it should have done, specify the amount of the recognizance, the number of sureties required, and the amount in which they were to be bound respectively.

S. 492 distinctly provides that the summons shall set forth the substance of the report or information on which it is issued, the amount of the bond, and the term for which it is to be enforced; and, if security is called for, the number of sureties required, and the amount in which they are to be bound respectively, and the time and place at which the person summoned is required to attend. We think it very desirable that Magistrates should, in the performance of their duties, attend strictly to the provisions of the law. This is desirable on many grounds; and, if there were no other reason for desiring it, on this ground alone, that it would save a number of references which take up a considerable portion of the time of this Court, and which are rendered possible merely because Magistrates do not pay that attention which they might reasonably be expected to pay to the express provisions of the law.

What we have to decide in the present case is, whether the omission by the Assistant Magistrate to insert in the summons certain of the particulars required by the section is an omission which will invalidate all proceedings had upon a summons so informally issued.

Now, in this case, we find that the summons did intimate to both parties who have been bound over that they were to show cause why recognizance and security should not be taken from them. The summons did not specify, as it should have done, the amount of the recognizance, or the amount in which the sureties were to be bound respectively.

What then is the nature of the precepts contained in this section of the Code of Criminal Procedure? Are they imperative or directory merely? The Code does not in express language say what shall be the consequence of not attending to the exact provisions contained in s. 492, and it has been said that, where the Legislature has expressed no intention on the point, that intention should be imputed to it which is most proper, and it must be that which is most consistent with reason and with due regard to convenience and justice.

In applying this principle, it has generally been considered that, where the prescriptions of a Statute relate to the performance of a public duty, they are to be understood as instructions merely for the guidance and government of those on whom the duty is imposed; in other words, they are to be considered as directory merely, and not imperative. Instances are: Where a Statute provided that no person named in the commission of peace should be authorized to act as a

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justice of the peace until he had taken and subscribed the oaths required by law, and a person named in the commission did act without having taken and subscribed those oaths, it was held that his not having taken those oaths did not affect the validity of the acts done by him. Again, where a Parochial Assessment Act required that poor-rates should contain certain particulars relating to the person and property to be rated, this provision was held to be directory, and not to affect the validity of a rate which did not contain all the particulars required.

In a very excellent little work on Statute Law recently published by Mr. Wilberforce, the result of the cases is thus stated: "A similar construction is placed upon Statutes which provide that things shall be done in a certain manner. Such a provision is usually considered directory, unless the Legislature has used negative words or other words showing an intention to treat the manner of performance as essential to the validity to the act, or unless the Statute confers a special authority which must be strictly followed."

Now, in the case before us, if the summons had not expressly given notice to the petitioners that they would have to show cause why they should not give security, and notwithstanding this omission security had been taken from them, we think that they would have been prejudiced by the form of the summons. But, as the summons did give distinct notice that both recognizance and security would be required of them, although the amount of such recognizance and security was not specified, we think that the irregularity was not one which really prejudiced the petitioners, and that the provisions of the law as to the insertion in the summons of the amount of the recognizance and security ought to be regarded as directory only, and not as imperative. In this view, the omission in the summons will not invalidate the subsequent proceedings.

We, therefore, decline to interfere with the order of the Assistant Magistrate.

APPELLATE CRIMINAL.

Before Mr. Justice McDonell and Mr. Justice Field.

1882.

April 20.

8 Cal. 728.

IN THE MATTER OF THE PETITION OF GOPAL CHUNDER SIRDAR.

GOPAL CHUNDER SIRDAR *v.* FOOLMONI BEWA.¹

Abetment—Extortion—Village Chowkidar—Penal Code (Act XLV. of 1860), s. 384.

The mere fact that the offence of extortion under s. 384 of the Penal Code is committed in the presence of the village chowkidar, without eliciting any disapproval on his part, will not render him liable as an abettor of the offence.

In this case, the petitioner, Gopal Chunder Sirdar, was charged with aiding and abetting one Shib Chand Bhandari in extorting Rs. 15 from one Foolmoni Bewa. The Deputy Magistrate, in his judgment, said: "The evidence for the prosecution proves that the accused Shib Chand charged the complainant with the theft of the bythuk of his hookah, and threatened to 'challan' her, unless she paid him Rs. 30, and that accused eventually agreed to take Rs. 15, which sum the complainant, by making over her personal jewellery to one Umesh Purkhait as security, managed to raise and pay the accused.

¹ Criminal Motion, No. 75 of 1882, against the order of *E. M. Reily, Esq.*, Deputy Magistrate of Diamond Harbour, in the 24-Parganas, dated the 7th March 1882.

The presence of the accused chowkidar, Gopal Chunder Sirdar, is deposed to, and, though it does not appear that he said or did anything in particular, his presence during the occurrence, added to the fact of his not having disapproved of the accused Shib Chand's words and conduct and action, sufficiently indicate the abetment on his part." The Deputy Magistrate convicted Shib Chand Bhandari under s. 384 of the Penal Code, and sentenced him to one month's rigorous imprisonment, and to pay a fine of Rs. 30, or in default to similar additional imprisonment for one month. He convicted the petitioner Gopal Chunder Sirdar under ss. 384 and 109 of the Penal Code, and sentenced him to one month's rigorous imprisonment. Shib Chand appealed to the District Judge, who, disbelieving the evidence for the prosecution, reversed his conviction, and ordered the fine to be returned. Gopal Chunder moved the High Court to have the finding and sentence of the Deputy Magistrate reversed and annulled.

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Baboo *Boido Nath Dutt* for the petitioner.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

McDONELL, J.—In this case, one Shib Chand Bhandari was charged with extortion, the extortion being said to consist in taking Rs. 15 from a woman by threatening to bring a charge of theft against her.

The petitioner before us, Gopal Chunder Sirdar, was the village chowkidar, and he has been convicted of abetment of the extortion committed by Shib Chand Bhandari.

The Deputy Magistrate says in his judgment: "Though it does not appear that he (Gopal Chunder Sirdar) said or did anything in particular, his presence during the occurrence, added to the fact of his not having disapproved of the accused Shib Chand's words and conduct and action, sufficiently indicate the abetment on his part."

We think that the omission on the part of Gopal Chunder Sirdar to disapprove of the conduct of Shib Chand Bhandari cannot, under the circumstances, be said to amount to abetment. The only portion of the definition in s. 107 of the Penal Code, which can be supposed to apply, is the 3rd clause, namely, "intentionally aids by any act or illegal omission the doing of that thing." Now, there was no illegal omission on the part of the chowkidar in this case. He was not bound by s. 89 or by s. 90 of the Code of Criminal Procedure to report the offence of extortion; and, even if he were so bound, his subsequent omission to report the commission of the offence could not be said to be intentionally aiding the doing of the thing itself, which must have been done before it could be reported by the chowkidar.

The offence of extortion is not a "cognizable offence;" and therefore, even if we suppose that the chowkidar knew the charge of theft to be false, and this does not appear, s. 95 or s. 97 of the Code of Criminal Procedure would not apply.

That the chowkidar intentionally aided the commission of the offence of extortion by any act is negatived by the Deputy Magistrate's finding; and we are unable to see that he aided by any illegal omission. We must, therefore, set aside the conviction and sentence.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice McDonell and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF LUDDUN SAHIBA.

LUDDUN SAHIBA *v.* MIRZA KAMAR KUDAR.¹

1882.

April 24.

8 Cal. 796.)

Maintenance—Mutta Form of Marriage—Criminal Procedure Code (Act X. of 1872), s. 536—Mahomedan Law—Sheea Sect.

Under the law of the Sheea sect of Mahomedans, a mutta wife is not entitled to maintenance; but such a provision of the law does not interfere with the statutory right to maintenance given by s. 536 of the Code of Criminal Procedure.

The mutta form of marriage does not admit of repudiation under the law of the Sheea sect of Mahomedans.

Quære.—Whether the form of divorce called zihar may be exercised in the mutta form of marriage.

ONE Luddun Sahiba applied to a Magistrate, under s. 536 of the Code of Criminal Procedure, for maintenance, stating that she had been married to her husband, under the mutta form, for a period of fifty years, and that her husband had now refused to maintain her.

The husband alleged that the mutta was contracted for one month and a-half only, and that, after living with Luddun for a month, he gave up the remaining fifteen days on her going away to her own house without his consent.

The Deputy Magistrate held that, according to the Sheea law, by which the parties were governed, the woman had no right to maintenance, she being a mutta wife to whom the section of the Criminal Procedure Code was inapplicable; and that, the husband having given up a portion of the period of the mutta marriage, the woman was no longer his wife within the meaning of s. 536. He, therefore, dismissed the application.

The case came up to the High Court under s. 294 of Act X. of 1872.

Mr. *Amir Ali* and *Moonshi Serajul Islam*, for the petitioner, contended that the provisions of the Sheea law could not interfere with the statutory right to maintenance given by s. 536.

Mr. *Abdool Rahman*, *contra*, contended that the effect of giving up part of the period for which the contract of marriage had been made was to put an end to the relationship of husband and wife.

The order of the Court (McDONELL and FIELD, JJ.) was as follows:—

The petitioner in this case made an application under s. 536 of the Code of Criminal Procedure for the purpose of obtaining an order for maintenance of herself as the wife of Prince Mirza Kamar Kudar. It is admitted on all hands that the parties are Sheeas, and that she was a wife by the mutta form of marriage contract. She alleges that the period of the contract made between herself and the defendant was fifty years. The defendant, on the other hand, alleges that the period was one month and a-half only.

The Deputy Magistrate, before whom the case came for disposal, was of opinion, *first*, that, inasmuch as, under the Sheea law, a mutta wife has no right to maintenance, the petitioner was not entitled to obtain an order for maintenance under the provisions of s. 536 of the Code of Criminal Procedure; and,

¹ Criminal Motion, No. 93 of 1882, against the order of *Syed Amir Hussain*, Deputy Magistrate of the 24-Parganas, dated the 25th February 1882.

secondly, that, as the defendant had given up the remaining term of the period of the mutta marriage, the petitioner was no longer a wife within the meaning of s. 536.

As to the first point, there is no dispute that, according to the Sheea law, a mutta wife is not entitled to maintenance. But it is contended by Mr. Amir Ali that this provision of the Sheea law cannot interfere with the statutory right to maintenance given by s. 536 of the Code of Criminal Procedure.

We think that this contention is correct. A right to maintenance, depending upon the personal law of the individual, is a right capable of being enforced, and properly forms the subject of a suit in a Civil Court. But we think that this right, depending upon the personal law of the individual, is altogether different from the statutory right to maintenance given by s. 536 in every case in which a person, having sufficient means, neglects or refuses to maintain his wife.

As to the second point, it is admitted by both sides that the husband can give up the remaining portion of the period for which the contract of mutta marriage is made. For the defendant it is contended that the effect of giving up the rest of the period is to put an end to the relationship of husband and wife. No authority has been shown to us in support of this contention, and, as at present advised, we are unable to concur in the argument that the giving up of the remainder of the term terminates the relationship of husband and wife. According to the Sheea law, the mutta form of marriage does not admit of repudiation, and, if the giving up of the remainder of the term had the effect contended for, this would practically destroy the provision of the law which forbids repudiation in this form of marriage.

We think, therefore, that the Deputy Magistrate was not right in dismissing the petition on either of the grounds on which he has proceeded. We must, therefore, set aside his order, and remand the case in order that he may determine whether the period of the mutta contract was fifty years, as alleged by the petitioner, or one month and-a-half only, as alleged by the defendant—determine, in other words, whether the petitioner is still the wife of the defendant.

In the course of the argument a question was raised before us, upon which we pronounce no opinion, because it was not a point which was raised before the Deputy Magistrate. We refer to the question whether the form of divorce, known as *zihar*, may be exercised in the mutta form of marriage. Mr. Baillie says that there is some difference of opinion on this point, but that, according to the opinion which is founded on traditional authority, it may be exercised. The defendant contended before the Deputy Magistrate that he had given up the remainder of the term, and that this had the effect of terminating the relationship of husband and wife. He made no allegation that he had exercised, and had a right to exercise, *zihar*.

Order set aside.

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8 Cal. 736.

Before Mr. Justice McDonell and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF JHUBBOO MAHTON AND OTHERS.

THE EMPRESS *v.* JHUBBOO MAHTON AND OTHERS.¹

1882.

April 28.

8 Cal. 739.

Evidence—Writing to Refresh Memory—Right of Counsel to inspect the Writing—Neglect to exercise such Right—Deposition of Medical Witness—Criminal Procedure Code (Act X. of 1872), ss. 240, 323—Duty of a Judge when charging a Jury—Constructive Murder under s. 34 of Penal Code (Act XLV. of 1860)—Effect on others charged under s. 149—Irregularities in Procedure and Admission of Evidence.

Per FIELD, J.—The grounds upon which the opposite party is permitted to inspect a writing, and to refresh the memory of a witness, are threefold: (i) to secure the full benefit of the witness's recollection as to the whole of the facts; (ii) to check the use of improper documents; (iii) to compare his oral testimony with his written statement.

Per FIELD, J.—The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.

Per FIELD, J.—Under the provisions of s. 323 of the Code of Criminal Procedure, the examination of a medical witness taken and duly attested may be given in evidence in any criminal trial; but in order that such evidence may be admissible against any individual accused person, the examination must have been taken in the presence of the accused person.

Per FIELD, J.—It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts; and if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection.

Per FIELD, J.—Where a prisoner is constructively guilty of murder under s. 34 of the Penal Code, it is doubtful if he can be said to have committed the offence of murder within the meaning of s. 149, so as to make other prisoners, by a double construction, guilty of murder.

Per FIELD, J.—Irregularities under s. 240 of the Criminal Procedure Code in the selection of the jurors, and in the admission of the deposition of a medical witness treated, it not being shown that the prisoners had been thereby prejudiced, as being objections which ought not to be entertained for the purpose of interfering with the verdict, regard being had to the provisions of s. 283 of the Criminal Procedure Code, and s. 167 of the Evidence Act.

THIS was an appeal from an order of the Sessions Judge of Patna.

The facts of the case are fully set out in the judgment of FIELD, J.

Mr. Branson, Mr. Huda, and Mr. Sandel, for the appellants.

The *Officiating Advocate-General* (Mr. Phillips) and Mr. M. Ghose for the Crown.

The following judgments were delivered:—

FIELD, J.—In this case eight persons have been tried and convicted under s. 302, read with s. 142, of the Penal Code, and have been sentenced to transportation for life. The circumstance out of which the case arose was a dispute concerning a piece of land and the crop which, at the time of the occurrence, was upon this land.

The first prisoner, Jhubboo, was originally charged under ss. 302, 326, 396, and 148 of the Penal Code. In the course of the trial, two further charges were added, *viz.*, that he, Jhubboo, was a member of an unlawful assembly,

¹ Criminal Appeal, No. 146 of 1882, against the order of H. Beveridge, Esq., Sessions Judge of Patna, dated the 22nd February 1882.

in the prosecution of the common object of which, namely, in taking possession of certain crops by force, one of the members committed murder by causing the death of one Ibrahim Hossein, and that he was thereby guilty under s. 302, read with s. 149, of the Penal Code; and, *secondly*, that he was a member of an unlawful assembly, in the prosecution of the common object of which, namely, in taking possession of the crops by force, one or more of the members caused grievous hurt to one Torab Ali, and that he had thereby committed an offence punishable under s. 325, read with s. 149, of the Penal Code.

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Against the next two prisoners, Lukshman Mahton and Umrao Mahton, there were charges under s. 302, read with s. 149, s. 326, read with s. 149, and s. 396 of the Penal Code. The charge under s. 302 runs thus: "That you were members of an unlawful assembly, by a member of which, to wit, Jhubboo, an offence, to wit the murder of Ibrahim Hossein, was committed, such as you knew to be likely to be committed, in the prosecution of the common object, to wit, the taking possession of the crops by force." Lukshman is also charged with rioting, armed with a deadly weapon, under s. 148.

Against the remaining five prisoners—Harihur Mahton, Ramdehal Mahton, Sajwan Mahton, Mahabir Mahton, and Ramjiwan Mahton—there are charges under s. 302, read with s. 149, s. 326, read with s. 149, and s. 396 of the Penal Code; and in these charges the common object is indefinitely stated to be "the taking possession of the crops by force." And the charges as to murder and grievous hurt alleged that the accused persons knew these offences to be likely to be committed in the prosecution of the common object. There was also against Harihur Mahton an additional charge under s. 148.

Two observations may be made in respect of the prisoners other than Jhubboo: *first*, the charges against them did not allege that the offences of murder and grievous hurt were committed in the prosecution of the common object of the unlawful assembly, and yet the jury have found that these prisoners are guilty, on the ground that the offence of murder was committed in prosecution of the common object of the unlawful assembly. The Judge gave no direction upon the matter of the charge as framed, *viz.*, that murder was such an offence as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object; he summed up as if the charge alleged, which it did not, that murder had been committed in prosecution of the common object. It is reasonable to suppose that the Judge's misdirection led the jury into error. *Secondly*, the charges allege that the offences of murder and grievous hurt were committed by Jhubboo Mahton. These charges were not amended by the insertion of any such words as the following: "or some other person unknown who was a member of the unlawful assembly." The jury have found, as a fact, that Jhubboo Mahton did not commit the murder; and if Jhubboo did not commit the murder, it is not easy to understand how the prisoners other than Jhubboo could be constructively convicted of murder, on the ground that murder had been committed by Jhubboo in prosecution of the common object of the unlawful assembly.

Five persons are said to have been injured in the course of the riot—namely, Ibrahim Hossein, Imdad Ali, Gohur Ali, Torab Ali, and Abdul Karim. Of these, Ibrahim Hossein has since died, in consequence, as is alleged by the prosecution, of the injuries which he received on the occasion of the riot.

In the petition of appeal which has been presented to this Court, a number of points have been taken; but as they have not all been pressed upon us,

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I shall, before proceeding to deal with the Judge's charge to the jury, notice those only which formed the subject of the arguments addressed to us.

The first point is, that the jurors who tried the case were not, as they should have been, chosen by lot from the persons summoned to act as jurors. S. 239 of the Code of Criminal Procedure directs that assessors shall be chosen by the Judge. S. 240 directs that the jurors shall be chosen by lot from the persons summoned to act as jurors. If, as is alleged in the petition of appeal, the Judge himself selected the jurors instead of choosing them by lot, he acted contrary to the provisions of s. 240. But as there is no serious contention that the appellants were in any way prejudiced by what the Judge is said to have done in this matter, I think the objection is not one which ought to be entertained for the purpose of interfering with the verdict, regard being had to the provisions of s. 283 of the Code of Criminal Procedure.

The next point is, that, although the police-officer, Ram Surrun Lal, was allowed to refresh his memory by looking at his diary, the Sessions Judge improperly refused to allow the counsel for the defence to see this diary. What really happened was this: The police-officer, Ram Surrun Lal, when under examination, was asked whether he took down the statement made by the witness Leakat, and he replied that he did. He then read, or refreshed his memory, by looking at the original statement so taken down by him. This was, as I understand it, a statement taken down under the provisions of s. 119 of the Code of Criminal Procedure, and was not necessarily a part of the diary which a police-officer is required to keep by s. 126. The particulars which s. 126 requires to be recorded in a police-diary do not include any written statement taken down under s. 119; and from the papers produced before us, it would appear that, as a matter of fact, the written statement was not an integral portion of the diary. Having looked at Leakat's statement, the police-officer said, in answer to a question put by the prisoner's counsel, that it contained nothing about Jhubboo jumping on Ibrahim. The object of asking this question was to show that Leakat in his first statement to the police had said nothing about the prisoner Jhubboo jumping on the deceased Ibrahim. The medical evidence showed that Ibrahim had received internal injuries, and the theory of the defence was, that, after these injuries were discovered upon a *post-mortem* examination, the witness Leakat improved his testimony by adding a statement about Jhubboo jumping on Ibrahim with the object of accounting for the internal injuries discovered by the *post-mortem* examination. As, however, the police-officer stated that Leakat had said nothing to him about Jhubboo jumping on Ibrahim, the object of the question was attained, and it was unnecessary for the prisoner's counsel to ask to look at the diary.

The police-officer then stated in answer to a further question that the statement taken by him did not record that Jhubboo had given orders. It appears from a note made lower down by the Sessions Judge that this question also was answered by the witness after looking at the written statements taken by him, when he questioned the persons afterwards called for the prosecution in the Court of Session. Here also, as the answer of the witness was all that the prisoner's counsel could desire, there was no necessity for him to look at the original statement with which the witness refreshed his memory, and he did not ask to do so.

After this we have nearly a page and-a-half of the same witness's cross-examination, and then we find that the witness was asked—"Did Torab Ali say anything to you about his having seen Gohur Ali, Imdad Ali, and Abdul Karim being struck?" The answer was, "I do not remember." Before giving this

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answer, it is not contended that the witness again looked at the original statements of the witnesses, and the Judge then makes this note—"The counsel for the defence wishes to see the diary, and to make the witness refresh his memory therewith. The Court declined to do this." It is now contended that because before answering the two first questions above referred to, the witness had looked at the original statements in order to refresh his memory, the counsel was entitled to see the diary when, at a later stage of the examination, the witness gave the answer, "I do not remember." I think that this contention is untenable. I have first to observe that, although the term 'diary' has been used, I take it that what the Judge and the counsel were really alluding to was the statement taken down by the police-officer under s. 119. Having regard to s. 161 of the Evidence Act, the prisoners' counsel was entitled to see the writing with which the police-officer refreshed his memory in order to answer the first two questions. This writing was, as to the first question, the original statement of Leakat. What the writing was with respect to the second question is not very clear.

Now, the writing which the prisoners' counsel desired to see when the witness said, "I do not remember," was not the statement of Leakat, but the statement of Torab Ali. I think that, as the prisoners' counsel did not exercise his right to look at the writing when the first or when the second question was answered, but allowed the examination to proceed, he lost his opportunity of claiming to look at the writing to which the witness referred before answering the first and the second questions. I do not assent to the argument that, because counsel was entitled to see the writing which contained the statement of Leakat, he was, therefore, entitled to see other writings which contained the statements of persons other than Leakat, and which had no connection with Leakat's statement, except that they were taken in the course of the same inquiry by the police. Nor can I assent to the argument that counsel, having a right to look at a particular writing before or at the moment when the witness used it to refresh his memory in order to answer a particular question, and not then exercising this right, continued to retain it throughout the whole of the subsequent examination of the witness.

The grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness are threefold: (i) to secure the full benefit of the witness's recollection as to the whole of the facts; (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement. The opposite party may look at the writing to see what kind of writing it is in order to check the use of improper documents; but I doubt whether he is entitled, except for this particular purpose, to question the witness as to other and independent matters contained in the same series of writings. I think, therefore, that, at the particular stage at which the prisoners' counsel asked to see what he called the diary, by which I presume he meant the whole series of writings containing the statements of all the persons examined by the police-officer, he was not entitled to exercise the right claimed in the particular way claimed by him. I further think that the Sessions Judge was not bound to compel the witness to look at the so-called diary in order to refresh his memory; and that it was wholly within his discretion whether he should do so or not.

The third point is that the deposition of the medical officer was taken by the Magistrate when only three prisoners—namely, Jhubboo, Lukshman, and Umrao—were before him, and that, as regards the remaining five prisoners,

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this examination of the medical officer was improperly used as evidence in the Court of Session, inasmuch as it was not taken by the Magistrate in their presence.

Under the provisions of s. 323 of the Code of Criminal Procedure, "the examination of a Civil Surgeon or other medical witness, taken and duly attested by a Magistrate, may be given in evidence in any criminal trial, although the person examined is not called as a witness, but the Court may summon such Civil Surgeon or other medical witness if it sees sufficient cause for doing so." I take it that, in order to be admissible under this section as evidence against any individual accused, the examination must have been taken by the Magistrate in his presence. In the present case, I think it exceedingly probable that the examination of the medical witness was not taken in the presence of the five prisoners other than Jhubboo, Lukshman, and Umrao. At the same time I cannot say that this is a point upon which there is no possible doubt. No specific objection to the admissibility of the medical officer's examination was taken upon this ground in the Court of Session. If such objection had been taken, it is just possible that matter might have been forthcoming to show that the other five accused were present in person or by agent (s. 191, Criminal Procedure Code) when the medical officer was examined by the Magistrate.

The medical officer was called in the Court of Session, and it has been contended before us that, as he was called, his deposition taken by the Magistrate was absolutely inadmissible. I do not assent to this argument. I think that a deposition, properly taken, may be put in, and that the medical officer may then be called and further interrogated upon any points upon which there had not been a sufficient examination by the Magistrate. In the present case the medical officer was called, and was cross-examined by the prisoners' counsel. It is true that this cross-examination was expressly stated to be on behalf of one of the prisoners only; but it is equally true that counsel had an opportunity of cross-examining on behalf of all the prisoners. One important reason why a deposition not taken in the presence of a person sought to be affected by it is inadmissible is, that such person had no opportunity of cross-examining the witness. In this case all the accused were afforded this opportunity in the Court of Session. Then, further, it has not been contended that, if the medical officer had been examined again in-chief in the Court of Session, any advantage would have accrued to the appellants which they could not have obtained by cross-examining him when he was called by the Sessions Judge.

Under these circumstances, I think, it has not been shown to us that the prisoners were prejudiced by the irregularity, if committed; and, with reference to s. 283 of the Code of Criminal Procedure and s. 167 of the Evidence Act, I think that this objection would not justify us in interfering with the verdict.

Having disposed of these preliminary questions, I now come to consider the Judge's charge to the jury, and as the conclusion to which I feel myself constrained to come is, that this charge is radically defective in at least two essential particulars, I shall set out the essential portions of the charge, and state somewhat fully the grounds upon which I am led to this conclusion.

After some preliminary observations the Judge proceeds to say: "The first question which you have to decide is—Was there a disturbance in the village of Sopowan and plot called Jhikitia Kunda on the morning of Monday, the 28th November last, and were Ibrahim and four others wounded there? There can be no doubt that Ibrahim is dead, and I do not think that there can be any reasonable doubt that he was killed. The medical evidence shows that he had

a severe and dangerous wound on the left arm. The ulnar artery had been cut, and the ulnar bone broken and comminuted, and this wound appeared to have been inflicted with a sword. The medical evidence shows that death was the result of hæmorrhage and shock."

He then proceeds to remark upon the injuries said to have been caused to Torab Ali, Imdad Ali, Gohur Ali, and Abdul Karim; and after this he says: "The next questions which you have to decide are: Were the prisoners present at that disturbance? Did they take part in it? Was that disturbance a riot? Did the prisoners take part in the riot? Was the common object of the rioters to take possession by force of a crop of paddy, and were the killing of Ibrahim Hossein and the wounding of the other four men done in prosecution of the common object of the rioters? The question of the presence of the prisoners and of their participation in the riot must be considered by you separately for each prisoner. You must consider if the evidence shows that each of the prisoners was present and took part in the riot. If you have any doubt as to the presence or participation of any one of the prisoners, you will give him the benefit of it. If you find that there was a riot, and that the prisoners took part in it, then you have to consider under what circumstances the riot was committed. It is evident that the dispute was about the cutting of a crop of paddy. A most important question here arises—namely, who cultivated the land and sowed the paddy?"

After this he discusses the question as to who sowed the paddy; and he then continues:—

"You will ask yourselves who sowed the land? Was it Jhubboo or Leakat? If you find that Leakat sowed the lands, then Jhubboo's right of private defence is gone,¹ whether the land was really his or not. For if he allowed² Leakat to take possession in Assar, he had no right to resist the cutting in Aghran. If Leakat sowed the land in Assar, even though wrongfully, his cutting the crop in Aghran was not theft, &c., so as to give Jhubboo a right of private defence.³ If you find that Leakat sowed the crops, and that the prisoners were present and took part in the riot, I think that you must find them guilty.⁴

"If, again, you find that the crop was sown by Jhubboo, then the question which you have to ask yourselves is—if he and his party exceeded their right of private defence? The fourth exception to s. 99 declares that the right of private defence in no case extends to the inflicting more harm than it is necessary to inflict for the purpose of defence. Did the prisoners or any of them exceed this limit? The evidence shows that there were some 200 Kurmis armed with swords and lathis, while there were only four or five Mahomedans, and that they were unarmed. I do not think that it can be said that they needed to wound three persons and kill a fourth in order to preserve the paddy.⁵ The case is

¹ The soundness of this direction is very questionable.—Note by FIELD, J.

² It is said that there is no evidence that he allowed him; that no such case was made; that the prisoners did not rely upon the right of private defence, but denied the transaction as stated by the prosecution; and that the Judge, assuming for the prisoners a defence based on the exercise of the right of private defence, misled the jury with supposing that they admitted the facts, and sought to explain away their criminality.—Note by FIELD, J.

³ This also is questionable. It can scarcely be said that, if A wrongfully sows a crop on B's land, A is entitled to reap this crop, and B has no right to prevent him.—Note by FIELD, J.

⁴ Of murder.—Note by FIELD, J.

⁵ It might, with equal truth, have been pointed out that two hundred men did not need to wound three persons and kill a fourth in order to achieve the common object of getting possession of the crop.—Note by FIELD, J.

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rather one of killing and wounding under grave and sudden provocation,¹ and therefore punishable under ss. 304, 334, and 335. Here it will be necessary for you to consider the evidence against each prisoner."

The Sessions Judge then discusses the part which Jhubboo took in the occurrence, and adverts to the fact that the witnesses in their statements before the police, and the deceased Ibrahim in his dying declaration, said nothing about Jhubboo giving orders or jumping upon Ibrahim when down. The direction of the Judge upon this part of the evidence was particularly favourable to the prisoner Jhubboo. In order to enable the jury to consider the effect of the evidence against each of the other accused, the learned Judge says that he here 'summarized' the evidence of each witness; but the charge does not contain this summary. The Judge then proceeds: "If you find that the crop was sown by Jhubboo, and that he and the other prisoners had a right of protecting the crop from being cut and carried away by Torab and Leakat's party, but that the limits of the right of private defence were exceeded, you shall consider what, in your opinion, each prisoner did. Jhubboo is said to have ordered the killing of Ibrahim, and to have aided in doing so by stamping on his chest, &c. He is also said to have wounded Torab, an old and feeble man. It could scarcely have been necessary for him to do this in order to defend² his property. Lukshman is said to have wounded Gohur Ali with a sword, and Harihur to have wounded Abdul Karim with a sword. The other five are all said to have used their lathies. If you believe that they did, and that they exceeded their right of private defence by doing so, then you can find them guilty of causing hurt. You will also remember that, if all the prisoners joined together in assaulting the other side, and if they were not justified by the law of private defence in doing so, or if they exceeded that right by striking the other party, then they were an unlawful assembly, and each is liable for the acts done by the assembly or any member thereof. You will also remember the law that an assembly not originally unlawful may become unlawful afterwards. If the crop was Jhubboo's, and he and the other prisoners went to protect it, they did not commit a riot by assembly; but if they went on and attacked the other party, and in doing so exceeded the limits of their right of private defence, they became an unlawful assembly."

Now, there are parts of this charge, and particularly of this last passage, more especially the words "if they exceeded that right by striking the other party, then they were an unlawful assembly, and each is liable for the acts done by the assembly or any member thereof," which appear to me wholly defective and misleading; but I do not propose to comment upon every portion of this charge which appears to me open to observation. I shall notice only two defects, which appear to me so serious, that I feel constrained to express my opinion that the appellants have not had a fair trial upon the grave charge upon which they have been convicted. These defects are: (i) No explanation of, or direction as to, the law relating to murder was given by the Sessions Judge to the jury; (ii) the jury were misdirected with respect to that portion of the charge which was concerned with s. 149 of the Penal Code.

It was properly pointed out by the Sessions Judge to the jury that the seven prisoners other than Jhubboo were not charged with having themselves done

¹ The Judge does not say, and it is not easy to understand, what constituted the grave and sudden provocation here referred to.—Note by FIELD, J.

² The common object charged was not to defend or maintain possession, which would not come within the purview of cl. 4, s. 141 of the Penal Code, which says, "take or obtain possession."—Note by FIELD, J.

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any act which could constitute the offence of murder. The charge against them was that Jhubboo had committed murder, and that inasmuch as they were with Jhubboo, members of an unlawful assembly, and Jhubboo, while with them a member of that unlawful assembly, committed murder, they were, by virtue of the provisions of s. 149, guilty of murder, because they knew it to be likely that murder would be committed in prosecution of the common object of the unlawful assembly. Upon this charge, the first essential question was, whether murder had been committed by Jhubboo? There was no amendment charging in the alternative that the offence of murder had been committed by some person other than Jhubboo. The second essential question was, did the prisoners other than Jhubboo know it to be likely that the offence of murder would be committed in the prosecution of the common object of the unlawful assembly?

As to the first point, the jury found that the murder was not committed by Jhubboo, and this being so, it is not easy to understand how, upon the charge as drawn, the other seven prisoners could have been convicted under s. 302 read with s. 149. The Sessions Judge appears to have assumed throughout the whole of his charge that the act by which Ibrahim lost his life was murder. As to what constitutes murder, I find no direction whatever. It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts, and if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection. In this case the medical evidence goes to show injuries of three kinds: (i) there were injuries about the head and congestion of the brain—on this point nothing whatever was said to the jury; (ii) there were injuries to the small intestines; and (iii) there was a swordcut on the arm. The opinion of the medical officer as to the cause of death was, that death was due to shock following the injuries of the small intestines to and hæmorrhage from a wound in the arm. He gave no opinion, and apparently was not asked his opinion, as to whether death did, or could, result from the injury to the arm alone. If the jury believed that Jhubboo inflicted the wound on the arm, and also caused the injuries to the intestines, this was not very material. If, however, the jury did not believe that Jhubboo caused the injuries to the intestines, but believed that he inflicted the wound on the arm, this became very material. The jury appear to have disbelieved the evidence as to Jhubboo jumping upon the deceased, and so causing the injuries to the intestines. If this were so, the question at once arose, whether a shock sufficient to cause death was, or could have been, the result of hæmorrhage from the wound in the arm.

If the wound on the arm alone did not or could not cause death, it is impossible to say that Jhubboo committed murder. If death were the result of the combined effect of the wound on the arm and the injuries to the intestines, and the jury believed that Jhubboo inflicted the wound on the arm, and some other person unknown caused the internal injuries, Jhubboo might be liable for murder by reason of the provisions of s. 34 of the Penal Code, which provides that, when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. But it may be a question whether in this case Jhubboo, being thus constructively guilty of murder, could be said to have committed the offence of murder within the meaning of s. 149, so as to make the other prisoners by a double construction guilty of murder.

On these essential points no direction whatever was given to the jury.

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Then, in the next place, when the jury had made up their minds as to whether Jhubboo had inflicted both injuries, or one of them, or neither of them, if they believed that he inflicted one or both, they should have been directed to consider what offence was committed thereby; and to enable them to do so, the law relating to murder should have been explained to them. There is apparently nothing to suggest that the infliction of injury was, with reference to the first clause of s. 300, an act done with the intention of causing death. It then became necessary to consider whether there was an intention of causing bodily injury; and, if so, whether Jhubboo knew this bodily injury to be likely to cause the death of Ibrahim (cl. 2, s. 300). If the jury found that Jhubboo intended to cause bodily injury, but did not know this bodily injury to be likely to cause death, they ought then to have considered whether this bodily injury was sufficient, in the ordinary course of nature, to cause death, and upon this point the opinion of the medical witness would have been very material. If the jury found that it was not so sufficient, they should further have considered, with reference to the fourth clause of s. 300, whether Jhubboo knew that his act was so imminently dangerous that it must in all probability cause death, or such bodily injury, &c. (cl. 4, s. 300). As to whether the act was so imminently dangerous, the opinion of the medical officer would again have been material. If the jury found that the act of Jhubboo did not come within any of the four clauses of s. 300, they could not have found that Jhubboo committed murder.

But Jhubboo's act, though not falling within any of the clauses of s. 300, might, with reference to s. 299, have been done with the intention of causing such bodily injury as was likely to cause death, or with the knowledge that he was likely by such act to cause death. As to whether the bodily injury was likely to cause death, the opinion of the medical witness would again have been material. If the jury found that Jhubboo's act came under the portion of s. 299 just referred to, this act would have been culpable homicide not amounting to murder.

The same observations are applicable, if for Jhubboo some person or persons unknown had been substituted in the charge by alternative language or otherwise.

On all these essential points no remark or observation was made to the jury; and I entertain no doubt that the appellants have been seriously prejudiced by this misdirection or want of direction. If the jury had been properly directed upon these points, it is quite possible that they would have found that the act by which Ibrahim lost his life was not murder, but the lesser offence of culpable homicide in the person who committed that act. They might even have found that this act did not amount to culpable homicide, but constituted grievous hurt only.

I may further here remark that, although there were charges under ss. 326 and 396, no instruction whatever appears to have been given by the Sessions Judge as to these charges.

I now come to the second point. The Judge records the following note of what passed between him and the jury after they had retired to consider their verdict: "After about three-quarters of an hour the jury returned and stated that four of them, including the foreman, found all the prisoners guilty. The fifth jurymen, Baboo Kesho Ram Bhuth, doubted the guilt of the prisoners, and would acquit them. The foreman stated that they found the prisoners all guilty of the charges under s. 149. They did not find that Jhubboo himself killed Ibrahim Hossain; and that therefore he was not guilty under the charge under s. 302, which charged him with having personally murdered Ibrahim

Hossain. But they found that Ibrahim Hossain was murdered by some member of the unlawful assembly, and that the murder was committed in prosecution of the common object of the assembly. They found that all eight prisoners were present and took part in the riot, and that all eight were therefore guilty, under ss. 149 and 302, of having murdered Ibrahim Hossain. In reply to a question from the Court, four of them stated—*i.e.*, the four who were unanimous stated—that they found that the crop was sown by Leakat Hossein. The fifth jurymen, in reply to a question, said that he doubted who had sown the crop. The Court concurred with the verdict. The Court had not itself felt quite certain as to who had sown the crop. But that point having been once found by the majority in favour of Leakat, it followed that the crime of the accused was murder. The Court was not prepared to dissent from the opinion of the majority that Leakat had sown the crop. That was a point on which they were the best judges, and, as the Court remarked in the charge, once it was held that Leakat sowed the crop, Jhubboo's plea of private defence was gone. As the jury did not find that Jhubboo personally murdered Ibrahim, the Court could not regard him as more guilty than the others, nor did it think that capital sentences should be passed on eight men."

The Court sentenced each of the eight prisoners under ss. 302 and 149 to transportation for life.

The Court did not pass any sentence under the other sections.

I may here observe that, when the jury were not unanimous as to their verdict, the Judge would properly have required them to retire for further consideration (see s. 263, Code of Criminal Procedure). Again, this same section allows the Judge to ask the jury such questions as are necessary to ascertain what their verdict is, and directs that such questions and answers shall be recorded. The learned Sessions Judge has not complied with this direction of the law by recording the questions and answers, but has given the substance of them merely.

It will appear from the extracts above made from the Judge's charge, and from the above record of what took place between the Judge and the jury, that the jury were directed to consider whether the murder was committed in prosecution of the common object of the assembly, and that the jury found that the murder was committed in prosecution of the common object. Now, the charge against the prisoners other than Jhubboo did not allege that murder was committed in prosecution of the common object of the unlawful assembly. What it did allege was that the prisoners knew it to be likely that murder would be committed in prosecution of that object, and upon this, the language of the charge, I find no direction. It appears to me that the jury were in consequence misled to find in the affirmative something which was not alleged in the charge.

The prisoners other than Jhubboo could not, upon the charges as drawn, have been convicted of murder, unless they knew that it was likely that murder would be committed in prosecution of the common object of taking possession of the crops by force. The circumstances from which the jury could infer that the prisoners knew this to be likely were not placed before them. They were told to find that which was not in the charge, *viz.*, whether murder was committed in prosecution of the common object of taking of possession of the crops by force.

Having regard to the law as laid down in the case of *The Queen v. Sabed Ali*,¹ I think the observations of the Judge upon this point, even assuming that

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¹ 11 B. L. R. 347; S. C., 20 W. R. (F. B.), Cr. Rul., 5.

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the charge alleged murder to have been committed in prosecution of the common object, were meagre and defective, and not calculated to give the jury that assistance which they ought to have had in order to enable them to understand clearly the circumstances under which they would be justified in convicting the prisoners other than Jhubboo constructively of the serious offence of murder.

The case has, I observe, occupied no less than eight days of the Sessions Judge's time, and I should be extremely reluctant to send it back to be tried again if I saw any other way in which the interests of justice could be satisfied. Having regard to the defects which I have pointed out, I cannot satisfy myself that these prisoners have had a fair trial. At the same time their absolute innocence is not so clearly doubtful or beyond doubt that I feel justified in saying that the body of evidence which is to be found in the case should not again be submitted to a jury.

I am, therefore, of opinion that the only proper course is to set aside the conviction and sentence, and direct a new trial; and I think that, before the new trial is commenced, the charges ought to be re-drawn more exactly with reference to the facts which have appeared in evidence.

As to whether the prisoners should be admitted to bail pending the second trial, we express no opinion, this being a matter for the discretion of the Sessions Judge.

MCDONELL, J.—I concur in the decision arrived at by my learned brother. I hold that the misdirections to the jury are such as to compel us, in the interest of justice, not only to set aside the conviction and sentence, but to direct a new trial. The Judge appears to have assumed throughout the whole trial that the act by which Ibrahim lost his life was murder, unless the accused could establish the plea of right of private defence.

The difference between murder and culpable homicide was apparently never explained to the jury, and even if one of the unlawful assembly committed culpable homicide amounting to murder, I do not think that the jury were instructed sufficiently as to the circumstances under which they would be justified in convicting the accused other than the one who committed the act constructively of the offence of murder.

Conviction set aside, and new trial directed.

CRIMINAL REFERENCE.

Before Mr. Justice McDonell and Mr. Justice Field.

1882.

April 20.

8 Cal. 851.

IN THE MATTER OF THE PETITION OF DINENDRO NATH SHANIAL.¹

Criminal Procedure Code (Act X. of 1872), ss. 47, 491—District Magistrate—Withdrawal of Case—Act XI. of 1874, s. 6.

The provisions of s. 47 of the Code of Criminal Procedure, Act X. of 1872, as amended by s. 6 of Act XI. of 1874, are wide enough to empower a District Magistrate to withdraw a case falling under s. 491 of the same Code.

THE terms of the reference in this case were as follows:—

“The Joint-Magistrate of Serajunge, proceeding with reference to s. 491, Code of Criminal Procedure, issued summonses against the petitioner Dinendro

¹ Criminal Reference, No. 91 of 1882, and letter No. 110, made by the order of C. A. Kelly, Esq., Sessions Judge of Pubna and Bogra, dated the 18th April 1882.

Nath Shanial and others to show cause before him why they should not give 2,000 rupees bail and 2,000 rupees recognizance to keep the peace for one year. The date of the original summons is 17th February 1882. Subsequently, in a vernacular order of the 11th March 1882, the Joint-Magistrate, no reasons being assigned in his order, directed the defendants each to give 200 rupees bail to appear before the District Magistrate of Pubna on the 20th of March. It does not appear from the record that there was any order from the District Magistrate withdrawing the case, or directing the Joint-Magistrate to send the papers to him. The case is now pending before the Magistrate of the District.

"In this case it does not appear to me that s. 47, Code of Criminal Procedure, should be held to apply. I find from the District Magistrate's letter of the 15th April, which accompanies, that he withdrew the case from the file of the Joint-Magistrate by a letter, of which a copy, as it appears, has been sent by the District Magistrate with his letter to me. But I am doubtful whether the proceedings would be legal. It does not appear clear that the withdrawal of proceedings under s. 491, Code of Criminal Procedure, especially after summonses have issued, is contemplated by s. 47, Code of Criminal Procedure. The summons mentions one Magistrate, one time, and one place; the order of the 11th March directs bail to be given for appearance before another Magistrate, on another date, and virtually at another place. In this case the case was not withdrawn, it appears, by any order, but by memo., signed by a Deputy Magistrate for the Magistrate. The explanation of the Joint-Magistrate was called for through the District Magistrate; but the District Magistrate has given his reason in his letter for not calling upon him to give it.

I am of opinion that the proceedings should not be allowed to go on before the Magistrate of the District, and that the vernacular order signed by the Joint-Magistrate should be considered null and void, and beg to recommend accordingly."

No one appeared on the reference.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

McDONELL, J.—We are of opinion that the provisions of s. 47 of the Code of Criminal Procedure, as amended by s. 6 of Act XI. of 1874, are wide enough to empower the Magistrate of the District to withdraw a case falling under s. 491 of the same Code.

Were it otherwise, it is not suggested, and we are unable to see, that the person concerned has been in any way prejudiced by the course which has been taken; and we think that this reference in the matter of an interlocutory order was unnecessary in the interests of justice.

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CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF RAM LALL.

THE EMPRESS *v.* RAM LALL.¹

1882.

May 6.

8 Cal. 875.

District Magistrate, Power of—Reference to High Court—Order of Appellate Court—Jurisdiction—Criminal Procedure Code (Act X. of 1872), ss. 295, 296, and 297.

A District Magistrate, being of opinion that the Sessions Judge had, on appeal, improperly set aside a conviction made by a Cantonment Magistrate, referred the matter to the High Court under s. 297 of the Code of Criminal Procedure.

Held that the Magistrate had no power to make such a reference.

In this case, Mr. Hastings, the Cantonment Magistrate of Dinapore, convicted Ram Lall of having poisoned a bullock, and sentenced him to two years' imprisonment under s. 429 of the Penal Code. The prisoner appealed, and on appeal the Sessions Judge held that the prisoner should have been convicted and sentenced under s. 428 of the Penal Code, and not under s. 429, and he reduced the imprisonment awarded to one year. Thereupon Mr. Hastings wrote to the Magistrate of Patna, giving his reasons for thinking that the Sessions Judge was wrong, and asking that the record of the case should be transmitted to the High Court for revision under s. 297 of the Code of Criminal Procedure. The Magistrate did so, and in his communication to the High Court endorsed the opinion of the Cantonment Magistrate.

No one appeared on the reference.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—This reference has been made because the Cantonment Magistrate who tried the case, and the District Magistrate, are of opinion that the Sessions Judge, as an Appellate Court, has improperly reduced the sentence passed.

The powers of the District Magistrate, in referring cases to this Court as a Court of Revision, are described in ss. 295, 299 of the Code of Criminal Procedure. S. 295 declares that the District Magistrate "may at all times call for and examine the record of any Court subordinate to him for the purpose of satisfying himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court;" and s. 296 adds that if the District Magistrate "is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or inadequate, he may report the proceedings for the orders of the High Court." But s. 296 is controlled by s. 295, and it was certainly never intended that a subordinate Court should have the power of questioning the propriety of an order passed by a Court of Appeal, and should refer the order of an Appellate Court to the High Court for revision, because it considers that the original sentence was a proper sentence, and should not have been reduced. If this were possible, every order of this description would most probably come before the High Court on revision, and there would be no finality, such as the law contemplates, in the order of an Appellate Court. We, therefore, decline to interfere.

¹ Criminal Miscellaneous Reference, No. 9 of 1882, and letter No. 1066C. Cases, from the order made by C. H. Vowell, Esq., Officiating Magistrate of Patna, dated the 26th April 1882.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF ISSUR CHUNDER NATH.

ISSUR CHUNDER NATH *v.* KALI CHURN NATH AND ANOTHER.¹

1882.

May 15.

District Magistrate, Power of—Withdrawal of Case—Code of Criminal Procedure (Act X. of 1872), s. 521.

8 Cal. 883.

Where a Magistrate, in a proceeding under s. 521 of the Code of Criminal Procedure, satisfies himself that there is no necessity for proceeding further under that section, he is competent to let the matter drop.

*In re Shonai Paramanick*² followed.

In this case the terms of the reference were as follows: "A complaint was laid before the Magistrate that one Kali Churn Nath and others had closed a public road used by men and cattle. After taking a report from the police, the Magistrate issued an order to the accused to open the road, or show cause to the contrary under s. 521, Criminal Procedure. Kali Churn appeared and showed cause on the 24th March, and three days later Ramananda Adhikari, who was one of those against whom notice had issued, appeared and claimed a jury under s. 523. These two persons' interests appeared to be opposed. They made contradictory allegations, each charging the other with obstructing the road. On the 31st March, the Magistrate appointed a jury; but, on a petition made next day by Kali Churn, he cancelled the order, as he considered the case was not one for the application of the provisions of s. 521, the two defendants having conflicting interests; and he therefore referred the complainant to the Civil Court. Kali Churn's objection is that the matter has been already decided in his favour by a decree of the Munsif's Court, which would show that the road was not a public one. The decree is one under s. 9 of Act I. of 1877. I think the order for a jury ought to have been allowed to stand, because it would have been for the jurors to decide how far Kali Churn was protected by his decree. If things are allowed to remain as they are, complainant will have no remedy, for a civil suit will not lie for obstruction to a public road. Besides, I do not think the contradictory allegations of the opposite party can affect complainant's position. If the jury decides in his favour, he can force either or both of them, if necessary, to remove the obstruction. For the above reasons, I think the order cancelling the order for a jury should be set aside, and the jury directed to proceed with their deliberation."

No one appeared on the reference.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—We see no reason to interfere. We agree with the judgment of another Division Court in the case of *Shonai Paramanick*,² that the Magistrate, having satisfied himself (as in the case now before us) that there was no cause for acting under s. 521, was at liberty to let the matter drop.

¹ Criminal Reference, No. 99 of 1882, and letter No. 314N, from the order made by R. Towers, Esq., Sessions Judge of Tipperah, dated the 5th May 1882.

² 1 C. L. R. 486.

CRIMINAL MOTION.

Before Mr. Justice Prinsep and Mr. Justice O'Kinsely.

IN THE MATTER OF THE HIGH COURTS' CRIMINAL PROCEDURE ACT (X. OF 1875),

AND

IN THE MATTER OF THE PETITION OF J. WOOD.

J. WOOD *v.* THE CORPORATION FOR THE TOWN OF CALCUTTA.¹

1882.

May 23.

8 Cal. 891.

Calcutta Municipal Consolidation Act (Beng. Act IV. of 1876), s. 77—License—Assessment—Fine—Boarding-house-keeper.

In order to obtain a conviction under s. 77, Beng. Act IV. of 1876, for keeping a boarding-house without taking out a license, it must be shown that the accused held himself out to the public as one whose business or profession it is to receive boarders for profit.

In order to pass a proper sentence of fine under s. 77, Beng. Act IV. of 1876, evidence should be given of the amount of assessment on the accused's house or place of business, and of the amount payable on account of the license which the accused should have taken out.

THE judgment of the Honorary Magistrate in this case was, as far as material, as follows :—

"In this case, Mr. J. Wood is charged by the Corporation of Calcutta for keeping a boarding-house at No. 5, Wood Street, without having taken out a license as required by s. 75, Beng. Act IV. of 1876. This case has occupied the attention of the Court for some days ; nearly all the facts of this case have been denied. I think that, in cases of this nature, the Municipality should provide the prosecuting officer with legal assistance, which would save a deal of time and trouble. A License Inspector can hardly be expected to understand law, and to examine and cross-examine witnesses in a contested case such as this. The case, however, seems to me not to be one of much difficulty. The charge is, as I have already stated, for keeping a boarding-house without having taken out a license, the keeping of a boarding-house being a trade within the meaning of the Act for which it is compulsory to take out a license. No attempt has been made before me to give any legal definition of the term 'the keeping of a boarding-house,' and it has not been attempted to be denied that persons other than members of the defendant's family did lodge and board in his house ; but it is contended that they were personal friends ; that no strangers were taken in ; and that the monthly sums they paid to the defendant were only their shares of the monthly expenses. A good deal has been said about a board having been hung up outside the house with the words 'Rooms to let' on it, although the fact of a board, with these words upon it, would in no way go to prove that the owner or occupier of the house kept a boarding-house ; still in the present case it would go some way to disprove the evidence that all defendant's lodgers were his personal friends, for he would hardly invite his friends to lodge with him in so public a manner. I do not, however, lay much stress on this fact, for several of the bills put in clearly show that the defendant did keep a boarding-house, as they are expressly stated to be for 'board and lodging.' The witness Mr. Brown states that he shared expenses with the defendant, but he also admits having paid Rs. 90 a month during the months he stayed at defendant's house. The witness Mr. Rymer says that he shared the expenses, and paid Rs. 70 a month ; he also, on being questioned by the Court, says that

¹ Criminal Motion, No. 112 of 1882, against the order of *H. M. Rustomjee, Esq.*, Honorary Magistrate of Calcutta, dated the 1st April 1882.

he paid Mrs. Sandeman, who kept a boarding-house in Lindsay Street, Rs. 80 a month for a room upstairs, and Rs. 70 for one in the lower floor. Mr. Burroughs, a witness for the defence, stated that he frequently visited the defendant at his house last year, two or three times a month. He did not know to his knowledge that Mr. Wood had friends living with him, while it has been admitted that Mr. Wood had friends staying with him. Mr. Burroughs says he knew the defendant for thirty-five years, and was on visiting terms. He went to defendant two or three times a month last year, and yet he says that he had no friends boarding and lodging with him to his knowledge. The defendant, in his statement to the Court, says that he kept no regular accounts, but charged the friends living with him so much as their share of expenses; but it seems strange that such monthly expenses did not vary. The witnesses Brown and Rymer, it may be presumed, are men of business, and, if the arrangement was that they were to share the expenses of the house, it is unlikely that they would have accepted the defendant's estimate of their share of the expenses without making some enquiry as to how such a share was arrived at. It has not been shown to the Court what the defendant is doing. Taking all the circumstances of this case into consideration, I hold that the defendant did keep a boarding-house during the year 1881 without having taken out a license as required by s. 75, Beng. Act IV. of 1876, and I convict him under s. 77 of the said Act, and sentence him to a fine of Rs. 75. The unstamped bills to be impounded and sent to the Collector of Stamps."

The defendant applied for, and obtained in the High Court, a rule to show cause why the conviction should not be set aside, and the fine refunded.

The *Advocate-General*, *Officiating* (Mr. *Phillips*), showed cause against the rule.

Mr. *Mitra* in support of the rule.—I understand the learned *Advocate-General* is going to question the jurisdiction of this Court under s. 147 of Act X. of 1875 over Justices of the Peace. [The *Advocate-General*.—I don't contend that.] The prosecution is under Beng. Act IV. of 1876, s. 75, which requires every person exercising certain trades, &c., specified in the third schedule of the Act, to take out a license; the third schedule gives three classes under which such persons may be assessed; and before a person can be called upon to take out a license, the class to which he shall belong must, under s. 78, be previously determined either by the Chairman or by some one authorized by him for that purpose. Now, in this case, there is no evidence to show that Mr. Wood was assessed at all, nor is there any evidence to show that information of such assessment was given to him as required by s. 99 of Beng. Act IV. and s. 10 of Beng. Act VI. of 1881. Moreover, a person cannot be fined under s. 77 as amended by s. 9 of Act VI. of 1881, unless and until the requirements of ss. 78 and 79 have been fulfilled; because, under s. 77, the penalty for not taking out a license is not to exceed three times the amount payable by the licensee. Therefore, the amount payable by the licensee not having been fixed, the Magistrate could not impose any fine under s. 77 of the Act.

[Mr. *Mitra* was going into the evidence to show that no case had been made out against Mr. Wood, when the Court called upon The *Advocate-General* to show how there could be any prosecution and fine without having the amount payable for the license previously ascertained.]

Cur. ad. vult.

The judgment of the Court (Prinsep and O'Kinealy, JJ.) was delivered by PRINSEP, J.—The petitioner Wood has been convicted, under s. 77, Beng. Act IV. of 1876 (the Calcutta Municipal Consolidation Act), of having, during

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1881, exercised the profession of boarding-house-keeper without the license required by s. 75, and has been fined Rs. 75.

Several questions have been raised before us on the merits of the case, and of these, the most important is, whether or not petitioner Wood keeps a boarding-house within the meaning of the Act. The term 'boarding-house' is not defined in the law. Looking, however, at the manner in which it is used in Calcutta, we think that, in order to obtain a conviction, it must be shown that the accused held himself out to the public as one whose business or profession it is to receive boarders for profit. In the present case, there is evidence on the record sufficient to justify the finding of the lower Court that the petitioner Wood kept a boarding-house. Nevertheless, the sentence of fine cannot be upheld. The law (s. 77) limits the fine in such a case to three times the amount payable in respect of the license which has not been taken out. There is absolutely no evidence on the record to show what is the amount payable on account of the petitioner's license, nor is there any evidence regarding the amount of assessment on petitioner's house or place of business on which any calculation of the amount payable on account of such business could be made.

Under such circumstances we set aside the order passed, and direct that the fine, if paid, be refunded. We altogether agree with the remarks of the Magistrate regarding the result of such prosecution being left in the hands of an inexperienced municipal officer. Much valuable time has been wasted in this Court on arguments arising from irregularities and omissions, which would not have taken place if the prosecution had been properly conducted; and we consider that the employment of the Advocate-General in this Court to defend the conviction would, in all probability, have been avoided, if some legal practitioner, even of the lowest grade, had been retained to appear before the Magistrate.

Rule absolute.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

*In re THE MUNICIPAL COMMITTEE OF DACCA v. HINGOO RAJ.*¹

1882.

May 30.

8 Cal. 895.

High Court, Power of, as a Court of Revision—Order of Acquittal—Criminal Procedure Code (Act X. of 1872), s. 296.

The High Court, as a Court of Revision, will not interfere with an order of acquittal.

IN this case it appeared that the accused Hingoo Raj had applied to the municipal authorities of Dacca for permission to make an excavation, and permission was refused; but, notwithstanding that, Hingoo Raj proceeded to make the excavation. For this, he was charged before a Bench of Honorary Magistrates of Dacca, but he was acquitted, as it did not appear to the Magistrates why permission to make the excavation had been refused. The Magistrate of Dacca referred the matter to the High Court under s. 296 of the Code of Criminal Procedure.

No one appeared on the reference.

The judgment of the Court (Prinsep and O'Kinealy, JJ.) was delivered by PRINSEP, J.—It is a rule of this Court that, as a Court of Revision, it cannot interfere with an order of acquittal.

Let the papers be returned.

¹ Criminal Reference, No. 107 of 1882, and letter No. 1360, from the order made by E. V. Westmacott, Esq., Officiating Magistrate of Dacca, dated the 17th May 1882.

ORIGINAL CRIMINAL.

*Before Mr. Justice Wilson.*THE EMPRESS *v.* R. P. COUNSELL.

1882.

June 28.

8 Cal. 896.

Witness, Examination of—Commission in Criminal Case—High Courts' Criminal Procedure Act (X. of 1875), s. 76.

The High Court refused to issue a commission in a criminal case, on the ground that such a course would be unsatisfactory and dangerous to the interests of the prisoner.

In this case an application, on petition, was made by Mrs. Dunne, a resident of Darjeeling, one of the witnesses for the prosecution, that she might be excused from attending the Court as a witness, and that the evidence should be taken by commission on interrogatories. The accused had been committed by the Deputy Commissioner of Darjeeling to take his trial at the June Sessions of the High Court on a charge of criminal breach of trust as a public servant.

Mrs. Dunne's petition and affidavit, in support of the application, stated that she was sixty-three years of age, and for the last thirty-two years had not been to the plains; that she was examined as a witness on behalf of the Crown before the Deputy Commissioner; and that she was suffering from congestion of the liver, and was advised by her medical attendant that her present state of health was such that it would be unsafe for her, and dangerous to her life, to go to Calcutta for the purpose of being examined as a witness, or for any other purpose.

The affidavit of Dr. Joubert, Civil Surgeon of Darjeeling, stated that Mrs. Dunne had been, and was, under his treatment for congestion of the liver; and that, considering her age and state of health, it would be unadvisable, if not dangerous, for her to go to Calcutta at this time of year for examination as a witness.

The affidavit of Mr. Hume, Solicitor, conducting the prosecution, stated that Mrs. Dunne was a material witness for the Crown, and that, without her evidence, it would not be safe for the Crown to proceed to a hearing of the case.

The *Officiating Standing Counsel* (Mr. W. C. Bonnerjee, with him Mr. J. G. Apar) for the Crown submitted that the petition and affidavits showed sufficient ground for the issue of a commission to examine the witness, Mrs. Dunne, under s. 76 of Act X. of 1875, the High Courts' Criminal Procedure Act.

Mr. M. P. Gasper, for the prisoner, opposed the application, and contended that s. 76 had no application to a case like this, inasmuch as it did not provide for inconvenience to a witness subpoenaed to attend; that the illness alleged was not sufficient to cause inability in the witness to attend the High Court; and that to cross-examine her on commission by interrogatories would be a most unsatisfactory mode of proceeding, and prejudicial to the interests of the prisoner. In the interests of the prisoner the witnesses ought to be before the Court and jury for cross-examination in a criminal case.

WILSON, J., refused the application, saying that, in a criminal case, the issue of a commission would be a most unsatisfactory course of proceeding, and one dangerous to the interests of the prisoner.

*Application refused.*Attorney for the Crown: *The Government Solicitor* (Mr. Upton).

Attorney for the prisoner: Mr. H. C. Chick.

APPELLATE CRIMINAL.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

IN THE MATTER OF THE PETITION OF PRANKRISHNA SURMA.

THE EMPRESS *v.* PRANKRISHNA SURMA.¹

1882.

June 20.

8 Cal. 969.

Kidnapping—Abetment—Penal Code (Act XLV. of 1860), ss. 109, 363—Right to Custody of Children.

A mother cannot have a right to the custody of her legitimate children adversely to the father. Ordinarily, the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as a taking out of his keeping. But where a Hindu woman left her husband's house, taking with her her infant daughter, and went to the house of A, and on the same day the daughter was married to B, the brother of A, without the father's consent, it was held that A was rightly convicted under ss. 109 and 363 of the Penal Code of abetting the offence of kidnapping.

Baboo Doorga Mohun Doss for the petitioner.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown.

THE facts of this case sufficiently appear from the judgment of the Court (WILSON and MACPHERSON, JJ.), which was delivered by

WILSON, J.—The conviction in this case was one under ss. 109 and 363 of the Penal Code for abetting the offence of kidnapping. Upon the appeal, two questions were argued: *First*, whether the substantive offence was committed; *secondly*, whether there was sufficient evidence of abetment. The second question we may dismiss at once by saying that, if the substantive offence was committed, there was ample evidence of abetment. The real question is as to the kidnapping. The facts proved appear to be the following:—

Parameshwari, the wife of Uma Churn Pattuk, left her husband's house at night, taking with her a daughter of six or seven years old, and a son still younger. She went to the house of a cousin of her, who lived in a house in the same homestead with the accused and his younger brother, Guru Dass. The same night Parameshwari gave her daughter in marriage to Guru Dass. The leaving of her husband's house with the daughter, and the marriage of the latter to Guru Dass, took place in pursuance of a previous arrangement between Parameshwari and the accused: and the marriage was without the sanction or knowledge of the girl's father. It was proved that Parameshwari had been subjected to some degree of cruelty at the hands of her husband; but the Court below did not find, nor do we think it could rightly have found, that the cruelty was such as to justify her in leaving her husband's house, even if that fact, had it been proved, could have affected the present charge, which, we are inclined to think, it could not have done.

There is no question that, by the Hindu law, a father is the guardian of his children, and is ordinarily entitled to their custody. But it was suggested that, in the case of a very young child, the mother has as good a right to the custody as the father, and even possibly a better. So that the taking of the child by the mother was not a taking out of the keeping of the lawful guardian within the meaning of s. 361 of the Penal Code. And in support of this, a passage was cited from the work of Dr. Gurudass Banerjee on the Law of Marriage and Stridhan, page 172. But we are unable to find any authority for the pro-

¹ Criminal Appeal, No. 280 of 1882, against the order of *T. F. Bignold, Esq.*, Sessions Judge of Chittagong, dated the 10th May 1882.

position that a mother can ever have a right to the custody of her legitimate children adverse to the father. And such a view seems to us inconsistent with the principles governing the Hindu law in such matters. Of course, under any ordinary circumstances, the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the rights of the father as guardian, and not as a taking out of his keeping. But the present case is very peculiar. The mother removed the girl from the father's house for the express purpose of marrying her without his consent, and thereby depriving him for ever of her guardianship and custody. This did, we think, amount to a taking out of the keeping of the lawful guardian. The conviction is, therefore, right.

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Conviction affirmed.

ORIGINAL CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Cunningham, and Mr. Justice Maclean.

THE EMPRESS v. PEMANTLE.

Guardianship of Illegitimate Child—Kidnapping—Lawful Guardian—Penal Code (Act XLV. of 1860), ss. 361, 366.

188a.
July 9.
8 Cal. 971.

The mother of an illegitimate child is its proper and natural guardian during the period of nurture. And where the mother, on her deathbed, entrusts the care of such child to a person, who accepts the trust, and maintains the child, such a person is "lawfully entrusted" with the care and custody of the minor within the meaning of s. 361 of the Penal Code.

The explanation of the words "lawful guardian" in s. 361 is intended to obviate the difficulty the prosecution might be put to in being bound to prove strictly, in cases of abduction, that the person from whose care the minor had been abducted was the guardian of such minor within the meaning of the legal acceptance of the word.

THE prisoner was charged, tried, and found guilty, under s. 366 of the Penal Code, for having kidnapped one Eva Fleury, in order that she might be seduced to illicit intercourse.

It appeared from the evidence given at the trial in the Sessions Court that Eva Fleury was the illegitimate child of a Mrs. Fleury, who, on her deathbed, made over the child, who was then about three years old, to the charge of a Mrs. Lorenztsen, and that, from that time up to the time of the alleged offence, Eva Fleury had lived in the house, and under the care and protection of Mrs. Lorenztsen.

Eva Fleury was, at the time the offence was committed, a minor under the age of sixteen years, and for the purposes of the trial, Mrs. Lorenztsen claimed to be the "lawful guardian" of the girl within the meaning of s. 361 of the Penal Code.

At the trial the prisoner was convicted and sentenced to three years' imprisonment; but at the request of Counsel, the learned Judge (CUNNINGHAM, J.), before whom the case was tried, reserved the question as to whether Mrs. Lorenztsen could be said to be the "legal guardian" of the child within the meaning of s. 361 of the Penal Code.

On the case reserved coming on before the Court, Mr. Roy, for the prisoner, contended that Mrs. Lorenztsen was not the lawful guardian of Eva within the meaning of s. 361; that even the parents of illegitimate children had not

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the legal right of guardianship—*Rex v. Felton*¹ cited in Macpherson on Infants, 67; and that Mrs. Fleury, not herself being the guardian of the child, had no right to delegate her guardianship to Mrs. Lorenztsen—*Ex parte Glover*;² Burns' Justice of the Peace, vol. I., p. 389. Under English law a child above the age of seven years can choose her own guardian—*In re Lloyd*.³ S. 361 was intended to protect parental rights, and this child being illegitimate was in the eye of the law no one's child.

The *Officiating Standing Counsel* (Mr. Bonnerjee) and Mr. J. G. Aparcar for the Crown were not called upon; but referred the Court to *Rex v. Cornforth*⁴ and *Ex parte Glover*.²

The judgment of the Court (GARTH, C.J., CUNNINGHAM, J., and MACLEAN, J.) was delivered by

GARTH, C.J.—The prisoner was tried and convicted on the 30th day of March last, upon a charge framed under s. 366 of the Penal Code, for having kidnapped one Eva Fleury, in order that she might be seduced to illicit intercourse.

Eva Fleury was the illegitimate child of a Mrs. Fleury, long since deceased, and was, when the offence was committed, living in the house and under the care and custody of a Mrs. Lorenztsen, who claimed to be her lawful guardian within the meaning of s. 361 of the Penal Code. Eva Fleury was, at the time when the offence was committed, a minor under the age of sixteen years, and Mrs. Lorenztsen's claim to be considered her legal guardian was based upon the fact that Mrs. Fleury, on her deathbed, confided Eva and another child to her keeping; this was some twelve years ago. Mrs. Lorenztsen accepted the trust, and has ever since had the charge of, and maintained the child at her own expense.

At the trial the counsel for the prisoner raised the point that Mrs. Lorenztsen was not, at the time when the alleged offence was committed, the lawful guardian of Eva Fleury within the meaning of s. 361 of the Penal Code. This point was reserved by the learned Judge who tried the case, and the prisoner having been convicted and sentenced under s. 366, this Court has now to determine whether that conviction can be maintained.

It was argued for the prisoner that Mrs. Lorenztsen was not the lawful guardian of Eva Fleury within the meaning of s. 361; that Mrs. Fleury herself was not the child's legal guardian at the time of her death, and therefore had no right to constitute Mrs. Lorenztsen, or any one else, the child's legal guardian; and, lastly, that s. 361 was intended rather to protect the rights of guardians than of minors; and unless the alleged guardian could be recognized by law as such, she would not come within the meaning of the section.

We think, however, that the object of that and the cognate sections of the Code is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians; and we also think that the somewhat liberal explanation of the words "lawful guardian" under s. 361 is intended to obviate the difficulty which would otherwise arise, if the prosecution were required to prove strictly in cases of this kind that the person from whose care or custody a minor had been ab-

¹ 1 Bott's Poor Law, by Const., p. 478, pl. 629.

² 4 Dowl. 291.

³ 3 M. and G. 547.

⁴ 2 Str. 1161.

ducted or kidnapped came strictly within the meaning of a guardian according to the legal acceptance of that word.

We cannot doubt for a moment that the mother of an illegitimate child is its proper and natural guardian during the period of nurture; and if, during that period, the mother dies, and commits the child, as she did in this instance, to the care of a faithful friend, who accepts the trust, and maintains the child in her own house, and at her own expense, we think it clear that such a person is "lawfully entrusted" with the care and custody of the minor within the meaning of the explanation in s. 361.

It too frequently happens that illegitimate orphan children, such as Eva Fleury, in the present instance, are those who most require the protection of the law; and if persons in the position of Mrs. Lorentzsen, who, so far as it appears, was the child's sole protector, are not to be considered lawful guardians within the meaning of the explanation, the law would become practically useless in a large class of cases in which its intervention is more especially needed.

Conviction upheld.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice Prinsep.

THE EMPRESS *v.* KESHUB MOHAJAN AND OTHERS, AND THE EMPRESS *v.* UDIT PRASAD.¹

1882.

Mar. 11.

Jurisdiction of Criminal Court—Tributary Mehals—Code of Criminal Procedure (Act X. of 1872), s. 70—Foreign Jurisdiction and Extradition Act (XXI. of 1879), s. 9—Regs. XII., XIII., and XIV. of 1805.

8 Cal. 985.

The prisoners, residents of the District of Singhbhum, a district in British India, were convicted, under s. 331 of the Penal Code, at Singhbhum, of an offence committed in Mohurbhunj.

Per GARTH, C.J., PONTIFEX AND MORRIS, JJ.—The territory of Mohurbhunj is not within the limits of British India; but, under the provisions of s. 9 of Act XXI. of 1879, a conviction in British India for an offence committed without the limits of British India is good.

Per MITTER, J.—Mohurbhunj is within the limits of British India; but seeing that the Tributary Mehals constitute a 'district' within the meaning of the Criminal Procedure Code, and that the Superintendent of these Mehals has been vested with the powers of a Sessions Judge under an order of the Government of India, a conviction under the Penal Code (having regard to the provisions of s. 70 of the Criminal Procedure Code) ought not to be set aside.

Per PRINSEP, J.—Mohurbhunj is within the limits of British India; but the Acts which extend to British India do not extend to Mohurbhunj. The territory having been expressly placed beyond the ordinary legislation, the law in force in British India cannot come into operation there until this exemption has been removed.

THE accused in these two cases were charged with having caused grievous hurt to one Ramdhone Pant in order to extort a confession.

The accused, who were policemen, belonging to Mohurbhunj, went into the District of Singhbhum, and there arrested Ramdhone Pant and six others, residents of Borla, in Singhbhum, on a charge of being implicated in a murder

¹ Full Bench Reference made by Mr. JUSTICE MITTER and Mr. JUSTICE MACLEAN, in Criminal Appeals, Nos. 395 and 396 of 1881, dated 18th August 1881.

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in Mohurbhunj. The men, after being arrested, were taken to Koodasai in Mohurbhunj. Whilst there, they were maltreated, and Ramdhone Panti died from the effects of such maltreatment after having been brought back with the other prisoners to Singhbhum. The Deputy Commissioner of Singhbhum, in the exercise of special powers under s. 36 of the Criminal Procedure, tried the cases, and convicted the prisoners of causing grievous hurt in order to extort a confession under s. 331 of the Penal Code, and sentenced them to terms of rigorous imprisonment varying from one to three years, and to a fine of Rs. 200.

The prisoners appealed to the High Court.

No one appeared for the prisoners at the hearing. But a question was raised by the Court as to whether the Deputy Commissioner of Singhbhum had jurisdiction to try an offence committed in Mohurbhunj.

MACLEAN, J., following the decision in the case of *Hursee Mohapatro v. Dinobundo Patro*,¹ decided on the 13th July 1881, was of opinion that Mohurbhunj formed part of British India specially exempted from the operation of the ordinary law by Reg. XIII. of 1805, and was under the administration of specially appointed officers under special rules, and that, therefore, the Penal Code and Criminal Procedure Code were not in force in Mohurbhunj.

MITTER, J., was of opinion that Mohurbhunj formed part of British India, and considered that the Criminal Codes were in force there.

There being a difference of opinion, the Court referred the following questions to a Full Bench :—

1st.—Whether the Code of Criminal Procedure and the Penal Code were in force in Mohurbhunj? and

2nd.—Whether, if the two Codes were not in force in Mohurbhunj, the prisoners could be tried in Singhbhum for causing grievous hurt to Ramdhone Panti at Koodasai in Mohurbhunj, assuming his death in Singhbhum to be the consequence of the grievous hurt caused to him at Koodasai?

The *Standing Counsel*, Mr. Phillips (with *The Advocate-General*, Mr. Paul), for the Crown.—The question is, whether Mohurbhunj is included in British India within the meaning of the various Acts of the Legislature which extend to British India. It is admitted that Mohurbhunj is not independent of the British Government, and our contention is that, although not an independent state, Mohurbhunj is nevertheless not British India within the meaning of the enactments. Mohurbhunj has been under the paramount power of the British Government ever since the cession of Cuttack on the 19th December 1803. The territory of Mohurbhunj is, and always has been, administered by the Raja, subject to the control and interference of the British Government. Did the Legislature, when it enacted laws, which were intended to apply, and be enforced in the whole of British India, intend that these laws should be enforced in Mohurbhunj? If not, the territory of Mohurbhunj is not subject to English law. If it did intend them to apply to Mohurbhunj, the Government has provided itself with no machinery to enforce such laws; but on the contrary, it has recognised a variety of illegal tribunals, and has itself created some, and has allowed the revenue to be appropriated by the Rajas of Mohurbhunj. It therefore seems that the Government, in its legislative capacity, could not have intended to apply or enforce laws in a territory which, in its executive capacity,

¹ 1 L. R., 7 Cal. 523.

it has left entirely without law. The treaty, by which it is assumed that Mohurbhunj was ceded, is that of the 17th December 1803, and by this treaty the province of Cuttack, including Balasore, were ceded in "perpetual sovereignty" to the East India Company; but it cannot be inferred that the cession of Cuttack in full sovereignty (even assuming that it included Mohurbhunj) transferred anything more than the suzerainty or paramount power, and this view is confirmed by the conduct of the British Government in its relations with the various territories ceded in 1803, and especially in its relations with the Tributary Mehals. In this treaty of 1803, art. x. describes the chief feudatories. The mere cession in full sovereignty did not, I submit, make those subjects, who were before feudatories; it follows therefore that such a cession would not bring the territory so dealt with into "the possession or under the government" of the East India Company, within the meaning of s. 1 of 21 and 22 Vic., c. 106, although it would vest in the East India Company certain powers in relation to the government of the territory within the meaning of that section. It further follows that the territory so dealt with would not be part of India within that section, for 'India' is there defined to mean "the territories vested in Her Majesty as aforesaid, or to become vested as aforesaid," *i. e.*, territories then in the possession or under the government of the East India Company, and which the A&S vest in Her Majesty, and also territories which might become so vested by virtue of any rights vested in, or which might have been exercised by, the Company. Now, Mohurbhunj has not become vested in Her Majesty since 1858, and since 1858, Her Majesty, by Her sanad of the 11th March 1862, has recognized the Raja as a Prince or Chief, who then governed his own territories, and has conferred upon him a power of adoption, which is inconsistent with the theory that the Raja is a subject of Her Majesty, and he must be a subject, if Mohurbhunj is part of British India. Further, it seems incredible that the general laws should, in 1874, have been declared applicable in Mohurbhunj and all the Tributary Mehals, and that Angul and Banki should be alone excepted; Angul and Banki having admittedly been taken possession of, and placed under the Government of Her Majesty by virtue of her paramount powers. The Local Extent Act, 1874, declares certain laws applicable to the whole of British India to be in force throughout the whole of British India, except the scheduled districts—*i. e.*, such laws were not in force in Angul and Banki; how did it happen then, apart from the exclusion supposed by PRINSEP and MACLEAN, JJ., that the general law did not prevail in Angul and Banki, which, according to their theory, were part of British India all along; and if it was by virtue of the exclusion they rely upon, how came the other mehals not to be scheduled also?

Mr. *M. Ghose* for the Raja of Mohurbhunj.

The following judgments were delivered by the Full Bench:—

PONTIFEX, J.—The question whether the territory of Mohurbhunj is within the limits of British India is a question of evidence.

There is nothing to show whether the Mahrattas exercised direct authority over this territory, or whether they treated it merely as tributary. From its situation and character, however, the probability would seem to be that the Mahrattas only exacted tribute from it. Nor does the cession by the Mahrattas to the East India Company throw any further light upon the matter. If the Mahrattas had only the rights of a paramount power, the East India Company could, under the cession, gain no higher rights.

In this state of circumstances, the Regulations of 1804 and 1805 were passed, the Government being probably in doubt as to what rights they actually took

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from the Mahrattas. Nothing was done under the Regulation of 1804 (which applies only to the territory ceded by the Mahrattas) to this particular territory. And the Regulation of 1805 seems to me to show that the Executive Government, being in doubt as to its true relation with the territory, determined to deal with it only in a negative way until such doubts were set at rest. It is observable that, in the schedule to the Regulation, this territory is described differently from the other estates dealt with.

The Regulations of 1816 and 1821 do not seem to me to carry the case further. They relate only to the exercise of such authority as would properly and naturally be exercised by a paramount power.

The treaty-engagement of 1829, if it stood alone, would, in my opinion, be conclusive to show that Mohurbhunj was merely tributary. It is of a different period to the engagements with the other mehals. It proceeds from the Raja of Mohurbhunj without any reciprocal instrument in the nature of a patta or sanad from the East India Company; and it speaks of "my territories," of "a contingent force of my own troops," and of "my successors," which is not the language which the Executive Government would be likely to tolerate from a mere subject.

Then come the rules of 1839 issued by the Bengal Government. They assume that there was something peculiar in the status of this territory; and, on the whole, they do not seem to me inconsistent with its being tributary. All that they do is to invest a Bengal officer with necessary authority as the representative of the paramount power to act at the request of the Raja.

No direct civil jurisdiction has ever been exercised in the territory by the Executive Government of India.

Lord Canning's sanad distinctly deals with the territory as independent, and not British, territory. For example, it ratifies the right of adoption, which would have been mere surplusage if addressed to a British Indian subject. We know that both the Government of India and the Government of Bengal consider the territory to be independent.

Under these circumstances, the question being a mere question of evidence, the maxim "*optimus interpres legis consuetudo*" applies with very great force.

I am of opinion, therefore, that this territory is not within the limits of British India. And if that is so, the conviction seems to be right; for the referring Judges state that "the prisoners describe themselves as residents of the Balasore or Singhbhum District," which would bring them within the provisions of s. 9 of Act XXI. of 1879.

MORRIS, J.—I concur.

GARTH, C.J.—I agree in the main with my brother Pontifex.

Whether the territory of Mohurbhunj forms part of British India or not, is a question of evidence. It depends partly upon documentary evidence, such as Regulations, treaties, and so forth; and partly upon the way in which the territory has been dealt with by the ruling powers, which are principally concerned with it—that is to say, the Governments of India and Bengal on the one hand, and the Maharaja, the native chief of the territory, on the other. And when we find that the Indian Government and the Maharaja have, for a long series of years, concurred in considering and treating this territory as no part of British India, and when we also find that Acts of the Indian Legislature, which have been passed for, and have been acted upon throughout, British India, have never been acted upon or considered to be law in this territory, I must say, it

seems to me, that such evidence, in the absence of any cogent proof to the contrary, ought, in British Indian Courts, to be almost conclusive upon the point.

I say "almost conclusive," because I quite think that, under the circumstances of this case, the question is undoubtedly one which the Court is bound to determine; and that no consensus of the powers who are interested in the matter ought to be considered as binding upon it.

It is possible, of course, that the Indian Governments, and the Maharaja too, may have been under a mistake. But before a Court of Justice ought to find it a mistake, I think the evidence that it is so should be clear and convincing—evidence of a very different character from the negative and equivocal language of the Regulations, to which our attention has been called, or acts of interference by the British authorities, which may have been intended rather as friendly aids to the Maharaja in the management of his own dominions, than as evidencing any wish on the part of the Indian Government to take the rule of the territory out of the Maharaja's hands.

Then, another point has also been suggested in this case, upon which, as the responsibility of deciding it rests peculiarly with myself, I think it right to explain my views. The question which we have been considering in this reference had previously come in much the same form before two Division Benches of this Court. Both those Benches, each consisting of two Judges, decided that Mohurbhunj was part of British India. But one of those Benches thought it right to refer certain points for the decision of a Full Bench.

Then, upon the case coming on for argument before this Court, the Advocate-General on behalf of the Government desired that we should also consider the question, whether Mohurbhunj formed part of British India; and my brother MITTER, one of the Judges who had previously decided that point, thought that it ought to be so considered; so, after some discussion, we all agreed to hear the point argued, and to decide it. The result has been that three of the Judges of the Full Bench are of opinion that Mohurbhunj is not part of British India, whilst the two other Judges (MITTER and PRINSEP, JJ.) are of a contrary opinion. My brother MITTER, however, for reasons which he will explain himself, holds, as we do, that the prisoners were rightly convicted.

Thus, it turns out that three Judges of the Full Bench have decided one way, whilst four other Judges of the Court have decided the other way; and for this reason it has been suggested to me that I ought to appoint another Full Bench to consider the question again. If I were to adopt this suggestion, I should appoint a Full Bench consisting of the whole Court; and if I thought that any real good was likely to be gained, or that the interests of justice in the particular case required it, I should certainly adopt that course, the more so because in the argument before us the prisoners were not represented.

But, as four out of the five Judges of the Full Bench consider (though for different reasons) that the conviction should be confirmed, and there is no reason to suppose that the prisoners have not had a fair trial, I do not think that the interests of justice require that the case should be heard again. The prisoners had, of course, a perfect right to raise the question of jurisdiction; but it was undoubtedly a technical one, and it has been overruled by the majority of a Full Bench.

That being so, I cannot see that any good would be gained by the whole strength of the Court being occupied (perhaps for days) in discussing an abstract question as to the political status of the territory of Mohurbhunj. The result would be either to affirm our present judgment, or else to place the Go-

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vernment of this country in a position of considerable difficulty. And, lastly, I wish to say that the alleged reason for appointing another Full Bench is in point of law no reason at all. It has constantly happened, both here and in England, that the majority of an Appeal Court which finally decides a point of difficulty are numerically fewer than the Judges who have previously decided the point the other way.

This was notably so in the Full Bench case of *Gujju Lal v. Fatteh Lal*,¹ which overruled, not only the case of *Neamut Ali v. Gooroo Doss*,² previously decided by the late Chief Justice and Mr. Justice AINSLIE, but also several other cases, which had been decided in the same way by other Judges of this Court.

And the same thing has often happened in England in the Court of Exchequer Chamber. But in all these cases the judgment of the appeal Court is no less decisive of the question, and is considered to be binding upon all other Courts, until it has either been reversed by the House of Lords, or overruled by some provision of the Legislature.

MITTER, J.—Upon the materials before us I am unable to agree in the conclusion that Mohurbhunj is a foreign territory, and not part of British India.

S. 2, cl. 8, of Act I. of 1868, says: "British India shall mean the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vic., cap. 106 (an Act for the better Government of India), other than the Settlement of Prince of Wales's Island, Singapore, and Malacca." S. 1 of 21 and 22 Vic., cap. 106, is to the following effect: "The government of the territories now in the possession or under the government of the East India Company, and all powers in relation to government vested in, or exercised by, the said Company in trust for Her Majesty, shall cease to be vested in, or exercised by, the said Company, and all territories in the possession or under the government of the said Company, and all rights vested in, or which, if this Act had not been passed, might have been exercised by the said Company in relation to any territories, shall become vested in Her Majesty, and be exercised in her name; and, for the purpose of this Act, India shall mean the territories vested in Her Majesty as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such rights as aforesaid." Therefore the question for decision is, whether Mohurbhunj was in the possession or under the government of the East India Company.

That Mohurbhunj is part of Zilla Cuttack is clear from the terms of Reg. IV. of 1804, as well as from the concluding section of Regs. XII., XIII., and XIV. of 1805, and the preamble of Reg. XI. of 1816.

The Regulation of 1804 was passed almost immediately after that part of the country came into the possession of the East India Company on the close of the Mahratta war, and extended the general criminal law in force under the Government of the East India Company to the province of Cuttack, including Balasore and its dependencies. That territory being formed into the Zilla or District of Cuttack, any doubt that might exist whether Mohurbhunj, or what is now known as the Tributary Mehals, was dealt with by that Regulation is removed by a reference to the Regulations (XII., XIII., XIV.) of the following year, which "for the present" withdrew all this tract of country from the operation of "all laws and regulations" which have been or shall be enacted (Reg. XIV., 1805, s. 13). The preamble to Reg. XI. of 1816, moreover, describes Mohurbhunj as one of the Tributary Estates in Zilla Cuttack. In the

¹ I. L. R., 6 Cal. 171.² 22 W. R. 365.

engagement entered into in the year 1829 by the then Raja of Mohurbhunj (see Aitchison's "Treaties," &c., Vol. I., p. 184¹) he describes himself as "of Killa Mohurbhunj" of Cuttack. Therefore, it is quite clear, both from the Regulations passed by the East India Company and the engagement executed by the Raja of Mohurbhunj, that Mohurbhunj is part of Cuttack.

The whole Province of Cuttack was ceded to the British Government by a treaty, dated the 17th December 1803, between Roghuji Bhoosla and the Hon'ble East India Company (see p. 97, Aitchison's "Treaties," &c., Vol. III.).

It has been said that the Mahratta Chief might have possessed only a paramount power over the Rajas of the Tributary Mehals, the sovereign power being vested in them. But by the second article of the aforesaid treaty, the Province of Cuttack, of which Mohurbhunj is a component part, was ceded "in perpetual sovereignty" to the East India Company.

It has been further said that, shortly after the cession of Cuttack, the British Government was not certain as to the exact status and position of the Tributary Rajas, and that, therefore, the Regulations of 1805 were not extended to them. The language of these Regulations does not show any uncertainty in the mind of the ruling authorities as to the status of these mehals. They were described in ss. 36 and 37 of Reg. XII. of 1805 as "jungle or hill zemindaries" or "estates." Their "tributes" are styled as "quit-rents." Referring to the settlement of Mohurbhunj, s. 37 says that it will have to be concluded with the "proprietor of that estate for the payment of a fixed annual quit-rent."

The reason for exempting the Tributary Mehals from the operation of the Regulations was not founded upon any uncertainty regarding their status or position, but upon the character of the inhabitants, who are described as "a rude and uncivilized race of people." Similar considerations influenced the Government in withdrawing Chota Nagpore in 1833 from the operations of the Regulations. In fact, it is notorious that this was the cause of the formation of what are called Non-Regulation Districts of British India.

Then, in 1816, the Reg. No. XI. was passed, vesting an officer under the British Government, *viz.*, the Superintendent of the Tributary Mehals, with the power of trying cases of inheritance or succession to these estates. A special procedure was also laid down in that Regulation.

It is said that these rules were laid down by the British Government as a paramount power over the native sovereigns. But the Governor-General in Council could not pass any legislative enactment in respect of any foreign territory.

It may be noticed here that, in the years 1845 and 1850, the Indian Legislative Council passed laws relating to these mehals, and under s. 43 of 3 and 4 Will. IV., cap. 85, the Governor-General in Council had authority only to legislate in respect of territories under the Government of the Hon'ble East India Company.

It has been already noticed that, in the year 1829 (that is, several years after the British Government had legislated for Mohurbhunj, and had, by Reg. XI. of 1816, assumed to itself the right of determining the succession to the estate of Mohurbhunj by establishing special Courts and procedure for this purpose), an engagement was executed by the then Raja of Killa Mohurbhunj in favour

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¹ Ed. of 1876, p. 109.

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of the Government of the Hon'ble East India Company. It is headed in the Collection of Treaties already referred to as a "Treaty Engagement." Whether this heading is to be found in the document itself or not, or whether it is a mere description of it given by the editor of the Collection of Treaties, &c., I have no means of ascertaining. But in the body of the document itself, it is simply called an engagement. By it the Raja engages to maintain himself in submission and loyalty to the Government of the East India Company, to pay sicca Rs. 1,001 as pesh-kush for the said Killa, to depute a contingent force of his own troops with the forces of Government for certain purposes specified in it, and to relinquish a certain specified claim which he had on "the Government," meaning thereby the Government of the East India Company. The two last clauses are very significant, because they contain a distinct admission on the part of the Raja that there was no separate Government of his own within the Killa in question. The Raja called the Government of the East India Company "the Government," meaning thereby that there was but one Government in the whole Province of Cuttack, of which Mohurbhunj was a component part.

Now, it is said that the condition regarding the deputation of a contingent force of the Raja's troops to act with the forces of Government shows that the engagement was not executed by a subject, but by a sovereign. That no such inference can be legitimately drawn from the condition in question is clearly shown in the judgment of a Division Bench of this Court in *Hursee Mohapatro v. Dinobundo Patro*;¹ the passage is to be found at p. 542 of the report. I need not make an extract of it here.

In these mehals the administration of civil justice, excepting in cases provided for by Reg. XI. of 1816, and Acts XXI. of 1845 and XX. of 1850, has been left entirely in the hands of the native Rajas, who have no criminal jurisdiction, except in petty cases. The administration of criminal justice is, with that exception, in the hands of the officers under the British Government. Special rules of procedure were framed in 1839 by the then Superintendent of the Tributary Mehals; though they were not formally sanctioned by the Government, yet the officers entrusted with the administration of criminal justice in these mehals were directed to follow the spirit of these rules as closely as possible.

The recent orders of Government regarding the powers to be exercised by these officers are thus succinctly recited in the judgment of Cunningham, J., in the case already referred to (p. 531): "On the 12th December 1870, the Secretary of the Bengal Government addressed the Magistrate as *ex-officio* Assistant Superintendent, Tributary Mehals,' informing him that, as *ex-officio* Assistant Superintendent of the Tributary Mehals, he was empowered to take up for trial all offences committed within the Tributary Mehals not punishable with death, and to pass sentences not exceeding seven years, submitting his proceedings, in each case, to the Superintendent. Trials thus conducted were to be, as far as possible, in accordance with the Criminal Procedure Code

"In 1872, the Government of India vested the Superintendent of the Tributary Mehals with the powers exercised by a Sessions Judge in Regulation Districts, and with power to hear appeals from sentences passed by any subordinate officer in Tributary Mehal cases.

"On the 30th April 1873, the Government of Bengal addressed the Superintendent of the Tributary Mehals in answer to a letter submitting a tabular

¹ I. L. R., 7 Cal. 523.

statement of the powers then exercised by officers in the tributary estate of Orissa, and the powers which, in the opinion of the Superintendent, ought to be exercised in accordance with the spirit of the new Criminal Procedure Code; authorised the Superintendent to exercise the powers of Magistrate of a District and of a Sessions Judge under s. 15 of the Act, and gave him power to hear appeals from sentences under s. 36. The Magistrates and *ex-officio* Assistant Superintendents of the Tributary States were invested with the powers of a Magistrate of the first class, and under ss. 36 and 222 of the Code."

1832.

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v.

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3 Cal. 985.

Upon the materials before us we have, therefore, these facts established:—

(1.) The cession of Cuttack, of which Mohurbhunj is a component part, to the Government of the East India Company "in perpetual sovereignty" in 1803.

(2.) In 1804, 1805, several Regulations were passed by the British Government treating the Tributary Mehals as part of Cuttack ceded to them.

(3.) Legislative enactments were passed from time to time vesting officers under the British Government with power to decide suits of particular descriptions arising in these mehals.

(4.) An engagement was executed by the Raja of Killa Mohurbhunj in 1829 to pay a certain amount of pesh-kush for the Killa, and to maintain himself in submission and loyalty to the Government of the East India Company.

(5.) With very insignificant exceptions, British officers administer criminal justice in these mehals.

In a case decided by the Judicial Committee of the Privy Council—*Damodar Gordhan v. Deoram Kanji*¹—a similar question arose, *viz.*, whether a village named Gangli, which was admittedly in British Territory, was ceded to a native sovereign or not? In the Province of Kattyad, the Thakur of Bhaunagur held certain taluqs which have never been brought under the ordinary administration of the British Government in India. For these taluqs the Thakur of Bhaunagur used to pay certain tributes to the Peshwa and the Gaikwar. The rights of the Peshwa and Gaikwar in these taluqs were transferred to the East India Company between 1802 and 1820. The judicial administration in these taluqs was left in the hands of the Thakur down to 1831. In that year a Criminal Court of justice in Kattyad was established for the trial of capital crimes in certain cases, the sentence of the Court requiring confirmation by the Bombay Government. By an order of Government, the village Gangli was withdrawn from the ordinary jurisdiction of the British Courts of the Bombay Presidency and made part of these taluqs belonging to the Thakur of Bhaunagur. It was contended that this act of Government amounted to a cession of Gangli to a native sovereign, *viz.*, the Thakur of Bhaunagur. The Judicial Committee held that this act did not amount to a cession of territory, but it was intended to confer upon the Thakur of Bhaunagur within Gangli as large a criminal and civil jurisdiction as that which he exercised in these taluqs. It is clear that the status of Mohurbhunj is very much similar to that of these taluqs of the Thakur of Bhaunagur. The Judicial Committee of the Privy Council was strongly inclined to the opinion that these taluqs formed part of British territory. This point was not expressly decided, because it was not absolutely necessary.

Some stress has been laid on the sanad of adoption granted to the Raja of Killa Mohurbhunj by the British Government in the year 1862. But such sanads were granted to persons who are admittedly holders of mere zemindaries and

¹ I. L. R., 1 Bom. 367.

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3 Cal. 585.

jagirs (see Aitchison's Treaties, &c., Vol. III., pp. 319, 320). On the whole, I am of opinion that Mohurbhunj is within British India.

The next question is, whether the conviction of the appellants is right, they not having been tried by the Superintendent of the Tributary Mehals.

I think the Tributary Mehals constitute by themselves a district within the meaning of the Criminal Procedure Code, and by the Government order of 1872, the Superintendent was vested with the powers of a Sessions Judge. I am of opinion, therefore, that, having regard to the provisions of s. 70 of the Criminal Procedure Code, the conviction of the prisoners ought not to be set aside.

PRINSEP, J.—I have had the advantage of seeing the judgments of all my learned colleagues in this case; but I regret to be unable in any respect to alter the opinions expressed by me in the case of *Hursee Mohapatro v. Dinobundo Patro*.¹ That case was decided by Cunningham, J., and myself, after hearing the arguments of counsel on both sides. In the present case the prisoners, appellants, have not been represented: the case has, therefore, been decided on *ex-parte* arguments.

The points for our decision are:—

First.—Whether the territory of Mohurbhunj is or is not British India, as defined in the Statutes 21 and 22 Vic., cap. 106?

Second.—If it is British India, whether the Indian Penal Code and the Code of Criminal Procedure are in force within that territory?

Third.—If it is not British India, whether the prisoners can be properly tried in British India?

All these points were fully discussed and decided in the case of *Hursee Mohapatro v. Dinobundo Patro*,¹ and as, after hearing the matter re-argued by the Law Officers of Government, and Mr. Mon Mohun Ghose on behalf of the Raja of Mohurbhunj, I see no reason to modify the opinion expressed in my judgment in that case, I do not propose to give the grounds of my opinion with the same fulness as I expressed them in that judgment. It will be sufficient that I should briefly state them, and at the same time mention the reasons for which I altogether dissent from the opinions of the majority of my learned colleagues.

I would first of all observe that it was no part of the argument in the case heard by CUNNINGHAM, J., and myself, that there was any difference between the status of Mohurbhunj and the other Tributary Mehals, and though this distinction has been made by my learned colleagues in this case, I find myself unable, for reasons which I shall presently state, to agree in that opinion. It will, I think, be more convenient to deal with the case first as if no such distinction existed.

The Province of Orissa as now known, together with the country termed the Tributary Mehals, was conquered by the British from the Mahrattas in 1803, and afterwards formed the subject of a treaty entered into with the chief of the Mahrattas, Sewa Sahib Roghuji Bhoosla, on 13th December 1803, by which the country was ceded to us in "perpetual sovereignty." Treaties made by us during the course of the war with some of the chiefs of the Tributary Mehals, who are described as feudatories of the Mahrattas, were confirmed by that treaty. Mohurbhunj was not among those feudatories who had joined us, but that is immaterial, as will appear from the narrative of subsequent events. The British

¹ I. L. R., 7 Cal. 523.

Government then proceeded to legislate for this new territory, and passed Reg. IV. of 1804 to provide for the administration of criminal justice and the authority of the police. We learn from this Regulation that our rule dated, not from the date of the treaty of 13th December 1803, but from that of the conquest of Cuttack, 14th October 1803.

The Regulation deals with the "Province of Cuttack, including Balasore and the other dependencies of the said Province," and forms this country into the Zilla or District of Cuttack with two divisions. Whatever doubt there may be regarding the inclusion of the Tributary Mehals as dependencies of the Province of Cuttack within the operation of this Regulation, is removed by the Regulations passed in the following year. The Reg. IV. of 1804 was repealed, and three Regulations were passed (XII., XIII., XIV. of 1805), providing respectively for the revenue, criminal, and civil administration in the Province of Cuttack, and every one of these Regulations specially exempts the Tributary Mehals from the operation of those laws, which, it is declared, shall not be "construed for the present to extend to the estates of certain hill or jungle rajas or zemindars," of which a list is given. There would have been no necessity for this provision if the law of 1804 had not been intended to apply, and did not apply, to the estates of these rajas or zemindars, and if, in the opinion of Government, the legislation for the Province of Cuttack would not otherwise extend to these estates.

The preamble to Reg. XI. of 1816, which was enacted to provide for the trial and determination of "claims to the right of inheritance or succession in certain tributary estates in Zilla Cuttack," also confirms this view. Act XXI. of 1845 is to the same effect, and so is the preamble to Act XX. of 1850, which recites that "whereas certain jungle or hill zemindaries in the Zilla of Cuttack enumerated in s. 36, Reg. XII., 1803, of the Bengal Code, and the territory of Mohurbhunj in the same zilla, are temporarily exempted by the said Regulation," &c., "and were temporarily exempted from the Laws and Regulations for the maintenance of the police and for the administration of justice in criminal cases." That Act provided for the determination of boundaries of those zemindaries, not only as between them and what may be termed regulation territory, but as between one another.

This is all the legislation on the subject, and from this, to my mind, it clearly appears that all the Tributary Mehals have been regarded as country ordinarily subject to the laws in force under the British Government, but specially exempted "for the present" from their operation. The Tributary Mehals have also uniformly been described as estates or zemindaries in Zilla Cuttack, of which they were first made part by Reg. IV. of 1804. I regard the terms of the Regulations and Acts to which I have referred as clear and express on this point, and I cannot consider the legislation of the Government in thus temporarily exempting the Tributary Mehals from the operation of the general laws and regulations—in authorizing the Collector of Cuttack to conclude a settlement for the payment of a fixed annual quit-rent—in providing for the determination of all claims of inheritance or succession to those estates—in empowering the Governor-General in Council to prescribe rules for the guidance of such agents and their subordinates as he shall appoint, and for the powers to be exercised by them in civil suits and criminal trials—and in investing the Superintendent of the Tributary Mehals with power to determine all disputes regarding the boundaries between the several estates, as negative or of any doubtful meaning. If any further indication of the intention of Government is necessary, it is to be found in the orders passed by Government in 1814

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when creating the office of Superintendent of the Tributary Mehals, which I shall presently quote.

I will next refer to what may be termed the executive or political action of Government with regard to the Tributary Mehals. S. 37, Reg. XII. of 1805, declared that "it shall be the duty of the Collector of the Zilla (Cuttack) to conclude a settlement of that estate (*i. e.*, the lands known as the Territory of Mohurbhunj) for the payment of a fixed annual quit-rent, on the principles on which a settlement has been concluded with the other hill or jungle zemindars, specified in the foregoing section." These other zemindars are the chiefs of the other Tributary Mehals.

In accordance with the terms of s. 37, the settlement, which appears in Aitchison's Treaties, &c., Vol. I., p. 184, was in 1829 made with the Raja of Mohurbhunj. The engagements with the rajas or zemindars of the other estates known as the Tributary Mehals were made several years earlier; in fact, they are referred to in s. 36 of Reg. XII. of 1805 as having been already entered into.

Some stress has been laid on the terms of the engagement entered into by the Raja of Mohurbhunj in 1829 as shewing that he was not a subject of the British Government. That engagement is similar in all its terms to those entered into by all the other Rajas, except the Raja of Keonjhar, and, as I have already stated, the engagements of all those Rajas formed the subject of s. 36, Reg. XII. of 1805, and are mentioned as "settlements for the payment of a fixed annual quit-rent." The terms 'estate,' 'zemindar,' 'settlement,' and 'rent,' applied to all the Rajas of the Tributary Mehals, leave no doubt in my mind of their status with respect to the British Government. I have already, in my judgment in the previous case, noticed the terms in the engagement which, in my opinion, do not bear the interpretation put on them by my learned colleagues. The Raja styles himself as "of Killa Mohurbhunj of Cuttack." Zilla Cuttack has, since its conquest in 1803, invariably been a part of British territory and British India, and therefore the reference to Zilla Cuttack would, in my opinion, only be an additional indication of the fact that Mohurbhunj was, as set forth in Reg. IV. of 1804, a dependency of the Province of Cuttack, and from that time a part of that Zilla. The expressions quoted from the treaty in the judgment of my learned colleagues appear to me of little significance. The succession to all these Rajas has always been assured to them, and the British Government has gone further to establish special Courts to determine claims to the right of succession or inheritance (Reg. XI. of 1826). The Government, moreover, in its desire to be guided by local customs in 1826, circulated among all these Rajas 25 questions to ascertain the customs in their families, and their answers have always been used by our Courts in determining all questions of inheritance in that part of the country. The papers known as the Pachees Sawal (25 questions) have always been regarded as authoritative by our Courts, and have more than once been quoted to me without any objection in cases tried by me in this Court. The expression "my successors" in the treaty-engagement is thus easily explained. The country having sometimes been described in the Regulation as the Territory of Mohurbhunj, I see no special force in the expression "my territory." As regards the co-operation of "a contingent force of my own troops," I would only again refer to the preamble to Reg. XIII. of 1805, which describes the origin of the maintenance of such "troops" throughout Orissa, and shows that after all they are merely police-leaves kept for the protection of the country. The Orissa paiks are well known to every one who has been officially connected with that part of India,

The treaty-engagement, too, is similar to those entered into by the other Rajas, which were referred to with approval in s. 36, Reg. XII. of 1805, and this was a Regulation for the settlement of the revenue of the Province or Zilla of Cuttack. So far, then, as its terms go, I cannot regard this treaty-engagement otherwise than as the result of the settlement which it was the duty of the Collector of Cuttack (s. 37, Reg. XII. of 1805) to conclude for the payment of a fixed annual quit-rent, not tribute.

Next in order come the rules of 1839. These were prepared by the then Superintendent of the Tributary Mehals, Mr. H. Ricketts, and submitted by his successor, Mr. Moffat Mills, for the sanction of Government. That sanction was never accorded. Instructions were, however, issued, that the officers were to act up to the spirit of those rules. I can find no authority for asserting that the action of these officers was to be exercised at the request of the Raja of Mohurbhunj, or any other Raja. On the contrary, the Government officers have always assumed a superior authority up to the present day, which seems to me to go far to indicate the exact position occupied by all these Rajas. That such a state of things existed and has been continued is (to use the words of the Regulations of 1805) "owing to the rude and uncivilized race of people occupying those hill and jungle zemindaries," not, as has been stated, in consequence of any doubt on the part of Government regarding its true relations with that territory.

But if it be necessary to refer to other evidence of the intention and policy of Government in their relations with the Tributary Mehals, I would quote the orders of the Governor-General in Council in 1814 when the appointment of Superintendent of the Tributary Mehals was created. These orders are particularly important from the early date on which they were issued, as well as from the occasion which called for them. The letter is addressed to the officer who was appointed the first Superintendent of the Tributary Mehals.

"With respect to the office of Superintendent of the Tributary Estates, your attention is desired to the following remarks and instructions:—

"Under the existing Regulations¹ certain estates situated within the limits of the District of Cuttack are exempt from the operation of the general regulations, but pay a fixed annual revenue to Government.

"The Governor-General in Council does not understand that such exemption was founded upon any claims which the proprietors of those estates have to the exercise of independent authority. On the contrary, his Lordship in Council apprehends that it originated entirely from the opinion which was entertained of the uncivilized manners of the zemindars themselves, and of the inhabitants generally of those places, combined with the nature of the country, which was supposed to consist for the most part of hills and jungles. These circumstances, of course, render it extremely difficult to execute any process of the Courts of Judicature, or otherwise to give effect to any orders which the Judge, the Magistrate, or Collector, in the discharge of their public functions, may have occasion to enforce in any of those places.

"From this short review of the subject it follows that the continuance of the above-mentioned estates on their present footing is a mere question of expediency, and that there is not anything in the nature of our connection with the proprietors of them which should preclude us from placing them under the ordinary jurisdiction of the Civil and Criminal Courts, should it at any time

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¹ Ss. 36 and 37, Reg. XII., 1805; s. 13, Reg. XIII., 1805.

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be thought advisable with reference to the points noticed in the preceding paragraph to do so. It will, of course, be understood that, in adopting any arrangements of that nature, no alteration is to be made in the amount of the revenue payable by the proprietors of the above-mentioned estates respectively which has been declared¹ to be fixed in perpetuity.

"Under the circumstances above noticed, it will be one of the first objects of your consideration to inform yourself whether any of the mehals to which the foregoing paragraphs refer can be conveniently brought under the ordinary jurisdiction of the Civil and Criminal Courts, and to report the result of your enquiries on that subject to Government."

I further find from a selection of official papers published by Government in 1867 as "Papers of the Settlement of Cuttack and on the state of the Tributary Mehals," that various Superintendents have, from time to time, endeavoured to obtain the introduction of some definite law into the Tributary Mehals, the necessity being generally recognized, until in 1839 some rules were proposed by Mr. Moffat Mills, the then Superintendent, but that the Government, probably for the same considerations as influenced them in enacting the Regulations of 1805, has hesitated to introduce any regular system. All these attempts were altogether in accordance with the directions of the Governor-General in Council in his orders of 1814, in which, by requiring the Superintendent, then appointed, to inform himself "whether any of the mehals can be conveniently brought under the ordinary jurisdiction of the Civil and Criminal Courts, and to report the result of his enquiries on that subject to Government," he declared the policy of Government to be to make these mehals, as soon as circumstances would permit, subject to the general law in force elsewhere.

It has been suggested that none of these acts of Government show that they even took possession of this territory; but that all that the Government has done is to exercise a sovereign control as the paramount power over the conduct of the Raja, and has allowed him to rule the territory as an independent state.

I cannot accept this view for the following reasons:—

The British Government has repeatedly legislated for Mohurbhunj. The treaty-engagement of 1829 was entered into under authority of a Revenue Regulation of 1805, declaring it to be the duty of the Collector to make a settlement with the Raja for the payment of a fixed annual quit-rent for his estate, and even to the present time British officers have assumed to themselves the sole right to try in British India even inhabitants of Mohurbhunj for heinous offences committed by them in Mohurbhunj. Added to all these facts we have the orders of Government of 1814.

These papers of 1814 were not placed in my hands when I decided the case of *Hursee Mohapatro v. Dinobundo Patro*,² and I refer to them with much satisfaction as confirming the opinion I then expressed and still entertain. Moreover, when, even up to the present day, officers of Government are directed to try, in what is beyond question British India, inhabitants of all these Tributary Mehals whenever charged with any heinous offence, I cannot agree that there has been any consensus between the British Government and the Maharaja of Mohurbhunj that the territory of Mohurbhunj should be no part of British India.

¹ S. 36, Reg. XII. of 1805.

² I. L. R., 7 Cal. 523.

The last public document is the sanad of Lord Canning of 1862. The right of adoption which it confirmed was one which I have already shown has been recognized by the British Government since 1829. Mitter, J., has further pointed out that similar sanads were granted to individuals who were undoubtedly British subjects.

No special importance can, in my opinion, be attached to the grant of such a sanad. It has not been contended that this sanad made any alteration in the previously existing status of the Raja, or that at any time there has been anything amounting to a cession of territory to the Raja; but it has been stated that this sanad is an indication that Government dealt with this territory as independent, and not as British territory, and that it is evidence that it has at no time formed part of British territory. Such an interpretation is certainly not consistent with the Government orders of 1814, already quoted by me. But, for the reasons above stated, I can attach no force to that sanad.

Other papers, however—official correspondence—have been laid before us. So far from the Government having, as has been said, concurred in considering and treating this territory as no part of British India, I find that more than one Lieutenant-Governor of Bengal has not only insisted on its being under his Government, but has repudiated the idea of its being independent. There has certainly been no such admission, though other Lieutenant-Governors have allowed the matter to remain in doubt. The exemption of this territory from the ordinary legislation and the application to it of special legislation on special subjects seem to me, as I stated in my previous judgment, rather to show that it has always been regarded as under our dominion and Government, and I am confirmed in this opinion by the orders of the Governor-General in Council passed in 1814, which I have already quoted. There is no precedent that I am aware of, in which our relations with any foreign states have been regulated by legislation, or that which has been termed our 'paramount power' has been exercised in this manner. Legislative powers have been given by Statutes from time to time to be exercised over our own subjects, and within our own dominions.

For these reasons, I agree with MITTER, J., that Mohurbhunj, like other Tributary Mehals, is British India; but I regret to differ from him that all Acts extended to British India apply also to it. It appears to me rather these territories have been expressly placed beyond the ordinary legislation; and that, until this exemption has been specifically removed, the laws in force generally throughout British India are not in operation in those parts. That the Legislature recognized such a contingency will appear from the preamble to Act XVI. of 1874.

I am further unable to find any distinction between Mohurbhunj and other Tributary Mehals as regards its relations with Government. As I have before stated, this was never asserted by the Advocate-General or the Standing Counsel when they appeared before CUNNINGHAM, J., and myself in the case of *Hursee Mohapatro v. Dinobundo Patro*;¹ but because Mohurbhunj was separately dealt with in Reg. XII. of 1805, and because the treaty or engagement with the Raja was not entered into until 1829, several years after those with the other chiefs of the Tributary Mehals, it is sought to make some distinction between them and Mohurbhunj.

The reason why Mohurbhunj was separately dealt with by Reg. XII. of 1805 appears from the terms of the two sections (36 and 37) which refer to it and

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3 Cal. 985.

¹ I. L. R., 7 Cal. 523.

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the other Tributary Mehals. The Regulation was for the settlement of the land-revenue of the District of Cuttack. S. 36 confirmed the settlements for the payment of a fixed annual quit-rent by the zemindars of the Cuttack Estates, all mentioned by name, and since known as the Tributary Mehals of Cuttack; and as no such settlement has been made with the Raja of Mohurbhunj, s. 37 empowered the Collector of Cuttack to make a similar settlement with him. This settlement was the result of the treaty or engagement of 1829, which, as I have already pointed out, is precisely similar in its terms with the treaties or engagements entered into with the Rajas of all the other Tributary Mehals, except that of Keonjhur.

In conclusion, I must express my great regret at the unsatisfactory termination of this case. Not only has a bare majority of the Judges in a Bench of five overruled the opinions of four Judges that Mohurbhunj is in British India, but this has happened in a case tried *ex-parte*. How far this may be considered binding is doubtful. But the result is the more particularly unsatisfactory, because the grounds upon which the decision of the majority has proceeded distinguish between Mohurbhunj and the other Tributary Mehals, and the relations between the Government and these mehals remain in the same position as they were before the hearing of this case. Lastly, the present case concerns British subjects under trial for an offence committed in Mohurbhunj, whereas the Government has assumed to itself the right of trying, in Cuttack and other places out of the Tributary Mehals, residents of those mehals who cannot, in the view of the majority of my learned colleagues, be regarded as British subjects whenever any offence of a serious character has been committed in those mehals. That was the jurisdiction which I had to consider in the case of *Hursee Mohapatro v. Dinobundo Patro*;¹ but this point is not covered by the judgments now delivered. How far the exercise of this power is justifiable I need not at present determine, but to me it seems to negative this proposition that the Indian Government and the Maharaja have, for a long series of years, concurred in considering or treating these territories as no part of British India.

¹ I. L. R., 7 Cal. 523.

VOLUME IX.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

IN THE MATTER OF THE MUNICIPAL COMMITTEE OF DACCA.

THE MUNICIPAL COMMITTEE OF DACCA *v.* SOMEER.¹

1882.

May 25.

9 Cal. 38.

Bench of Magistrates, Power of—Beng. Act V. of 1876, ss. 180, 215, 216—Omission to remove obstruction.

A notice was issued under s. 215, Beng. Act V. of 1876, requiring A to remove an alleged obstruction. The requisition was not complied with, and A was prosecuted for non-compliance therewith, under s. 216, before a Bench of Honorary Magistrates.

Held that the Court had power to inquire whether the alleged obstruction was, in point of fact, an obstruction or not.

THIS was a reference under s. 206 of Act X. of 1872 from the Magistrate of Dacca. A requisition, in respect of an alleged obstruction, was, on the 28th of February 1882, issued on the accused Someer Tamakalla by the Secretary to the Municipal Commissioners of Dacca, under s. 215, Beng. Act V. of 1876. The accused neither obeyed the order nor preferred an objection under s. 180 of the same Act. He was, therefore, prosecuted under s. 216 of the Act.

A Bench of Honorary Magistrates discharged the accused, because, in the opinion of one of their number, who visited the place, there had been no encroachment. The Magistrate referred the case to the High Court, it being his opinion that "a Court, trying a case under s. 216 of Beng. Act V. of 1876, has no authority to inquire whether there was any encroachment justifying the issue of a requisition. That is an issue for the trial of which the law has provided in s. 180 of the said Act, which allows the person served to make an objection, and I submit that, on his failure to file any such objection, the requisition becomes absolute, and must be obeyed, and that, when the person is prosecuted for disobedience thereof, it is too late to open the question as to there having been any encroachment."

No one appeared on the reference.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—We are of opinion that the Bench of Magistrates had jurisdiction, in a prosecution under s. 216, Beng. Act V. of 1876, to determine whether the order which had not been carried out was a proper order—that is to say, in the present case, whether there had been any encroachment on the road which the accused was bound to remove on the order of a municipal authority. It has been held, in an analogous case under s. 518 of the Code of Criminal Procedure, that, when prosecuted under s. 188, Penal Code, for neglecting to carry out an order of a Magistrate to remove a nuisance, that although that order, if properly made, cannot be questioned in any Court, the accused can, when prosecuted for disobedience of it, claim exemption from its operation, on the ground that it was not an order which he was bound to obey, as being an order beyond the Magistrate's power and jurisdiction.

¹ Criminal Reference, No. 105 of 1882, and Letter No. 1334, from the order made by *E. V. Westmacott, Esq.*, Officiating Magistrate of Dacca, dated the 11th May 1882.

CRIMINAL REFERENCE.

Before Mr. Justice Maclean and Mr. Justice Norris.

IN THE MATTER OF DHUNUM KAZEE AND ANOTHER.

THE EMPRESS *v.* DHUNUM KAZEE AND ANOTHER.¹

1882.

July 13.

9 Cal. 53.

Criminal Procedure Code (Act X. of 1872), s. 263—Discretion of Court—Verdict of Jury—Forgery and Abetment—Acquittal by Jury—Disagreement by Judge—Principles guiding the Court's Discretion under s. 263 of the Criminal Procedure Code (Act X. of 1872)—“Fraudulently and Dishonestly Uttering”—Intention—Inference of Fraud.

Notwithstanding the large discretionary powers vested in the High Court under s. 263 of Act X. of 1872, the Court will adhere generally to the principle of the Courts in England, *vis.*, that the Court will not set aside the verdict of a jury unless it be perverse and patently wrong, or may have been induced by the error of the Judge; and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to.

Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudulent.

A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction: and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged.

Under s. 263 of the Code of Criminal Procedure, a Court is authorized to ask the jury such questions as are necessary to ascertain what their verdict really is; but where the verdict, although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question.

ONE Dhunum Kazee was charged under s. 471 of the Penal Code with having, on or about the 1st of February 1879, fraudulently and dishonestly used in the Munsif's Court a certain hiba, knowing, or having reason to believe, the same to be a forged document; and one Khorshed Kazee was charged, under ss. 471/109 of the Penal Code, with abetting the fraudulent and dishonest use of the forged document. The document purported to be executed in favour of the accused by their father, and purported to have been registered on the 14th April 1854.

The evidence clearly showed that the certificate of registration was a forgery. The accused, therefore, contended that the charge related exclusively to the forgery of the executant's name, and not to the forgery of the certificate of registration. The jury unanimously acquitted the accused, but the Judge, disagreeing with the verdict of acquittal on the sole ground that the verdict was against the weight of evidence, submitted the case to the High Court under s. 263 of the Code of Criminal Procedure.

It appeared from the Judge's report sent to the High Court that, after the verdict was given, he asked the jury to give their reasons for the verdict, and that they replied “that there was no proof as to who forged the registration-certificate—*i. e.*, whether they were forged by the father of the accused or the accused themselves; and no proof to show when the certificate of registration was forged—*i. e.*, whether before or after the hiba was filed in the Munsif's

¹ Criminal Reference, No. 9 of 1882, and Letter No. 599, from the order made by T. D. Beighton, Esq., Officiating Sessions Judge of Burdwan, dated the 7th June 1882.

Court; and no proof that the accused knew that the certificate was forged; and that they, therefore, found that the registration-certificate was a forgery, but not the executant's signature on the hiba."

Baboo *Umbica Churn Bose* for the appellants.

Baboo *Ram Churn Miller* for the Crown.

The judgment of the Court (MACLEAN and NORRIS, JJ.) was delivered by NORRIS, J.—In this case the accused Dhunum Kazee was charged under s. 471 of the Penal Code with having, on or about the 1st of February 1879, at the Jehanabad Munsif's Court, fraudulently and dishonestly used as genuine a certain document, dated the 12th Falgoon 1260, knowing, or having reason to believe, the same to be a forged document; and the accused Khorshed Kazee was charged under ss. 471/109 of the Penal Code with abetting the fraudulent and dishonest use of the forged document, knowing, or having reason to believe, that the same was forged. The jury unanimously acquitted the accused. The Officiating Sessions Judge of Burdwan, before whom the accused were tried, disagreeing with the verdict of acquittal, has submitted the case to the High Court under the provisions of s. 263 of the Criminal Procedure Code.

In arriving at a conclusion as to what principles should guide me in the exercise of the discretion given me by s. 263 of the Criminal Procedure Code, I am not left without authority. In *The Empress v. Mukhun Kumar*,¹ GARTH, C.J., says: "With regard to the first of these questions" (*i. e.*, how far the High Court is justified in a case referred under s. 263 of the Criminal Procedure Code in convicting the accused contrary to the express and unexplained finding of a jury) "it appears to me that, by that section, the Legislature intended to vest in the High Court a very large discretion, and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled; the verdict of a jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried, and of hearing the witnesses examined" (and, what is more important, cross-examined), "ought always, in my opinion, to command its proper weight; and the more unanimous their verdict may be, and the less likely to have been influenced by prejudice or error, the more entitled it should be to our respect and consideration; but there may be many occasions where, as it seems to me, little or no weight should be attached to their verdict; as for instance where, out of a jury of five, three are of one way of thinking and two of another, and the presiding Judge agrees with the minority, or where it is manifest from the conduct of the jury or otherwise that their minds have been influenced by a prejudice which has prevented them from forming a correct judgment. In the exercise, therefore, of my own discretion in cases coming before us under this section, I should not go so far as to hold with MACPHERSON and MORRIS, JJ.—*Queen v. Wusir Mundul*²—'that the verdict of a jury should not be interfered with except where there is a gross and unmistakable miscarriage of justice;' nor, on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence without giving the verdict of the jury its proper weight. Each case, in my view of the section, should depend upon its own circumstances."

In *Reg. v. Khanderao Bajirao*,³ West, J., says: "The section we have quoted (*i. e.*, s. 263, Criminal Procedure Code) lays down that the Court may

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¹ 1 C. L. R. 275, p. 281.

² 1 L. R., 1 Bom. 10.

³ 25 W. R., Cr. Rul., 25.

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acquit or convict without reference to the charges made against the accused ; in other words, the functions both of the Judge and jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England. Notwithstanding this difference, however, and the more onerous duties devolving in consequence on the High Courts in India, we still desire to be guided, as far as may be, by the analogies of the English law. It is a well-recognized principle that the Courts in England will not set aside the verdict of a jury unless it be perverse and patently wrong, or may have been induced by an error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers ; *first*, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature ; and, *secondly*, because any undue interference may tend to diminish the sense of responsibility which it is desirable that a jury should cherish. We think, however, that, by our rectifying a jury's verdict in a proper case, we shall increase, not diminish, that sense of responsibility."

The principles which guide the English Courts in deciding whether a new trial should be granted upon the ground that the verdict was against the weight of evidence were discussed in the recent case of *Solomon v. Bilton*,¹ where the Court of Appeal said : " The rule on which a new trial should be granted on the ground that the verdict was unsatisfactory, as being against the weight of evidence, ought not to depend on the question whether the learned Judge who tried the action was, or was not, dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to."

The Judge, in his report referring the case to us, makes no complaint of the conduct of the jury on the ground of prejudice ; he complains only that the verdict was against the weight of evidence, and he seeks to substantiate that complaint by calling attention to the answers given by the jury to certain questions put to them by him after they had returned their verdict. I shall presently refer to these answers.

Endeavouring to guide myself by the light of the principles laid down in the decision I have quoted, I have to ask myself : Is this verdict, which is sought to be set aside, such as reasonable men ought to have come to ? In order to answer this question, it is necessary to consider what the prosecution were bound to prove against the accused in order to justify a conviction. It was incumbent upon the prosecution to prove (i) that the document, alleged to have been used by the accused, was, in fact, a forged document ; (ii) that it was used by the accused ; (iii) that, at the time it was used by the accused, they knew or had reason to believe that it was a forgery ; (iv) that, at the time they used it, knowing, or having reason to believe, that it was a forgery, they did so fraudulently or dishonestly. If any one of these points was left in doubt, the jury were bound to acquit. A verdict of acquittal would be such as reasonable men ought to have come to.

The document, which was alleged to have been a forgery, was a *hiba-bil-ewaz*, or one of gift, purporting to have been executed in favour of the accused by their father Sudderuddin Kazee, and to have been registered by one Golam Russool, Kazee of Jehanabad, on the 14th April 1854. Sudderuddin Kazee died some ten or twelve years since, leaving the two accused, a daughter and a widow, the mother of his three children, him surviving. If the *hiba* was genuine, the widow and daughter were disinherited ; if it was a forgery, the daughter be-

¹ L. R., 8 Q. B. D. 176.

came entitled to one-fifth of seven-eighths of her father's property upon his death. The daughter, after her father's death, married one Aminuddin Kazee. The prosecution alleged that both the father's execution of, and the Kazee's certificate of registration endorsed on, the hiba-bil-awaz were forgeries; but they did not charge either of the prisoners with the actual forgery. Nothing worthy of the name of evidence was forthcoming at the trial to prove that the father's signature was a forgery, and practically that point was abandoned by the prosecution. On the other hand, there was an overwhelming body of evidence, proving beyond all doubt that Golam Russool's certificate of registration was a forgery, and I am abundantly satisfied that it was a forgery. Thus the first point necessary for the prosecution to establish was established. The use of the hiba by the accused was also proved by their own admissions. Point the second has thus been established.

In order to establish the third point, which for brevity I will call a guilty knowledge on the part of the prisoners, the prosecution sought to prove that, after Sudderuddin's death, his widow lived in commensality with the accused; that the daughter enjoyed the property equally with them; that Aminuddin had tried to sell his wife's share to the accused; that not only did they not mention the hiba, but carried on negotiations for the purchase, which only fell through by reason of the accused not offering a sufficient sum; that the accused, after the negotiations with Aminuddin had fallen through, knowing that he was treating for a sale to one Sheikh Budruddin, allowed the treaty to continue, and said nothing about the hiba; that, after the sale to Budruddin had taken place, when he went to take possession, Dhunum Kazee told him that his (Dhunum's) brother was in Calcutta, and would not return for fifteen days, when possession should be given; that, after the expiration of fifteen days, Dhunum told him that he would not give up possession; that, when Budruddin sued the accused and their sister in the Munsif's Court, the accused, instead of producing the hiba, at once asked for fifteen days' time to put in their written statement, and, at the expiration of that period, asked for another adjournment, and subsequently for a third, and that it was not until after the third adjournment that the hiba was filed in the Munsif's Court. If these facts, or the more important of them, had been proved, I should have been of opinion that the jury, as reasonable men, ought to have come to the conclusion that a guilty knowledge on the part of the accused was established. But I am by no means satisfied that these facts, or the more important of them, were proved. They rested upon the testimony of Budruddin and Aminuddin. The former admitted that he had been imprisoned for three months for being in possession of stolen property; that he was on bad terms with the accused before his purchase from Aminuddin; that he had charged Khorshed with stealing a goat, which charge was dismissed; that since then he had had twenty or twenty-five civil suits with them; he also stated that Aminuddin was on bad terms with the accused. It is true that he says he still eats at the houses of the accused, but as I understand it is only in cases of the most bitter hatred that one Mahomedan will refuse to eat salt with another. Upon these admissions I am not satisfied with the truth of this witness's evidence. Aminuddin admits that he has had a suit with the accused, and that he is on bad terms with them, and that Budruddin used to assist him in his litigation with the accused; and though he says that three or four persons were present when he tried to sell the property to the accused, he cannot remember their names. I am not satisfied as to the truth of this witness's evidence. I am of opinion that the prosecution failed to prove a guilty knowledge on the part of the accused; and if I can see my way to this conclusion, how much more probable is it that the jury, who had a full opportunity of judging of the credi-

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bility of the witnesses by observing their demeanour in the witness-box, and how they went through their cross-examination, may have come to the same conclusion. It may, no doubt, be said that the jury have not expressed any opinion upon the evidence of Budruddin and Aminuddin. It is sufficient to say in reply that their opinion was not asked, and, as they found a general verdict of not guilty, I have a right to assume that this estimate of the evidence corresponded with the one I have formed.

This finding disposes of the case. I think it right, however, to deal with an argument that was advanced on behalf of the accused at the hearing before us. It was urged thus: "The accused had a good defence to Budruddin's action without having recourse to the hiba. That being so, even assuming that the hiba was forged and used by the accused with a guilty knowledge, yet, as there was no legal necessity for their using it, they cannot be said to have used it fraudulently or dishonestly." I am clearly of opinion that the use of the hiba under such circumstances was 'fraudulent.' The word 'fraudulently' is defined by s. 25 of the Penal Code thus: "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." It is to be observed that this definition of 'fraudulently' differs entirely from that of 'dishonestly' as given in s. 24—"to do a thing dishonestly there must be the intention of causing wrongful gain to one person or wrongful loss to another;" and 'wrongful gain' is defined to be "gain by unlawful means of property to which the person gaining is not legally entitled;" and 'wrongful loss,' as "the loss by unlawful means of property to which the person losing it is legally entitled." A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction. Maule, J., says in *Reg. v. Nash*:¹ "There may be an intent to defraud without the power or the opportunity to defraud;" and at p. 503: "It is not necessary that any person should be in a situation to be defrauded." I am further of opinion that, in such a case as was put in argument before us, the intent to defraud the party to whom the document was uttered (in this case Budruddin) was a necessary inference which the jury ought to have been directed to draw: *Reg. v. Hill*² and *Reg. v. Cooke*.³ Let a person's title to property be ever so good, yet, if, in the course of an action brought against him to gain possession of the property, he uses by way of supporting his title, though there may be no necessity for the use of it, a forged document, such as this hiba, I am clearly of opinion that he uses it fraudulently.

It now only remains for me to notice the answers of the jury to certain questions put to them by the Judge after they had delivered their verdict. In reply to questions from the Court the jury stated as the reasons for their verdict: "There is no proof to show when the registration-certificate was forged—*i.e.*, whether before or after the document A (the hiba) was filed in the Munsif's Court. There is also no proof as to who forged the registration-certificate—*i.e.*, whether forged by the father of the accused or by the accused themselves; and, in the former case, that the accused knew they were forged. They find that the registration-certificate is a forgery, but not the executant's signature on the document."

It was urged by the learned pleader who appeared for the Crown that these answers showed that the jury had come to very foolish conclusions upon the evidence, and that, in receiving their verdict, he ought to proceed upon the

¹ 2 Dearsly's C. C. R., p. 500.

² *Id.* 58a.

³ 8 C. and P. 274.

assumption that these foolish conclusions, and these alone, had induced them to return a verdict of acquittal. It may be that the conclusions are foolish, but I refuse to consider these answers at all, because I am of opinion that the Judge had no right to put the questions which called forth the answers. The Court is authorized by s. 263 to ask the jury such questions as are necessary to ascertain what their verdict is. In this case the jury had returned a plain, simple verdict of 'not guilty'; it may have been erroneous, but it certainly was not ambiguous; and the duty of the Judge was to receive it, and record it, without asking any questions about it.

For the reasons given above, I am of opinion that the verdict of acquittal should stand.

Verdict upheld.

CRIMINAL MOTION.

Before Mr. Justice Maclean and Mr. Justice Macpherson.

IN THE MATTER OF THE PETITION OF HAVALDAR ROY AND ANOTHER.

HAVALDAR ROY AND ANOTHER *v.* JAGU MEAN.¹

Appeal from Decision of Bench of Magistrates—Summary Procedure—Criminal Procedure Code (Act X. of 1872), ch. xviii.

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July 6.
9 Cal. 96.

No appeal lies to a District Magistrate from the decision of a Bench of Magistrates composed of an Assistant Magistrate with second-class powers and two or more Honorary Magistrates, in a case tried under ch. xviii. of the Criminal Procedure Code.

Mr. *M. M. Ghose* for the petitioners.

Mr. *Kilby* for the opposite party.

THE facts of this case sufficiently appear from the judgment of the Court (MACLEAN and MACPHERSON, JJ.), which was delivered by

MACLEAN, J.—The petitioners were tried before a Bench of Magistrates at Jugdespore on a charge of an offence under s. 352. The Bench was composed of an Assistant Magistrate with second-class powers and three Honorary Magistrates. The former and two of the latter signed the judgment convicting the petitioners, and sentencing them to pay a fine of Rs. 5 each.

An appeal was preferred to the District Magistrate, who dismissed the appeal of Wahid Ali, and enhanced the sentence of Havaladar Roy by addition of two months' rigorous imprisonment.

On motion made by counsel, the proceedings have been sent for, and counsel heard on both sides. The first question for our decision is whether any appeal lay to the District Magistrate. This question is raised on behalf of the appellants themselves. In fact, they now assert that their appeal was improperly lodged. Had the sentence not been enhanced, we should not have entertained this objection. The case was tried under the summary procedure (ch. xviii.), and if the Bench was invested with first-class powers, there would be no appeal; see s. 274 of the Code of Criminal Procedure. Under para. 1 of Government Orders published in *Calcutta Gazette*, 1873, pages 17 and 662, any Bench of two or more Honorary Magistrates, sitting with a salaried

¹ Criminal Motion, No. 169 of 1882, against the order of the Jugdespore Bench of Magistrates (presided over by Mr. *T. Inglis*), Assistant Magistrate of Shahabad, dated the 22nd April 1882.

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Magistrate exercising not less than second-class powers, is vested with first-class powers. The case before us was, therefore, tried by a Bench vested with first-class powers under that rule. The Deputy Legal Remembrancer has laid before us some orders of Government, dated 31st March 1882, modifying other orders, dated 31st January 1878, relating to the constitution of Benches in Shahabad. As to the orders of 31st January 1878, we have no information. Those of 31st March 1882 justify us in holding that the Jugdespore Bench under the presidency of a Magistrate (salaried) exercising second-class powers has jurisdiction to try all cases under s. 222 of the Code of Criminal Procedure—that is, cases triable summarily by a First-class Magistrate.

We think, therefore, that the District Magistrate was not competent to hear an appeal against the sentence of the Bench, dated 22nd April 1882. We accordingly set aside the order of 3rd May, directing that Havalдар Roy be imprisoned for two months. Counsel for the petitioners does not press his case as to the order of the 22nd April, with which, therefore, we do not interfere.

Order set aside.

CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF PRAYAG SINGH AND OTHERS.

THE EMPRESS *v.* PRAYAG SINGH.¹

1882.
July 19.
9 Cal. 103.

*Jurisdiction—Protection of Property—Criminal Procedure Code
(Act X. of 1872), s. 518.*

A Magistrate has no jurisdiction to make an order under s. 518 of the Code of Criminal Procedure merely for the protection of property.

THIS was a motion to set aside an order of the Assistant Magistrate of Nawada, directing Prayag Singh and others to remove a bund, which they had erected across a stream called the Goukhana, and ordering that the water-course remain open until Prayag Singh and others should establish their right to close it in the Civil Court. The matter had been referred to the Sub-Deputy Collector for investigation and report, and his statement of the facts was as follows: "The real facts of the case are, that there is a stream called Goukhana, which, issuing from the *Chur* of Haswa, passes through Pancher, Bugoour, Bujra, Sukra, and Kuhooara, and falls into the River Dhanarje. About a chain above the boundary of the Government estate Sukra, a *pyne* from the village Mea Bigha joins on to this stream: As the *pyne* of Mea Bigha is a little higher than the bottom of the stream, it requires a deal of deepening to take a sufficient quantity of water to the village Mea Bigha. But the maliks of Mea Bigha, instead of deepening their own *pyne*, placed in September last a dam across the main stream to take the water into their *pyne*. As this dam would not allow a drop of water to go to the Government estate Sukra, and would injure the cultivation of that estate, the tehsildar reported the matter to Mr. Shircore, the then Sub-divisional Officer, on the 28th September last, and an order was passed on the same day, directing the maliks of Mea Bigha to remove the dam at once, or to file objections, if they had any.

¹ Criminal Motion, No. 152 of 1882, against the order of *E. N. Baker, Esq.*, Assistant Magistrate of Nawada, dated the 4th January 1882.

The maliks wrote, in reply to the notice on the 30th September, that they would file objections within fifteen days, but they filed no objections, and the dam was cut open. They again, on the 11th December 1881, placed a dam across the main stream, and kept about a dozen of lathials to guard the dam, so that the Sukra men might not cut it open. The maliks of Mea Bigha admitted that they had placed the dam, and pleaded justification, alleging that the bund is a very old one, and that they have been preserving it for generations." Several witnesses were examined before the Sub-Deputy Collector, who came to the conclusion that the proprietors of Mea Bigha had no right whatever to maintain the bund. He then went on to say: "As for most of the lands so injuriously affected by the dam the ryots pay rent in money, I apprehend a serious breach of the peace if the dam is not removed. Under the circumstances, I consider it essentially necessary that the defendants Prayag Singh and other maliks of Mea Bigha be directed under s. 518, Criminal Procedure Code, to cut open the dam at once, and not obstruct the main course of the stream more than a day or two in the week. The defendants may also, I think, be prosecuted under s. 430, Indian Penal Code, for causing mischief by placing a dam across the irrigation-channel of Sukra, the consequence of which has been a serious damage to the agriculture of that estate."

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On the strength of the Sub-Deputy Collector's investigation and report, together with a visit made by him to the place where the bund had been erected, the Assistant Magistrate made the order now sought to be quashed.

Baboo *Umbica Churn Bose* and Baboo *Pran Nath Pundit* for the petitioners.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was delivered by

WILSON, J.—The order of the Assistant Magistrate must be set aside as made without jurisdiction. The order under s. 518 can only be made when it is necessary to prevent obstruction, annoyance, or injury to the person, or injury to human life, health, or safety, or a riot or affray. Such an order cannot be made merely for the protection of property.

In the present case, taking the Assistant Magistrate's finding at the highest, it cannot amount to more than this, that the bund in question diminishes the supply of water to the land lying at a lower level.

Order quashed.

CRIMINAL REFERENCE.

Before Mr. Justice Maclean and Mr. Justice Macpherson.

TAMIZ MANDAL v. UMID KARIGAR.¹

1882.

July 26.

Security for Good Behaviour—Code of Criminal Procedure (Act X. of 1872), ss. 504, 505.

9 Cal. 215.

An accused person was convicted of theft, and sentenced to two years' rigorous imprisonment, and was further ordered to enter into his own recognizances for Rs. 50, and find two sureties, each for a like sum, for his good behaviour for one year after the term of his imprisonment had expired; in default to suffer rigorous imprisonment for one year.

¹ Criminal Reference, No. 149 of 1882, from the order made by *W. V. G. Tayler, Esq.*, Magistrate of Nuddea, dated the 20th July 1882.

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9 Cal. 215.

Held that the latter part of the order was bad, and that the Magistrate should have proceeded under the provisions of s. 504, cl. 2, of the Code of Criminal Procedure.

*The Empress v. Partab*¹ followed.

THIS was a criminal reference made by the Magistrate of Nuddea, under s. 296 of the Code of Criminal Procedure (Act X. of 1872). The terms of the reference were as follows: "Umid Karigar was convicted by the Assistant Magistrate of Kooshtea under s. 380, Indian Penal Code, and was ordered to be rigorously imprisoned for two years, to enter into his own recognizances in Rs. 50, and to find two sureties, each in a like sum, to be of good behaviour for one year, after the term of his imprisonment had expired. In default, to suffer rigorous imprisonment for another year. The order for security and for a further term of one year's rigorous imprisonment, failing security, does not appear to be legal. The Assistant Magistrate, on being asked to report why this part of the sentence should not be quashed, stated that he was guided by the case of *The Empress v. Partab*¹; but I am still of opinion that it is illegal to call upon an accused person to find security for future good behaviour in addition to a sentence passed upon him for a specific offence, and this view appears to be concurred in by the Sessions Judge, who has lately in another case reversed a similar sentence. This portion of the sentence should, therefore, I think, be quashed."

No one appeared to argue the case.

The judgment of the Court (MACLEAN and MACPHERSON, JJ.) was delivered by

MACLEAN, J.—It would have been better, had the Assistant Magistrate followed the course pointed out by the presiding Judge in the case of *The Empress v. Partab*¹ as the proper course to be adopted.

We direct that the order passed under s. 505 of the Criminal Procedure Code be set aside, and leave it to the Assistant Magistrate to follow the course prescribed in s. 504, cl. 2, if he thinks proper.

¹ I. L. R., 1 All. 666. In this case, Spankie, J., said: "In making an order for security for good behaviour, I presume that the Magistrate holds the powers of a First-class Magistrate, and that he was acting under s. 505 of the Code of Criminal Procedure. I have some doubt whether the Magistrate had adduced before him such evidence as to general character as to justify his dealing with the accused for the offence of which he found he was guilty, and in the record of the trial I find no evidence from which it could be gathered that the accused was by repute a receiver of stolen property. But the prisoner certainly allowed that he had been punished twice for theft, and here he was again tried and found guilty of receiving stolen property. I am therefore unwilling to disturb the order. But the order should be no part of the sentence for the offence of which accused was convicted. There should have been a proceeding drawn out, representing that the Magistrate, from the evidence as to general character adduced before him in this case, was satisfied that Partab was by repute an offender within the terms of s. 505 of the Criminal Procedure Code, and therefore security would be required from him. But as he had been sentenced to two years' rigorous imprisonment, which term has not expired, an order should have been recorded to the effect that, on the expiration of the term, the prisoner should be brought up for the purpose of being bound (cl. 2, s. 504)."

CRIMINAL MOTION.

Before Mr. Justice McDonell and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF SREENATH BANERJEE AND ANOTHER.

THE EMPRESS *v.* SREENATH BANERJEE AND ANOTHER.¹

1882.

Aug. 7.

9 Cal. 221.

Wrongful Confinement—Penal Code (Act XLV. of 1860), s. 346.

In an order to render a person liable under s. 346 of the Penal Code, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered.

ON the 17th of February a Hindu woman went to the Court of the Magistrate of the 24-Parganas to complain of having been ill-treated and tortured by certain persons, relatives of the petitioners. The hearing of her complaint was not finished on the 17th, and she was told by her pleader to go away and come back the next day. The remaining facts are thus told by the Judge of the 24-Parganas in his judgment: "As she was departing, she says she was accosted by the appellants, Gangadhar Dhali and Sreenath, who contrived to put her into a carriage, and drove her away, taking her to various places, at the time strange and unknown to her, at one or other of which she was kept, until a stir having arisen, in the meantime, on account of her disappearance after having had such a complaint recorded, she was brought back by the present appellants and produced by them before another pleader of the Magistrate's Court, in whose premises she remained till next day, the 9th March, when she was made over to the police. It is for this abduction, and for this keeping the woman away from Court and from prosecuting her case there, that the present appellants have been convicted." The Deputy Magistrate convicted the accused under ss. 201 and 346, but passed sentence under the latter section only. On appeal, the Sessions Judge quashed the conviction under s. 201, but affirmed the conviction and sentence under s. 346. It was objected before the Judge that, "granting the truth of the woman's story as to her having been taken here and there, such treatment, she having been left admittedly to her own desires at each place of so-called confinement, and at liberty to go whither she pleased, and to invoke the assistance of the police, is not confinement in law." But the Judge, in consideration of the timid and submissive natures of the lower-class women of the country, when brought into contact with influential middle-class men and Brahmins, and of the fact that the woman was taken away to strange places, miles from her home, overruled the objection. The petitioners then moved the High Court to set aside the order of the Sessions Judge, and have the conviction quashed.

Baboo *Umbica Churn Bose* for the petitioners.

Baboo *Ram Chandra Mitter* for the Crown.

The judgment of the Court (McDONELL and O'KINEALY, JJ.) was delivered by

McDONELL, J.—In this case the prisoners were convicted of offences under ss. 201 and 346 of the Penal Code. On appeal, the Sessions Judge properly acquitted them of any offence under s. 201; but upheld the conviction under the latter section. We are of opinion that the conviction cannot be sustained. To

¹ Criminal Motion, No. 205 of 1882, against the order of *J. P. Grant, Esq.*, Sessions Judge of the 24-Parganas, dated the 29th June 1882.

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render a person liable under s. 346, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. In the present case it is clear that the element is wanting.

Again, it appears to us that the complainant was not at all in wrongful confinement. The Judge himself says that she was induced, not forced; and that her confinement was not actual, but, as he calls it, potential. This is not sufficient. We therefore set aside the conviction and sentence; and, acquitting the prisoners, direct their release.

Conviction quashed.

Before Mr. Justice Wilson, Mr. Justice Maclean, and Mr. Justice Macpherson.

IN THE MATTER OF THE PETITION OF HENRY KYTE.¹

THE CROWN *v.* HENRY KYTE.

1882.

Aug. 1.

9 Cal. 223.

Excise Act (Beng. Act VII. of 1878), s. 61—Imported Liquor—Possession—Pass—Consignee—Agent.

Certain liquors arrived in Calcutta per S.S. *Navarino*, consigned to M. & Co. at Agra, who requested A to pay on their behalf the duty and landing charges, and forward the goods to Agra. While on the way from the steamer to the railway station, the goods were seized as being in the possession of A without a pass, within the meaning of s. 61 of Beng. Act VII. of 1878, and A was convicted and sentenced to a fine under the provisions of that Act.

Held that the conviction was bad.

In this case Henry Kyte was, on the 1st of December 1881, charged before the Presidency Magistrate with having in his possession, in the Strand Road, Calcutta, on the 30th of November 1881, imported liquor without a pass or license (to wit, thirty cases Port and twenty cases Sherry, each one dozen), in contravention of ss. 17 and 61 of Beng. Act VII. of 1878, as amended by s. 8, Beng. Act IV. of 1881. The accused pleaded not guilty. The facts of the case are fully set out in the judgment of Mr. Justice Wilson and Mr. Justice Macpherson. In convicting the accused the Magistrate said: "If the accused had a wholesale license, he would still require a pass to protect the liquor in transit. In this case he had neither a license nor a pass, and under the law he is liable to punishment, and the liquor to confiscation. Under all the circumstances of the case, however, I fine the defendant Rs. 30 (thirty), and order one-fifth of the liquor seized—*viz.*, 10 cases—to be forfeited.

The accused now moved the High Court to quash the Magistrate's order.

Baboo *Kalichurn Banerjee* and Baboo *Umerendro Nath Chatterjee* for the petitioner.

The following judgments were delivered:—

MACLEAN, J.—The vakil for the petitioner has failed to satisfy me that the conviction, dated 1st December 1881, is not founded upon a correct view of the law; and, under any circumstances, I object to re-opening a case after the lapse of six months from the date of the conviction.

I am not prepared to say that the petitioner was not in possession of the liquor. It had, it is admitted, been passed out to him from the Customs, and

¹ Criminal Motion, No. 161 of 1882, against the order of *B. L. Gupta, Esq.*, Presidency Magistrate of Calcutta, dated the 1st December 1881.

he was about to despatch it to the consignee at Agra. Neither am I satisfied that the holder of a license, not granted by the Excise Authorities here, is a licensed vendor within the meaning of Beng. Act VII. of 1878. In this view of the law, the petitioner, whether in possession on his own account or for the consignee, was a person "other than a licensed vendor," and, being admittedly without a pass from the Collector or other officer duly empowered in that behalf, I see no illegality in his conviction under s. 61, Beng. Act VII. of 1878.

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MACPHERSON, J.—I am sorry to differ, but I certainly think the conviction is bad, on the ground that no offence has been committed. The facts are, that certain liquor consigned to Martinez and Company, licensed vendors at Agra, was imported in the Steamer *Navarino*. The petitioner, at the request of the consignee, cleared this liquor by paying the duty and landing charges. The Abkari Authorities seized it in the Strand Road while it was being conveyed to the Howrah station for despatch to the consignee. The petitioner was convicted of having the liquor in his possession in contravention of ss. 17 and 61 of the Excise Act (Beng. Act VII. of 1878). He was not himself a licensed vendor, nor had he a pass from the Collector. The question then is, was the liquor in his possession within the meaning of those sections?

Putting a reasonable construction on the word 'possession,' I hold that it was *not*. There is certainly a distinction between possession and a bare temporary custody or charge on behalf of another person. The liquor belonged to a licensed vendor, and was in course of transit to him. It would be a very strained construction of the sections to say that it was in the possession of the petitioner, who had merely done what was necessary to clear and forward the goods to their proper destination. If it was in his possession, it was equally in the possession of the cartmen who were carrying it. I think it makes no difference, so far as the petitioner is concerned, that the consignee was a licensed vendor, not in Bengal, but in the Upper Provinces. If this conviction is right, then A, who had imported liquor for his own consumption and use, would be guilty of no offence once the liquor had come into his actual possession; but B, who, acting for A, had cleared the liquor, and was conveying it from the Custom-house to A's house, would be guilty of an offence under s. 61, because B was in possession of it, and the possession was not for his private use and consumption. The Courts must certainly, before convicting, enquire into the *purpose* of the possession, and, I think, they must also enquire into the *nature*.

It may be noted that, in this case, though the usual notice was given to the Government Solicitor, no one has appeared for the Government to support the conviction; and though the Presidency Magistrate has, in two subsequent cases, come to an exactly contrary conclusion on precisely the same facts, the Excise Authorities have accepted the decisions. Apart from this, however, I consider the conviction bad, and would set it aside.

As to the delay in making the application, this has been sufficiently accounted for. The delay might have been some ground for refusing the rule. It is no ground for rejecting the application when the rule has been granted.

The Judges having disagreed, the proceedings were laid before Mr. Justice WILSON, who delivered the following judgment:—

WILSON, J.—I agree on the whole with MACPHERSON, J., that this conviction was wrong.

We must take the facts, I think, to be these, and these only, that certain liquors arrived by the S.S. *Navarino* for Martinez and Company, licensed dealers

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of Agra, in the North-Western Provinces; that the accused was requested by them to pay, on their behalf, the duty and the landing charges, and to forward the liquor to Agra. The liquor was seized in Calcutta as being in the possession of the accused without a pass, within the meaning of s. 61, Beng. Act VII. of 1878.

I do not think we can support this conviction, unless we are prepared to lay down broadly that anybody who has anything to do with the transit of liquor is within the section. If the accused was within the section, I do not see why the ship-owners, if they landed the goods, were not equally so. I do not see how the Railway Company, if they had carried the goods, could have escaped the necessity of obtaining a pass, and perhaps a pass for each District of Bengal through which they carried them.

As to the delay that has occurred—taking into consideration the fact that the Magistrate himself has since disapproved of the conviction, the efforts which the accused has made in other quarters to reverse or nullify it, and that no objection is raised on the part of the Crown—I think we may properly set aside the conviction, and direct the return of the fine and the release of the goods declared to be forfeited.

APPELLATE CRIMINAL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

THE EMPRESS *v.* HURRO KOLE.¹

1882.
 Aug. 31.
 9 Cal. 283.

Jurisdiction—Appeal—Revision—Offence committed out of British India.

The High Court has no power, either by way of appeal or revision, to interfere with a sentence passed by the Superintendent of the Tributary Mehals when exercising jurisdiction over offences committed in Mohurbhunj, a place not situated within the limits of British India.

Empress v. Keshub Mohajun,² and *Hursee Mahapatro v. Dinabundhu Patro*,³ referred to.

In this case, the appellant, Hurro Kole, was charged with murder, by intentionally causing the death of one Ghashye Kole on the 6th October 1881, at Higli, in Mohurbhunj. The prisoner was tried and convicted by the Superintendent of the Tributary Mehals, at Balasore, on the 1st of March 1882, and sentenced to transportation for life. He thereupon appealed to the High Court.

No one appeared to argue the case.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was delivered by

WILSON, J.—This is an appeal from a conviction by the Superintendent of the Cuttack Tributary Mehals. The offence was committed in Mohurbhunj. The accused is a native of Mohurbhunj. The trial took place at Balasore. It has been decided by a Full Bench that Mohurbhunj is not a part of British India—*The Empress v. Keshub Mohajan*.² The Superintendent of Tributary Mehals and his Assistant exercise jurisdiction over offences committed in those mehals, including Mohurbhunj, under regulations and instructions which were examined in the case just referred to and in *Hursee Mahapatro v. Dinabundhu Patro*.³

¹ Criminal Appeal, No. 166 of 1882, against the order of A. Smith, Esq., Superintendent, Tributary Mehals, Cuttack, dated the 1st March 1882.

² I. L. R., 8 Cal. 985.

³ I. L. R., 7 Cal. 523.

We have not now to consider whether the jurisdiction as exercised is in accordance with law or not, but only whether we have any power to interfere with the decision of the tribunal. We think this Court has no such power, either by way of appeal or of revision. The Letters Patent now in force (those of 1865) by s. 27 make this Court a Court of Appeal "from the Criminal Courts of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence." Those words, according to the well-known rule of construction, must mean British Indian Courts, that is to say, Courts established in and for British India. S. 28 makes the Court "a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction." This section, therefore, carries the case no further. The Criminal Procedure Code gives an appeal to this Court only from Sessions Judges and certain other specified officers, all of whom are British Indian officers, and exercise their functions in and for British India. The revisional powers given by the Code are likewise limited to the Courts subordinate to this Court, which, for the reasons already pointed out, must be restricted to British Indian Courts. This appeal must be rejected, on the ground that we have no power to entertain it.

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9 Cal. 288.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

MANU MIYA v. THE EMPRESS.¹

1882.

Oct. 9.

Foinder of charges—Offences of the same kind committed in respect of different persons—Criminal Procedure Code (Act X. of 1872), ss. 452, 453, and 455.

9 Cal. 371.

Where an accused was charged under one charge including four counts, *vis.*—

- (1.) House-breaking by night with intent to commit theft in the house of A ;
- (2.) Theft from the same house ;
- (3.) House-breaking by night with a like intent in the house of B ;
- (4.) Theft from that house ;

And where he pleaded guilty to the first and third charges,

Held that the case was within the terms of s. 453, and that the words "offences of the same kind" are not to be limited by the explanation to that section, but include a case like this, where a man has within a year committed two offences of house-breaking.

Held, also, that the words "offences of the same kind" are not limited to offences against the same person.

Per FIELD, J.—The explanation to s. 453 must be understood as extending and not as limiting the meaning of that section.

Per NORRIS, J.—Care should be taken that accused persons are not prejudiced by charges being joined, and the Court should at all times be anxious to lend a willing ear to any application upon their behalf by separation of charges and for separate trials upon separate charges.

*Empress v. Murari*² dissented from.

THE facts of this case appear sufficiently from the judgment of Mr. Justice Norris.

No one appeared for either side.

¹ Criminal Appeal, No. 454 of 1882, against the order of *H. Muspratt, Esq.*, Sessions Judge of Sylhet, dated the 21st June 1882.

² 1. L. R., 4 All. 147.

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The following judgments were delivered by the Court (FIELD and NORRIS, JJ.) :—

NORRIS, J.—In this case there were four heads of charge or counts against the prisoner, *viz.*, *first*, house-breaking by night with intent to commit theft in the house of one Baroda Prosad Das ; *second*, theft from the same house ; *third*, house-breaking by night with intent to commit theft in the house of one Tarini Churn Dutta ; and, *fourth*, theft from the same house.

At the trial before the Sessions Judge the prisoner pleaded guilty to the first and third heads of charge, and was sentenced upon the first to three years' rigorous imprisonment, and upon the third to three years' rigorous imprisonment, to commence at the expiry of the sentence passed under the first head of charge.

It does not appear that any plea was recorded upon the second and fourth heads of charge ; the Judge merely says : " No sentences are given under the second and fourth heads of charge, as they are included in the first and third heads."

The Magistrate committed the prisoner upon one charge only, including therein the four heads of charge to which I have referred ; and the Sessions Judge tried him upon that one charge as sent up by the Magistrate.

We do not think that the courses followed by the Magistrate and Sessions Judge are illegal. S. 452 of the Code of Criminal Procedure says : " There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted." S. 453 says : " When a person is accused of more offences than one of the same kind, committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three." Then follows the explanation : " Offences are said to be of the same kind under this section if they fall within the provisions of s. 455." S. 455 says : " If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence ; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences."

Now, if we are to hold that the words " offences of the same kind " in s. 453 refer to and include only " offences that fall within the provisions of s. 455," then undoubtedly there has been an illegality ; there has been an " error or defect either in the charge or in the proceedings on the trial," which would call for our interference, if we were of opinion that such error or defect had prejudiced the prisoner in his defence ; but, as the prisoner pleaded guilty, he cannot be said to have been thus prejudiced. But we are of opinion that we cannot so hold. To do so would be equivalent to striking s. 453 out of the Code altogether. We are of opinion that the words " offences of the same kind " in s. 453 are not to be limited by the explanation to that section, but include such a case as this, where a man has, within a year, committed two offences of house-breaking. The " offences " mentioned in s. 455 are not, in fact, " offences of the same kind," but offences of different kinds arising out of " a single act, or set of acts." Moreover, these offences of different kinds arising out of " a single act or set of acts " must, in the contemplation of the section, have been committed at one and the same time, whereas s. 453, by the use of the words " within one year of each other," clearly points to offences committed on distinct occasions, separated, it may be, by 364 days. Upon the words of the Act, therefore, we are of opinion that there has been no illegality.

We now proceed to consider another point, *viz.*, whether the "offences of the same kind," mentioned in s. 453, must be held to mean offences against one and the same person. We are of opinion that they must not be so limited. There is nothing in the words of the section itself so limiting them, and we are not at liberty to introduce words of limitation unless it is absolutely necessary to do so. We are aware that in this holding we are refusing to follow the decision of the High Court at Allahabad in the case of *Empress v. Murari*,¹ but with the greatest respect for the learned Judges who decided that case, one of whom, Straight, J., has a most deservedly high reputation as a criminal lawyer, we do not think it is correct. As I said before, there are no words in the section limiting its operation as the Allahabad High Court would limit it. This of itself would, in our opinion, be sufficient ground for supporting our present ruling, but we think it well to refer to the practice of the Criminal Courts in England as furnishing authority in support of our view. According to the Common Law of England, there is nothing to prevent a prisoner being charged on different counts of the same indictment on the several different felonies. In Hale's Pleas of the Crown, Vol. II., p. 173, it is laid down that, "if there be one offender, and several capital offences committed by him, they may be all contained in one indictment as burglary and larceny; larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment;" and see *Reg. v. Heywood*.² In the case of *Castro v. The Queen*,³ Lord Blackburn, at p. 243, makes the following observation: "The course taken with regard to one indictment was this: The Queen having sent her Commission to the Grand Jury or any other Commission to a proper tribunal, the tribunals so authorized presented all the offences that came to their knowledge; if it was brought sufficiently to their knowledge that a man had committed ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and if there were many other persons (as generally there are), it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that process could be issued against a man so charged, to bring him upon his trial before a petty jury, to try whether he was guilty of those offences so charged or not.

"Now, at Common Law, there was no objection whatever, in point of law, to bringing a man who was charged with several offences if those charges were all felonies, or were all misdemeanours, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony and misdemeanour, and, therefore, felony and misdemeanour could not be tried together; but any number of felonies, and any number of misdemeanours, might. The contrary was asserted by the learned Counsel, but, though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and, frequently, the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Whenever it would be unfair to a man to bring him to trial for several things at once, an application might be made, to the discretion of the presiding Judge, to say, 'Try me only for one offence, or try me only for two offences; if

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¹ 1 L. R., 4 All. 147.³ L. R., 6 Ap. Ca. 229.² 1 L. and C. 451.

1 L. R., Cal. 60.

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one was the real thing, let me be tried for one, and one only; and whenever it was right that that should be done, the Judge would permit it. For these mixed motives it was well established by a long series of decisions (I confess I doubt whether they were right at first, but certainly they have been both well established now, and sanctioned by Statute—that is quite clear), that where the several charges were of the nature of felony, the joining of two felonies in one count was so, necessarily I may say, unfair to the prisoner that the Judge ought, upon an application being made to him, to put the prosecutor to his election, and send them to two trials. It never was decided, even in felony, that, if that application for the election was not made, the joining of several felonies, that is to say, the taking several felonies which had been found together, and trying those several felonies before one petty jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although, if the proper application had been made at the proper time in a case of felony, the party prosecuting would have been put to his election or made to take one felony only, and not both at the same time. But in cases of misdemeanour, it was by no means a matter of course that that should be done. I think that, if the Judge, upon an application made to him, had been satisfied that to try the man for several misdemeanours together would work injustice to the prisoner, he had a perfect right to say, 'I will not work this injustice by trying them together; let us diminish them in number, and try a reasonable number, and no more.' I do not know whether that was ever done in a case of misdemeanour, but I feel very little doubt that it may have been."

The Legislature has enacted in two cases that three charges of felony may be charged in one indictment. 24 & 25 Vic., c. 96, enacts that "it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon, for all or any of them;" and s. 71 of the same Act contains similar provisions with regard to three distinct acts of embezzlement.

Such is the law and practice in England with regard to felonies. In cases of misdemeanour there is no limit to the number of counts charging distinct offences that may be inserted in one indictment. In prosecution of what are called "long firm swindles" it is not unusual to insert ten or fifteen counts, each charging a separate offence against different persons. Within my own experience there was a case tried before Mr. Justice Hawkins at the last May Session of the Central Criminal Court, where the indictment contained some 120 counts, and at least 25 or 30 of these charged separate offences against different persons. The offences in this case, house-breaking by night, or, as called in England, burglary, were, according to English law, felonies; and, no doubt, had the prisoner been tried in England, two separate indictments would have been preferred against him; but here, happily, we know nothing of the antiquated distinction between felony and misdemeanour, and, therefore, if our view of the law is correct, the question in this case is reduced to one of practice, and upon this point we are of opinion that the practice prevailing in England with regard to misdemeanour is the one that should be followed here. But the Judges should take care that prisoners are not prejudiced by that course being taken, and they should, at all times, be anxious to lend a willing ear to any application for separation of charges and for separate trials upon separate charges. The prisoner in this case having been convicted on his own plea, there is no appeal under s. 273 of the Criminal Procedure Code, except as to the

extent or legality of the sentence, as I have already pointed out. We are of opinion that there is no illegality, and, having regard to the offences to which he pleaded guilty, we are of opinion that the sentences are not at all too severe.

This appeal will, therefore, be dismissed.

FIELD, J.—I am of the same opinion. I think that the explanation to s. 453 of the Code of Criminal Procedure must be understood as extending, not as limiting, the meaning of the section itself. As pointed out by my brother Norris, there are in the section no words which limit the three offences for which an accused person may be charged and tried at the same time to offences against the same person; and I think the explanation cannot operate to impose any such limitation or restriction upon the general language of the section.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF CHAROO CHUNDER MULICK AND OTHERS.

CHAROO CHUNDER MULICK *v.* THE EMPRESS.¹

High Courts' Criminal Procedure Act (X. of 1875), ss. 14 and 147—Commitment, Application to quash—24 and 25 Vic., c. 104, ss. 13 and 15.

The words "or other proceeding" in s. 147 of Act X. of 1875 do not include a commitment, and an application to have a commitment quashed can be entertained under the provisions of that section.

Applications under s. 14 of that Act should be disposed of by the High Court in the exercise of its Ordinary Original Criminal Jurisdiction.

IN this case three persons, named Bunwari Lall, Charoo Chunder Mullick, and Chintamoney Doss, were charged before Mr. B. L. Gupta, one of the Presidency Magistrates, with certain offences under the Penal Code and Act XIV. of 1866 (The Post Office Act).

The first accused, Bunwari Lall, who was a post-office peon, was charged, under s. 406 of the Penal Code, with criminal breach of trust in respect of a number of voting papers entrusted to him to deliver to the address of one Kedar Nauth Dutt. He was also charged under s. 409 of the same Act with criminal breach of trust as a public servant in his capacity of post-office delivery-peon in respect of the same voting papers; and he was further charged with having committed an offence punishable under s. 47 of Act XIV. of 1866 (The Post Office Act).

The other two accused, Charoo Chunder Mullick and Chintamoney Doss, were charged with having aided and abetted the first accused in committing the offences charged under ss. 406 and 409 of the Penal Code, and also with having abetted the offence charged under s. 47 of Act XIV. of 1866; and thereby having committed an offence punishable under s. 52 of that Act; and they were further charged with having fraudulently retained or wilfully kept or obtained a voting paper, and thereby committed an offence punishable under s. 45 of Act XIV. of 1866, while Bunwari Lall was also charged with having abetted the commission of that offence.

¹ Criminal Motion against the order of *B. L. Gupta, Esq.*, Presidency Magistrate of Calcutta, dated the 9th October 1882.

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The case was heard and inquired into by Mr. B. L. Gupta, who committed all of them to the High Court for trial.

Thereupon the accused petitioned the High Court, and applied that the record might be sent for, and the order of commitment quashed, and their discharge directed, on the ground that the said commitment was illegal, because the evidence given in the investigation before the Magistrate was not sufficient to justify the charges; and, even supposing it to be true, it was not sufficient in law to form a ground for the commitment, and consequently that the Magistrate should have either dismissed the charges or discharged the accused, and should not have committed them, or any of them, to stand their trial before the High Court.

Upon this application the record was sent for, and the case came on to be argued before a bench consisting of Mr. Justice Field and Mr. Justice Norris.

Mr. *Branson* and Mr. *M. Ghose* appeared for Charoo Chunder Mullick.

Mr. *L. M. Ghose* for Chintamoney Doss.

Mr. *M. P. Gasper* appeared on behalf of the Crown.

The judgment of the Court (FIELD and NORRIS, JJ.) was delivered by

FIELD, J.—In this matter an application has been made, asking us to call up the proceedings connected with the commitment of three persons, Baboo Charoo Chunder Mullick, Chintamoney Doss, and Bunwari Lall, with a view to such commitment being quashed, on the ground, *first*, that, as regards one of these persons, Babu Charoo Chunder Mullick, there is no evidence which can in any view of the case incriminate him; and, *secondly*, that, as regards all three accused, even if the truth of the facts deposed to by the witnesses examined before the Magistrate be assumed, these facts do not constitute any offence punishable by the criminal law.

The application at first purported to be made under s. 147 of the High Courts' Criminal Procedure Act (X. of 1875), but it comes before us to-day as an application under either this section or s. 14 of the same Act.

The first question with which we now propose to deal is, whether an application of this nature, an application, that is, to quash a commitment made by a Presidency Magistrate, can be entertained, and an order quashing such commitment made under the provisions of s. 147.

This section is as follows: "Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay, that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case from any Criminal Court situate within the local limits of its ordinary original criminal jurisdiction, and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only."

The proceeding which we are asked to quash on the present occasion is not a conviction, but a commitment; and what we have to decide is, whether a commitment is a proceeding within the meaning of the words "or other proceeding." We have considered this question since the application was first made to us the day before yesterday, and we are both of opinion that a commitment is not a proceeding within the meaning of these words. According to the usual construction, the words "or other proceeding" must be taken to mean other proceeding of the same nature, *ejusdem generis*, with a conviction. Now, a conviction is a definitive decision of a Judge or Magistrate having jurisdiction to

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deal definitively with the matter before him, whereas a commitment is merely a preliminary proceeding by which a Magistrate, not himself having jurisdiction to deal definitively with the matter before him, sends that matter to be definitively disposed of by another tribunal. That this is a distinction well understood and indeed made by the Indian Legislature itself will appear from s. 10 of the Penal Code and ss. (b) and (d) to that section. It appears to us, therefore, that a commitment is not a proceeding *ejusdem generis* with a conviction. It was asked in the course of argument what proceedings can the Legislature be supposed to have intended by the words "or other proceeding" if these words do not include a commitment? The answer to this question is not difficult. There are numerous cases in which a Presidency Magistrate has jurisdiction to make a definitive order other than a conviction. For example, he can make an order punishing for contempt of Court (ss. 205 to 207, Ch. XV. of the Presidency Magistrates' Act, IV. of 1877). He can make an order requiring security to keep the peace (ss. 208 to 211 of Ch. XVI. of the same Act). He can make an order requiring security for good behaviour (ss. 212 to 214 of the same chapter). He can make an order putting a person in possession of immovable property (s. 233 of the same Act). He can make an order for maintenance (ss. 234, 235, Ch. XVIII. of the same Act). He can make an order giving compensation for a groundless charge or complaint (s. 242 of the same Act). All these orders are in their nature definitive, that is, unless brought before a superior tribunal for revision, and thereupon revised, they are, and remain, final. It appears to us that, in using the words "or other proceeding" in s. 147 of the High Court Criminal Procedure Act, the Legislature contemplated proceedings and orders such as those which I have just mentioned.

But there are other considerations which have influenced us in arriving at a conclusion in this matter. When a proceeding is transferred to the High Court under s. 147, the High Court has power to "determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but *on the merits only*."

In other words, the High Court, in order to the exercise of the jurisdiction hereby conferred, must proceed to consider all the evidence in the case, must come to a finding upon questions of fact, for otherwise it could not quash or affirm on the merits. In so dealing with a case, which in the ordinary course would be tried by a jury, with whom rests the decision upon questions of fact, the High Court would be superseding the jury, by whom, in the usual course, the case would be tried. We think it extremely improbable that the Legislature contemplated any such result as this.

Then, again, if a commitment may be quashed upon the merits under s. 147, and an application to this effect may be made by, or on behalf of, any accused person who has been committed, it will, in practice, be made only in those doubtful cases in which there is reason to hope that the application to have the commitment quashed will prove successful. If that hope should be found to be a mistaken one, the result would be that a prisoner, committed upon evidence sufficiently weak to make the result of a trial doubtful, would come to his trial prejudiced by the opinion of a Division Bench of two Judges pronounced against him to the effect that the commitment ought not to be quashed. It may be said that the accused person could avoid this result by abstaining from making an application under s. 147 to have his commitment quashed; and that, as he can foresee this effect of an unsuccessful application, he cannot justly complain of a result brought about by his own action. Giving to this argument all the con-

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sideration which it deserves, we cannot think that the Legislature intended that a Bench of two Judges should pronounce their opinion publicly upon the merits of a case which must afterwards come before a jury.

Then, again, when a Magistrate has committed a case, he becomes *functus officio*, and it may be said with some show of reason that there is no case before him which can be *transferred* to the High Court.

For all these reasons it appears to us that the words "or other proceeding" in s. 147 of the High Courts' Criminal Procedure Aft (X. of 1875) do not include a commitment; and that no application to have a commitment quashed can be entertained under the provisions of that section.

But there is another section in the Aft under which it may be possible that the petitioners may obtain that which they seek. I say "may be possible," because upon this point, speaking for myself, I desire to express no opinion, and this, for the reasons which I shall presently state. The section to which I refer is s. 14, which provides that, "when any charge or portion of a charge, recorded as aforesaid, appears to a Judge of the High Court at any time before the commencement of the trial of the person charged to be clearly unsustainable, such Judge may make on the charge an entry to that effect. Such entry shall have the effect of staying proceedings upon the charge or portion of the charge," &c. Now, the jurisdiction conferred by this section is a jurisdiction which may be exercised by a Judge, that is, one Judge of the High Court.

Having regard to that which has been determined by the learned Chief Justice under s. 14 of the High Court Aft, 24 and 25 Vic., cap. 104, we are agreed, and, speaking for myself, I am very strongly of opinion that, if this matter is to be heard by a single Judge, it should be heard by my brother Norris, and that I ought not to sit to hear it.

The Chief Justice has determined, under the section just quoted, that Mr. Justice Norris and myself "may form a Division Bench, and hear and determine any appeal, motion, or other matter, in any civil or criminal case which may be brought before the High Court in its Appellate Jurisdiction, or which they shall order to be brought before them." Now, clearly a matter under s. 14 of the High Courts' Criminal Procedure Aft is not a matter brought before the High Court in its Appellate Jurisdiction. I take it that the words, "or which they shall order to be brought before them," have reference only to the same Appellate Jurisdiction.

Then the Chief Justice has further determined that, on and after the 18th September 1882, and until further order, the ordinary Original Civil and Criminal Jurisdiction of the High Court shall be exercised by the Hon'ble Mr. Justice Cunningham, the Hon'ble Mr. Justice Norris, and the Hon'ble Mr. Justice Pigot sitting separately.

And the Officiating Chief Justice has determined on the 10th August 1882 that until further order the ordinary Original Criminal Jurisdiction of the Court shall be exercised by the Hon'ble Mr. Justice Norris. It is quite clear from this that I am not, and that my brother Norris is, a Judge, as to whom it has been determined by the Chief Justice under the provisions of s. 14 of 24 and 25 Vic., cap. 104, that he shall sit alone for the exercise of the ordinary Original Criminal Jurisdiction of the Court; and this being so, it appears to me proper that, as this matter is one falling within that jurisdiction, it should be disposed of by Mr. Justice Norris.

I have further thought it right to consider whether this matter shall be heard by myself and my brother Norris sitting together; in other words, whether

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I shall continue to sit with my learned brother for the hearing and determination of the matter, as a matter to be disposed of under s. 14 of the High Courts' Criminal Procedure Act, and I have decided not to do so. So long as we had not determined whether or not the matter could be dealt with under s. 147, I have continued to sit, because it has been the recent practice of this Court that matters under this section should be dealt with by the Division Bench for the time being exercising the Appellate Criminal Jurisdiction of the Court. During my experience several cases have been so disposed of. I may refer, by way of example, to the case of *The Empress v. Thompson*; ¹ *Wood v. The Corporation of the Town of Calcutta*, ² and *In re Poorna Churn Pal*.³ The former practice was to bring applications under the section before a single Judge sitting on the Original Side of the Court. See, for example, the cases of *The Empress v. Gasper*,⁴ and the *Corporation of the Town of Calcutta v. Bheecunram Napat*.⁵ Whatever doubt there may be as to whether applications under s. 147 of Act X. of 1875 should be heard by the Division Bench exercising the Appellate Criminal Jurisdiction of the Court, I think there can be no doubt that applications under s. 14 of the same Act must be disposed of in the exercise of the Court's Original Criminal Jurisdiction.

S. 36 of the Letters Patent of 1865 provides that any function which by these Letters Patent is directed to be performed by the High Court in the exercise of its Original or Appellate Jurisdiction may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose under the provisions of the thirteenth section of the 24 and 25 Vic., cap. 104. This section is as follows: Subject to any laws or regulations which "may be made by the Governor-General in Council, the High Court may, by its own rules, provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court of the Original and Appellate Jurisdiction, vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice."

So far as I am aware, no rule has been made under this section since the date of the Letters Patent of 1865; but there was a rule made previously, and while the Letters Patent of 1862 were in force, *viz.*, "A Court for the exercise of the ordinary Original Criminal Jurisdiction of this Court may be held before one Judge, and two or more Courts may sit at one time, in each of which there shall be one Judge" (see Rule 58, Belchambers, p. 87). As there is here an express provision, Rule 51 does not apply, which provides that all powers and functions vested in the Court by the Letters Patent, *which are not otherwise expressly provided for by the Rules of Court*, may be exercised by a single Judge, or by a Division Court consisting of two or more Judges.

The operation of the rule above first quoted (No. 58) is saved by the second section of the Letters Patent of 1865, which provides that all rules and orders in force immediately before the publication of these Letters Patent shall continue in force except so far as the same are hereby altered, until the same are altered by competent authority.

It would appear to follow that, while there is a single Judge, there is no Division Court appointed or constituted under s. 13 of the 24 and 25 Vic., cap. 104, to exercise the Original Criminal Jurisdiction of the Court, and that, therefore, this jurisdiction should not be exercised in this or any case by a Division Court consisting of two Judges.

¹ I. L. R., 6 Cal. 523.³ I. L. R., 7 Cal. 447.² I. L. R., 7 Cal. 322.⁴ I. L. R., 2 Cal. 278.⁵ I. L. R., 2 Cal. 290.

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It may be that this result would be altered by reading the words "subject to any laws or regulations which may be made by the Governor-General in Council" in s. 13, 24 and 25 Vic., cap. 104, with sub-s. 2, s. 2 of the General Clauses Act (I. of 1868): "Words in the singular shall include the plural," and that "a Judge" in s. 14 of Act X. of 1875 may thus be held to include two or more Judges. But as this may be arguable, and as my brother Norris is undoubtedly competent to act alone, I think it will be better that he alone should proceed to deal with the case, more especially as, if there should be a difference of opinion, my opinion as that of the Senior Judge would prevail, and there would be this result, that a Judge, whose competency to exercise jurisdiction may be arguable, would overrule a Judge as to whose competency there can be no doubt.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

1882.

Sep. 22.

ROGHUNI SINGH AND OTHERS v. THE EMPRESS.¹

9 Cal. 455.

Criminal Procedure Code (Act X. of 1872), ss. 119, 323—Evidence—Statements of witnesses to a Police Officer during an investigation—Refreshing memory—Medical witnesses, Evidence of—Opinion of experts how elicited—Examining at Sessions trial medical witness who has been examined before the Magistrate—Post-mortem examination reports.

In giving evidence, a police-officer may refresh his memory by referring to documents in which he has, under s. 119 of Act X. of 1872, reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses.

The evidence of a medical man, who has seen, and has made a *post-mortem* examination of the corpse of the person touching whose death the inquiry is, is admissible, firstly, to prove the nature of injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death.

A medical man, who has not seen the corpse, is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness's opinion on those facts. S. 323 of Act X. of 1872 does not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who has been examined before the Magistrate, and in every case in which the deposition taken by the Magistrate is essentially deficient, or requires further elucidation, such witness should be called and examined by the Sessions Judge.

A medical man, in giving evidence, may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom.

The facts of the case are stated in the judgment of the High Court.

Mr. Branson, Mr. M. M. Ghose, and Baboo Umakali Mookerjee, for the prisoners.

The Deputy Legal Remembrancer (Mr. Kilby) for the Crown.

The judgment of the Court (MITTER and FIELD, JJ.) was delivered by

FIELD, J.—This is an appeal from a sentence passed by the Sessions Judge of Patna upon three persons, Roghuni Singh, Ram Charan Singh, and Kanya

¹ Criminal Appeal, No. 508 of 1882, against the sentence of H. Beveridge, Esq., Sessions Judge of Patna, dated the 25th August 1882.

Singh, who have been convicted; the first-mentioned of murder, and the other two of abetment of murder, and have all three been sentenced to transportation for life. Two other persons, namely, Ram Lall and Bhoran, were tried, together with the appellants before us, and were acquitted by the unanimous verdict of the jury.

The prisoners, appellants, have been convicted by a majority of three out of five jurors.

It appears that the jury retired for eight minutes only, and in this case I desire to observe that this time was insufficient to enable the jury to consider the evidence, and deliberate thereupon amongst themselves.

The facts of the case for the prosecution are briefly these: Two persons, Radha Singh and Mewa Singh, were said to have taken a lease of some 10 bighas 13 cottahs of land from one Lakhon Mahton, ijaradar. On the morning of Monday, the 24th July 1882, these two persons, Radha Singh and Mewa Singh, went to a portion of the land consisting of some 10 cottahs, taking with them three labourers, namely, Sukun, Gania, and Badhan Mahton, for the purpose of transplanting paddy plants. There can be no doubt that between Radha and Mewa on the one side, and Ram Lall on the other side, there had been previous litigation and dissension. The story of the prosecution is that about mid-day Ram Lall and Bhoran came and ordered Radha Singh and Mewa Singh, and their workmen, to desist, and then went off, giving orders to the prisoners, Roghuni Singh, Ram Charan Singh, Kanya Singh, and others to beat Radha Singh and Mewa Singh and their people, if they did not desist. There is no suggestion that Ram Lall and Bhoran were on the spot when the subsequent occurrence took place. It is then said that Gunia and Sukun desisted from work, but that Badhan Mahton still went on working, whereupon Roghuni Singh, Ram Charan Singh, and Kanya Singh, came over, and Roghuni Singh struck Badhan on the head with a *lati*. Ram Charan Singh then struck him on the side of the temple, and Kanya Singh struck him on the side. There can be no doubt that Badhan Mahton died from congestion of the brain in consequence of having been struck on the head with some hard substance.

Now, the case for the prosecution is that this hard substance was a *lati*, and that this *lati* was in the hands of the prisoner, Roghuni Singh. The case for the defence, on the other hand, is that the injuries to Badhan's head were not, and could not have been, inflicted by a *lati*, but that they were inflicted by a wooden instrument, called an *arhan*, and that Radha Singh himself had struck Badhan Mahton with this wooden instrument while aiming a blow at one of the opposite party, which missed him, and came down on the head of Badhan Mahton, who was sitting down working transplanting the paddy plants. No witnesses were called in the Court of Session to prove the case set up by the defence, and we have to consider only the evidence for the prosecution, and the manner in which that evidence has been dealt with by the Sessions Judge.

It is to be observed, however, that the prisoners, in their statements before the Court of Session, alleged that they seized Radha Singh, and took him to the *cutochery* close by, where the jemadar of police was staying, and charged him, then and there, with having caused the death of Badhan. Now, although the jemadar examined most of the other persons who were present on the scene, he did not examine Radha, and this does seem to show that at that particular time Radha did not occupy the position of a witness.

A number of objections have been taken before us to the evidence produced at the Sessions trial, and the manner in which that evidence was dealt

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with by the learned Judge in his summing up to the jury. I purpose to deal only with two of these objections. The first is concerned with the observations which the Judge made to the jury as to the discrepancies between the account given by the witnesses in the Court of Session, and the previous account of the transaction given by them to the police jemadar.

I observe that the Sessions Judge read out to the jury the depositions or statements of the witnesses which were recorded by the police jemadar. I think that this was not a proper course. S. 119 of the Code of Criminal Procedure provides that these statements shall not be signed by the person making them, nor shall they be treated as part of the record, or used as evidence. It is, therefore, perfectly clear that these statements are not depositions, do not prove themselves, and cannot be treated as evidence. They might have been used by the police-officer to refresh his memory. But even if this were done, the evidence given by the police-officer, after so refreshing his memory from these statements, and not the contents of the statements themselves, would have been the relevant evidentiary matter. There can be no doubt that the account given by the witnesses to the jemadar, and the account given by them at the trial, very materially vary. The Sessions Judge, with reference to this, said to the jury:—

“Undoubtedly the discrepancies between the statements to the jemadar and those now made were a matter for serious consideration. The statements to the jemadar were recorded by him on the day of the occurrence; and if he had correctly taken them down, they were more likely to be truthful than those made in Court a month afterwards. Now, there were two suppositions which might be made as to the discrepancies. The first was that the jemadar had not accurately taken down the statements. The other was that the witnesses had really not mentioned Ram Lall and Bhoran as giving the orders, and that the present statement to that effect, and other alterations from the former statements, were subsequent inventions of the witnesses. As regards the first supposition, it was no doubt the case that the police did not always record statements correctly. This might arise from dishonesty and collusion, and it was evident in this case that the wealth was on the side of the prisoners. Some of them were zemindars and mokuraidars, while Mewa Singh and Radha Singh were poor men, who had been sold out of their lands, and almost out of their houses: or there might be mere neglect or stupidity without dishonesty.”

I think that it was improper to suggest to the jury that the fact of wealth being on the side of the prisoners might have influenced the police jemadar in recording the statements made to him by the witnesses, there being no evidence on the record that the prisoners or any persons on their behalf attempted to tamper with the police jemadar.

The second objection is that the Sessions Judge was wrong in calling Dr. Shaw, the Civil Surgeon, to contradict the deposition of the Assistant Surgeon Moulvi Asder Ali Khan. It is further said that, even if Dr. Shaw's evidence could have been admissible, it ought not to have been admitted without calling the Assistant Surgeon, and giving him an opportunity of explaining more fully the reasons for the opinions expressed in his deposition. The essential part of the deposition of the Assistant Surgeon is as follows:—

“The skull was fractured from the left temporal bone across the parietal bone, and the fracture was terminated at the end of the sagittal suture. The fracture was about 4 inches long. There was also a superficial wound a little above the left temporal region about 2 inches above the ear. *Underneath*

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this wound, there was no fracture. This was a slight superficial wound. There was also an abrasion below the right ear; this was very slight and superficial. Neither of the ears were hurt. On removal of the scalp, I found a patch of extravasated blood about 4 inches long and $2\frac{1}{2}$ to 3 inches broad just above the fracture." And further on: "In my opinion, one blow caused the fracture." Any flat substance would have caused that fracture. Under no circumstances would a *lati* cause such a fracture, because a *lati* would have cut open the scalp, and would not have caused such a widespread extravasation of blood. Neither of these two *lati*s in Court could have caused the fracture. I examined the body thoroughly, but found no other hurt. The hurt above the left temporal region, and the abrasion below the right ear, could not have been caused by these *lati*s in Court, or any ordinary *lati*. The abrasion below the right ear may have been due to a fall; no *lati* whatever would have caused it.

Dr. Shaw was called as a witness, and the following question was put to him by the Sessions Judge:—

Question—"The Assistant Surgeon of Barh has stated in his evidence that the skull was fractured from the left temporal bone across the parietal bone, and the fracture was terminated at the end of the sagittal suture. The fracture was about 4 inches long. He has also said that no *lati*s could produce the said fracture, because a *lati* would have cut open the scalp, and would not have caused such a widespread extravasation of blood. Can you state if in your judgment this opinion of the Assistant Surgeon is correct?"

Answer—"In my opinion, the opinion of the Assistant Surgeon is not correct. A blow from a *lati* might be given with sufficient force not to wound the scalp at all. Besides, the superficial wound described by the Assistant Surgeon in his report as half an inch long, and a little above the left temporal region, corresponds with the fracture, for he goes on to say that on removing the scalp the skull was found cracked, running from about 2 inches above the left meatus across the temporal bone, the parietal, backwards and upwards, terminating at the sagittal suture. Judging from this, the superficial wound corresponded to the upper third of the fracture. A fracture may extend further than the external wound. The Assistant Surgeon is also not correct in stating that there could not be an extravasation of blood, 4 inches long and $2\frac{1}{2}$ inches broad, caused by a round *lati*. Unless the wound has a particular appearance, you cannot tell from a fracture whether it was caused by a flat board or a round *lati*. The *lati*s in Court could have produced a wound like that described by the Assistant Surgeon."

There can be no doubt that Dr. Shaw in this deposition based his opinion in many important respects, not upon the facts which the Assistant Surgeon stated, but upon facts somewhat, and in one respect essentially, different. The Assistant Surgeon stated in his evidence that underneath the wound, that is, the superficial wound above the left temporal region, there was no fracture. Dr. Shaw, by a course of reasoning, arrived at a different fact, namely, that "the superficial wound corresponds to the upper third of the fracture;" and upon this different fact in part bases his opinion. Then Dr. Shaw refers to the "report," that is, the report of the *post-mortem*, written in the form usually filled up by Civil Surgeons at the time of making the *post-mortem* examination. Now, this report was not evidence, and, therefore, no facts could have been taken therefrom. The Assistant Surgeon might have used this report to refresh his memory when giving evidence; but the report itself was not admissible in evidence.

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But there is a still further and a more important consideration. The Assistant Surgeon had actually seen the dead body, and had performed the *post-mortem* examination; and his evidence, as that of a medical expert, was, therefore, admissible, first, to prove the nature of the injuries which he observed on the dead body; and, secondly, as opinion-evidence with respect to the manner in which those injuries were inflicted, and the cause of death. Now, Dr. Shaw had not seen the dead body, and had not made the *post-mortem* examination; and the difficulty in which he felt himself placed appears from what he says in a subsequent part of his deposition, namely:

"It is difficult for me, without having seen the fracture, to form any definite conclusion about it. Reading a description would not help me so much as actually seeing the thing."

Dr. Shaw was in the position of an expert witness who could give nothing but opinion-evidence. The general rule as to evidence of this kind is that the questions must be put to the witness hypothetically, put in this way:

"Assuming such and such facts to be true, what is your opinion on the matter?" "Assuming such and such an injury, an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?"

The facts thus hypothetically stated to the witness would, of course, be the facts which the evidence of the other witnesses in the case attempted to prove, and as to which it was for the jury to find whether they had been proved or not. If in this particular case the Sessions Judge of Patna had put the question to Dr. Shaw, assuming the injuries deposed to by the Assistant Surgeon, and had asked Dr. Shaw his opinion as to the weapon by which these injuries might or could have been inflicted, there might, perhaps, have been no valid objection to the evidence. But, even if this course had been pursued, I think that, having regard to the importance of the question at issue, it would have been only fair to the prisoners to put the Assistant Surgeon into the witness-box, and give him an opportunity of stating his reasons for the positive assertions contained in his deposition. I may observe that although s. 323 of the Code of Criminal Procedure allows the examination of a Civil Surgeon, taken and duly attested by a Magistrate, to be given in evidence in the Court of Session, it does not in any way preclude the Sessions Judge from calling the Civil Surgeon and examining him. And this course ought to be pursued in every case in which the deposition taken by the Magistrate is essentially deficient, or requires further explanation or elucidation. Unfortunately, however, Dr. Shaw was not questioned in the manner just indicated; and he was asked to sit in judgment upon the Assistant Surgeon: asked substantially to exercise the functions of the jury in forming an opinion upon the credibility of the Assistant Surgeon's evidence. I think that this course was essentially an erroneous one. If the Assistant Surgeon had been placed in the witness-box, and allowed to give his reasons for the views contained in his deposition, he might have stated further facts, observed upon the *post-mortem*, which would strongly support the correctness of his views, or under further examination he might himself have seen reason to modify the positive opinion expressed by him before the Magistrate; and if Dr. Shaw had been questioned, assuming the facts to be as stated by the Assistant Surgeon, this gentleman also might have stated the reasons for his views. If, as the result, there was any substantial difference of opinion between the Civil Surgeon and the Assistant Surgeon, the jury would have been in a position to judge for themselves which view appeared to them most likely to be correct. I think that, having regard to the great materiality of the question as

to the weapon used, it is impossible to say otherwise than that the prisoners have been prejudiced by the manner in which the medical evidence was dealt with by the Judge and placed before the jury. Under these circumstances, I think that this conviction must be set aside.

I have carefully considered the further order which ought to be passed in this matter, and I think that there ought to be a new trial. The prisoners called no witnesses to support the case set up by them; and, this being so, I cannot feel satisfied that their defence is so extremely probable as to make it undesirable in the interests of justice that they should a second time undergo a trial upon the serious charges preferred against them. I think I ought to point out that while two of the prisoners, Ram Charan and Kanya, have been convicted of abetting murder, there is nothing to be found in the Judge's charge explanatory of the law of abetment, and it does not appear what particular conduct on their part was considered to amount to abetment within the definition under s. 109 of the Indian Penal Code.

Re-trial ordered.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Field.

RONGAI AND OTHERS v. THE EMPRESS.¹

Practise—Repeal of Act—Appeal to High Court—Code of Criminal Procedure, Act X. of 1872, s. 36—Act X. of 1882, s. 408—High Court, Revisional Jurisdiction.

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Feb. 27.

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On the 9th of December 1882, a person was convicted under ss. 457 and 109 of the Indian Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate of Assam, exercising special powers under s. 36 of the old Code of Criminal Procedure, Act X. of 1872. The new Code of Criminal Procedure came into force on the 1st of January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence above-mentioned on the 23rd of January 1883.

Held by FIELD, J. (MITTER J., expressing no decided opinion) that the case was governed by s. 408 of the new Code of Criminal Procedure, and that no appeal lay to the High Court.

Held, by the Court, that the case was a fit one for the exercise of the High Court's Revisional Jurisdiction, and should be dealt with under the powers conferred on the High Court by virtue of that jurisdiction.

In this case the prisoners were charged by the Deputy Commissioner of Assam with having committed offences under s. 457, ss. 457 and 109, and s. 411 of the Indian Penal Code. The charges were proved to the satisfaction of the Deputy Commissioner, who sentenced the prisoners to three years' rigorous imprisonment on the 9th of December 1882. The Deputy Commissioner was invested with powers under the provisions of s. 36, Act X. of 1872. The prisoners appealed to the High Court on the 23rd of January 1883.

Baboo Hurry Mohun Chuckerbutty for the appellants.

The following judgments were delivered.

MITTER, J.—In this case three persons—Rongai, Gouri Khan, and Beerai—were convicted under s. 457, coupled with s. 109, by an officer exercising the special powers vested in him under s. 36, Act X. of 1872. They were each

¹ Criminal Appeal No. 40 of 1883, against the order of H. J. Peet, Esq., Deputy Commissioner of Luckimpore, dated the 9th December 1882.

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of them sentenced to three years' rigorous imprisonment on the 9th of December last. An appeal was presented to this Court on the 23rd of January last, and, on the appeal coming on for hearing before a Division Bench of this Court on the same day, the following order was passed: "The appeal is admitted. Send for the record, and issue the usual notices." The case being now called on before us to be heard finally, a question has arisen—whether this Court is competent to hear this case as an appeal against the conviction and sentence of the lower Court. It appears, with reference to the provisions of the old Code, that the provisions of the old Code and those of the new Code are not precisely the same. Under the old Code, the test which determined the venue of appeal in cases like the present was whether the officer in the lower Court exercised the special powers mentioned in s. 36. In this case, it is clear that the Deputy Commissioner, against whose judgment this appeal has been preferred, was exercising the special powers vested in him under s. 36 of the Code of 1872. As Magistrate he could not pass the sentence which was passed in this case, and it is also apparent on the proceedings that he was exercising the special powers under that section. That being so, it is quite clear that, under the old Code, the appeal lay to this Court, but under the new Code the right of appeal to this Court is restricted only to those cases in which the sentence passed by officers of this description, *viz.*, officers vested with special powers under the provisions of s. 36, requires confirmation by a superior Court. Then, whether under the old Code or under the new Code, it is quite clear that the sentence which was passed in this case did not require confirmation by a superior Court. That being so, it is also quite clear that if the new Code applies, the appeal in this case would not lie to this Court. The last section of the new Code provides that all pending proceedings would be governed by it; and, if the present case could be considered as a case pending on the 1st of January 1883, no doubt the new Code would have applied; but, as already stated, the case was disposed of in the lower Court on the 9th December 1882. On the other hand, by s. 2 of the new Code, Act X. of 1872 having been repealed, and this appeal having been preferred on the 23rd of January, the appellants could not claim any right of appeal which they had under the old Code, as that Code was not in force on that day. The section which deals with the right of appeal under the new Code is s. 408, and that section is to the following effect: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the first class, or any person sentenced under s. 349 by a Magistrate of the first class, may appeal to the Court of Session. Provided that "(a) when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such case shall lie to the High Court." The section says generally that any person convicted on trial by the officers above-mentioned may appeal to the Sessions Judge, and, in certain cases, to the High Court. Therefore, I am inclined to think that the right of appeal in this case would be governed by the provisions of the new Code. That being so, the appellants, as a matter of right, would not be entitled to appeal to this Court; but it seems to me that it is not essentially necessary in this case to decide this question, because, whether the appeal lies to the Sessions Judge or to this Court, this seems to be a fit case for the exercise of the revisional powers given to us by the new Code. It is, therefore, not necessary for me to express a decided opinion on this point; but, treating the case whether as an appeal or under the revisional powers vested in this Court, it seems to me that the conviction of the lower Court cannot stand.

[His Lordship, having gone through the evidence, said]:—

On the whole, I do not think that the evidence is sufficient to support the conviction of the prisoners. We accordingly set it aside, and direct their immediate release.

FIELD, J.—In this case, the appellants were convicted on the 9th of December last by a Deputy Commissioner in Assam exercising the special powers which could be conferred under s. 36 of the Code of Criminal Procedure, Act X. of 1872. That the Deputy Commissioner as District Magistrate was exercising these powers appears on the face of these proceedings, and, with reference to the provisions of s. 270, Act X. of 1872, it is also clear that the District Magistrate was exercising these powers, because it appears from the sentence awarded, *viz.*, three years' rigorous imprisonment, that such officer was exercising such special powers. As District Magistrate, the Deputy Commissioner could only have passed a sentence of two years' rigorous imprisonment. This being so, it is clear that, under the provisions of s. 270 just referred to, the appeal lay to the High Court, and not to the Court of Session. But it is, to my mind, clear that the present Code, Act X. of 1882, has altered the law. S. 408 of the present Code enacts thus generally: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the first class, or any person sentenced under s. 349 by a Magistrate of the first class, may appeal to the Court of Session, provided that when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such a case shall lie to the High Court." Now, it is clear to my mind that the words "District Magistrate" here include a District Magistrate vested with special powers under s. 30 of the present Code. It is, therefore, clear that all cases tried by a District Magistrate so vested are, as a general rule, appealable to the Court of Session, unless in any particular case the sentence, being subject to the confirmation of the Court of Session, is appealable to the High Court. Now, the sentence passed in the present case is a sentence of three years only; that sentence, according to the old law, and to the new law, did not, and does not, require confirmation, and, therefore, it is clear to my mind that, under the words of the present Code, the appeal in this case lay to the Court of Session, because the sentence passed was not subject to the confirmation of the Court of Session. The appeal was presented to the High Court after the 1st of January, and the question arises whether the High Court has jurisdiction to entertain the appeal so presented. It appears to me that the High Court, as a Court of Appellate Jurisdiction, cannot entertain this case as an appeal. S. 558 of the present Code relates to pending cases. Now, this was not a pending case, and, therefore, it does not come within the purview of that section. Then, it is contended that s. 6 of the General Clauses Act, I. of 1868, will apply. It appears to me that this appeal cannot, within the meaning of that section, be turned a proceeding commenced before the repeal of Act X. of 1872. The proceedings on the original trial terminated on the 9th of December. The proceeding before us is an appeal, and no such proceeding was commenced before us on the 1st of January. That being so, it appears to me that the case must come under the general language of s. 408, *viz.*, that any person convicted on a trial held by a District Magistrate may appeal to the Court of Session. That language is general; it is in no way restricted to persons convicted after the Code came into operation, and it is sufficiently wide to include the cases of persons convicted before the new Code came into force. This being so, I am of opinion that the appeal in the present case ought to have been made, not to the High Court, but to the Court of Session. I am, however, quite of opinion with my learned colleague that, having regard to the distance of Assam from Calcutta,

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having regard to the mistakes that may probably be committed upon a change in the law; and, moreover, having regard to the facts of this particular prosecution, it is a proper case in which to exercise the revisional jurisdiction of this Court. This being so, I have concurred in hearing this case as a case taken up for revision. As to the remarks on examination of the evidence, and generally on the merits of the case, which have just been made by my learned colleague, I entirely agree, and I think that these appellants must be acquitted and discharged.

Convictions set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

THE EMPRESS v. BROJOKANTO ROY CHOWDHURI¹

1883.
 Feb. 28.
 9 Cal. 637.

Criminal Procedure Code (Act X. of 1882), s. 133—Nuisance—Erection of buildings—Unconditional order.

Every order made under s. 133 of the Code of Criminal Procedure (Act X. of 1882) must appoint a time within which, and a place where, the person to whom it is directed may appear before the Magistrate, and move to have the order set aside or modified.

No unconditional order can be made under that section.

THIS was a reference to the High Court by the Sessions Judge of Backergunge to set aside an order made by the Deputy Magistrate of Putuakhali. The facts of the case are thus stated by the Sessions Judge: "On the 5th of January last, the Deputy Magistrate addressed to the applicant for revision, an order which, after reciting that last year the official residence of the sub-divisional officers of Putuakhali, with its out-offices, was destroyed by fire, that he apprehended a recurrence of such a calamity, and that the propriety of directing the applicant to remove his bazaar to a distance from the sub-divisional officers' abode was under consideration, forbade the applicant (1), to erect, or cause or permit to be erected, within his bazar (he is the proprietor of the soil on which stand the shops and other buildings that constitute the bazaar), or within the prostitutes' quarter, any thatched buildings, or buildings constructed of easily combustible materials; (2) to repair and cause or permit to be repaired within the aforesaid limits any such buildings; and enjoined him to put a stop to the erection of such buildings which had been undertaken within such limits prior to the issue of the Deputy Magistrate's order.

"The order served on the applicant is annexed to the application for revision. It purports to have been promulgated under s. 133, Criminal Procedure Code; but, in lieu of being conditional, peremptorily requires compliance therewith in ten days, and threatens the applicant with pains and penalties in the event of disregard thereof. It appoints no time or place for shewing cause against it, nor does it intimate that the applicant will have an opportunity of moving a Magistrate to set it aside or modify it." The Sessions Judge then went on to say that the Deputy Magistrate had given an explanation of his proceedings, but that in such explanation he had "overlooked the one irregularity which is fatal to the validity of his order, namely, its unconditional character."

No one appeared to argue the case.

¹ Criminal Reference No. 16 of 1883, and letter No. C-36, from the order made by J. F. Bradbury, Esq., Officiating Sessions Judge of Backergunge, dated the 21st February 1883.

The judgment of the Court (MITTER AND FIELD, JJ.) was delivered by

MITTER, J.—We agree with the Sessions Judge that the order of the Deputy Magistrate of Putuakhali, purporting to have been passed under s. 133, Criminal Procedure Code, is illegal, and should be set aside on the ground that it is unconditional. As required by the section, it does not appoint any time or place within which and where the person to whom it is directed may appear before the Deputy Magistrate himself, or some other Magistrate of the first or second class, and move to have the order set aside or modified. We accordingly set aside the order which the Sessions Judge recommends to be set aside.

Order set aside.

1883.

THE
EMPRESS
v.

BROJOKANTO
ROY CHOW-
DHURI,
9 Cal. 637.

APPELLATE CRIMINAL.

Before Mr. Justice Wilson and Mr. Justice Maclean.

IN THE MATTER OF PEARY MOHUN SIRCAR AND OTHERS.

PEARY MOHUN SIRCAR v. THE EMPRESS.¹

1883.

March 1.

Unlawful Assembly—Penal Code (Act XLV. of 1860), s. 143.

On the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a dispute of long standing between the accused and certain other parties regarding the possession of certain land; that neither of the parties was in undisturbed possession of the land; that the accused went to sow the land with indigo, accompanied by a body of men armed with *latties*; that they were prepared to use force, if necessary; and that the *lattials* kept off the opposite party by brandishing their weapons while the land was sowed.

Held that the accused were rightly convicted of being members of an unlawful assembly under s. 143 of the Penal Code.

*Sunker Singh v. Burmah Mahto*² distinguished.

In this case the prisoners were convicted by the Joint-Magistrate of Rajshahye of being members of an unlawful assembly, and sentenced to three months' rigorous imprisonment under s. 143 of the Indian Penal Code. The prisoners appealed to the Sessions Judge of Rajshahye, the material portion of whose judgment was as follows:—

It does not seem to be seriously denied in this case that the retainers of Messrs. Watson & Company went in a large body to sow down indigo on the lands which are referred to by the witnesses, and that many of these retainers were armed. This fact is proved by the clearest evidence; and the evidence of the constable, Permishwar Singh, shews that while the *lattials* were brandishing their *latties*, some fifty persons sowed down the lands in indigo. The pleader for Messrs. Robert Watson & Company, relying upon the case of *Shunker Singh v. Burmah Mahto*,² contends that the charge in this case cannot be sustained, as the intention of the defendants was not to enforce a right, but to maintain, undisturbed, the subsisting enjoyment of their rights. It seems to me, however, that the ruling above quoted is not applicable to the present case. It referred to the enjoyment of water actually flowing, and to the protection of the then subsisting enjoyment of this right, under circumstances where there was no time to have recourse to the police authorities. In the case now under appeal, it is clear that the land, of which the enjoyment is claimed, is disputed

¹ Criminal Motion, No. 32 of 1883, against the order of *L. Hare, Esq.*, Joint Magistrate of Rajshahye, dated the 4th January 1883.

² 23 W. R., Cr., 25.

1883.

PEARY
MOHUN
SIRCAR

v.

THE
EMPERESS,
9 Cal. 639.

land, and was so in April and May 1882, as well as in the following November, when it re-appeared from the bed of the Padma river. The District Judge went on to say that he agreed with the Joint-Magistrate that the evidence on the record is not sufficient to prove conclusively that either party was in *bond fide* possession. It is clear, however, that both parties claimed the right of possession, and that these claims arose as soon as the disputed land re-appeared from the bed of the river. It is the forcible assertion of this claim on the part of the appellants which is the subject of the present charge against them. . . . From a review of the whole evidence I concur with the Joint-Magistrate in the opinion that the appellants are guilty of the offence of which they have been convicted, and I accordingly dismiss this appeal.

The prisoners moved the High Court for a rule to show cause why the conviction should not be set aside as bad in law.

Mr. *Evans* for the petitioners.

The judgment of the Court (WILSON and MACLEAN, JJ.) was delivered by

WILSON, J.—This was a rule granted to show cause why a conviction should not be set aside on the ground that, assuming the facts found to be correct, the conviction was bad in law. We have had the advantage of hearing the arguments of the petitioner's Counsel, and it appears to us that, assuming the facts found to be correct, the conviction is good in law. The facts found are these: that there was no one in undisputed possession of the land in question, but that a dispute of some considerable standing existed between the two parties as to who was entitled to the land, and who was in possession of it; that a number of persons of the petitioner's party went to sow the land, together with a body of men armed with *lalties*; that they were prepared to use force, if necessary; and that they stationed these *laltials* to keep off the opposite party, and these were brandishing their weapons while the land was sowed. That falls within the definition of the offence, because there was an assembly for the purpose of enforcing a right by criminal force, or show of criminal force.

It was contended that this case was governed by the case of *Shunker Singh v. Burmah Mahto*;¹ but, as was pointed out by the Judge in the Appeal Court in this case, that case is distinguishable. It was decided on this ground, that what was done there was an act justified by the sections relating to private defence, and it was expressly pointed out that it did not fall under cl. 3 of s. 99 of the Penal Code. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. In this case it appears that there was plenty of time to have recourse to the public authorities; therefore, the law as to private defence does not apply.

The rule will be discharged.

Rule discharged.

¹ 23 W. R., Cr., 25.

APPELLATE CRIMINAL.

*Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.*EMPRESS v. ISHAN CHUNDRAN DE AND ANOTHER.¹

Bengal Excise Act (VII. of 1878), ss. 15, 53, 60, 61—Sale by servant of licensed vendor—Cooly employed by servant—Reference to High Court—Revisional Jurisdiction.

1883,
May 2.
9 Cal. 347.

The servant of a licensed vendor sold eight quart bottles of country spirit, and employed a cooly to carry them as he directed. The servant was convicted under s. 60, Beng. Act VII. of 1878; and the cooly was convicted under s. 61 of the same Act. It was suggested that the servant should have been convicted under s. 53, and that the cooly had committed no offence.

Held that the conviction of the cooly was illegal, and must be set aside.

Held, also, that the servant was properly convicted, and whether under s. 60 or s. 53 was immaterial.

*Queen v. Ishan Chunder Shaha*² and *Empress v. Baney Madhub Shaw*³ followed.

The necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision.

THIS was a reference from the Sessions Judge of Tipperah under s. 438 of the Code of Criminal Procedure. The terms of the reference were as follows:—

Accused No. 1 has been convicted under s. 60, and accused No. 2 under s. 61 of Beng. Act VII. of 1878. The former sold eight quart bottles of country spirit, and the latter had them in his possession, *i.e.*, carried them as a cooly by direction of accused No. 1.

It is contended that the conviction of both the accused is illegal, because accused No. 1 was not a licensed vendor, and accused No. 2 might lawfully have had 12 quart bottles in his possession.

With regard to the case of accused No. 1, he is not a licensed vendor, but he is servant to a licensed retail vendor, and sold the liquor as such. S. 60 applies only to sale by licensed vendors; accused ought not, therefore, to have been convicted under that section. It may be that he has committed an offence punishable under s. 53; and, if an appeal lay to this Court, I might perhaps, under s. 423 of the Criminal Procedure, alter the finding, maintaining the sentence; but as the case is not appealable, I cannot do so, and I cannot direct the lower Court to enquire into the offence punishable under s. 53, because I could only make such order in case the accused had been discharged; s. 436, Criminal Procedure. I think I ought, therefore, to submit the case of accused No. 1 to the High Court to be dealt with under s. 439. I am inclined to think that the proper course would have been to prosecute, not him, but his master, under s. 60.

As to accused No. 2 the conviction seems unsustainable. S. 61 of the Excise Act must be read with s. 15, in which the quantity specified is 12 quart bottles. It is stated that the Board of Revenue have made an order, as they are empowered under s. 15, reducing the quantity to 6 quart bottles, but my attention has been directed to the case of *Empress v. Kola Lalang*⁴ in which it is

¹ Criminal Reference, No. 49 of 1883, from the order made by *R. Towers, Esq.*, Sessions Judge of Tipperah, dated the 25th April 1883.

² 19 W. R., Cr., 34.

³ 1 L. R., 8 Cal. 207; 10 C. L. R. 389.

⁴ 1 L. R., 8 Cal. 214.

1883.

EMPRESS

v.

ISHAN

CHUNDERA

DE,

9 Cal. 847.

shown that persons who are not licensed vendors (and it is admitted that accused No. 2 is not one) do not commit an offence by possessing a less quantity than 12 quart bottles, though the quantity they possess may be greater than that authorized by the Board by virtue of the power conferred on them by s. 15. I would, therefore, recommend that the conviction of accused No. 2, who seems an innocent party, be set aside, and the fine ordered to be refunded to him.

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The second defendant must clearly be acquitted on the authority of the judgment of this Court in the case of *Empress v. Kola Lalang*,¹ in which we concur.

The first defendant has, in our opinion, been properly convicted, whether under s. 60 or s. 53 is immaterial—see *Queen v. Ishan Chunder Shaha*,² *Empress v. Baney Madhub Shaw*.³ We would further observe that, for reasons stated by the Sessions Judge himself, he need not have referred the case of this prisoner. A necessity for altering a conviction from one section to another for cognate offences when the accused has not been prejudiced by any such error is no sufficient ground for a reference to the Court of Revision.

APPELLATE CRIMINAL.

Before Mr. Justice McDonell and Mr. Justice Tottenham.

1883.

March 7.

9 Cal. 849.

CHUNDI CHURN MOOKERJEE AND OTHERS v. THE EMPRESS.⁴

Master and Servant—Criminal Act of Servant—Non-liability of Master—Indian Ports Act (XII. of 1875), s. 22.

The servants of a contractor, who had engaged to discharge ballast from a ship lying in the port of Calcutta, threw the ballast into the river within the limits of the port, and thus committed an offence under s. 22 of the Indian Ports' Act (XII. of 1875). It did not appear that the contractor had abetted the offence.

Held that he was not, in the absence of proof of abetment, liable for the acts of his servants.

Baboo Umbica Churn Bose for the appellant.

The *Standing Counsel* (Mr. Phillips) and Mr. Adkin for the Crown.

THE facts of this case sufficiently appear from the judgment of the Court (McDONELL and TOTTENHAM, JJ.) which was delivered by

McDONELL, J.—The appellant has been convicted before the Chief Presidency Magistrate of an offence against s. 22 of Act XII. of 1875, by improperly discharging ballast from the ship *Ben Nevis*, by the boats of Bishto Manjhi and Nufur Manjhi, by throwing it into the river within the Port of Calcutta, and has been sentenced to pay a fine of Rs. 250. The amount of the fine entitles the accused to appeal to this Court.

In our opinion the conviction is bad in law, for the facts proved or admitted do not establish any offence under the Act against the appellant. The

¹ 1. L. R., 8 Cal. 214.

² 19 W. R., Cr., 34.

³ 1. L. R., 8 Cal. 207; 10 C. L. R. 389.

⁴ Criminal Appeal, No. 155 of 1883, against the order of F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 21st February 1883.

first clause of s. 22 prohibits the casting of ballast or rubbish in the port without lawful excuse.

The next clause prescribes a penalty for whoever, by himself or another, so casts or throws the same, and for the master of any vessel from which the same is cast or thrown. It seems to us that to warrant the conviction under this section of a person not being master of a vessel from which ballast is thrown, it must be shown that the accused person, if he did not himself throw the ballast or rubbish into the port, intentionally caused somebody else to commit that offence.

In this case all that is proved or admitted against the appellant is that he made an agreement to remove the ballast from the ship *Ben Nevis*; that he engaged boats for that purpose; and that the ballast was removed from the ship in those boats. The boatmen, instead of landing the ballast at the proper place, threw it into the river, within the limits of the port. They were arrested, convicted, and fined. Proceedings were subsequently taken against the appellant under the same section, when the Magistrate held him "liable for his servants' act," and accordingly convicted and sentenced him. We cannot bring ourselves to accept this doctrine as admissible in dealing with a person accused of an offence, unless his liability for the acts of another is specifically declared by statute. The learned Standing Counsel, who has supported the conviction, admits that in a criminal trial the doctrine laid down by the Magistrate in this case would not be applicable, but he endeavours to distinguish this case from a criminal matter by describing it as *quasi*-criminal, or as one relating not to an "offence," but to a mere breach of rule. And, in such a case, he submits that knowledge or intention on the part of the person who is accused in respect of something done by other persons is not essential.

We cannot, however, apprehend the distinction so suggested as entitling a Criminal Court to place a person accused of what is described as a *quasi*-criminal act at a disadvantage from which one charged with serious crime would be protected, *viz.*, being held responsible for the acts of another without any proof of abetment or connivance on his part, and, in the absence of any statutory provision, fixing him with such responsibility. We observe that Act XII. of 1875 in Ch. VIII. refers to breaches of it as "offences," makes them triable by a Magistrate, and provides for the enforcement of penalties on conviction. The trial then is, we apprehend, a criminal trial, and the same principles will apply to it as to other criminal trials.

If the Legislature had intended to make persons in the appellant's position criminally liable for acts done by persons employed by them without proof of connivance, it would surely have provided for this in the Act. The very section (22) and following sections do enact that the master of any vessel shall be liable to be punished for acts done on board in breach of the rules laid down, though they may possibly be done without his knowledge, or even against his orders. This specific creation of criminal liability as against the master shows that without it he would not be liable for an act not done, or expressly permitted by himself.

We find nothing in the Act which renders the appellant liable to punishment for the acts done by others not proved to have been by his abetment or connivance. We, therefore, set aside the conviction, and direct that the fine, if paid, be refunded.

For these reasons we set aside the convictions and sentences in appeals Nos. 156 and 157.

Convictions set aside.

1883.

CHUNDI
CHURN
MOOKERJEE
v.
THE
EMPRESS,
9 Cal. 849.

APPELLATE CRIMINAL.

*Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.*SHADULLA HOWLADAR AND ANOTHER *v.* THE EMPRESS.¹

1883.

May 7.

9 Cal. 875.

Code of Criminal Procedure (Act X. of 1882), s. 309—Trial by Assessors—Evidence—Summing up of Evidence—Delivery of opinions of Assessors—Sessions Judge, Duties of.

The power of summing up the evidence given by s. 309 of the new Code of Criminal Procedure (Act X. of 1882) is intended to be exercised in long or intricate cases, and the Sessions Judge should confine himself to summing up the evidence, and should not obtrude on the assessors his opinion of the worthlessness or otherwise of certain portions of the evidence.

The Sessions Judge should also conform strictly to the words of s. 309, and require each assessor to state his opinion orally.

The Sessions Judge should not utilize the services of the pleader for the prosecution for the purpose of recording his summing up to the assessors. If he is not capable of recording the substance of it himself, he should employ an independent person for that purpose.

THIS was an appeal from a conviction and sentence of the Sessions Judge of Furreedpore. The facts of the case are sufficiently set out in the judgment of the High Court.

Baboo Gria Sunker Monoomdar for the appellants.

The Deputy Legal Remembrancer (Mr. Kilby) for the Crown.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—After considering the evidence on the record in this case, we are of opinion that the appellants have been rightly convicted under ss. 149 and 304 of the Indian Penal Code. It is clear that they were the ringleaders in a premeditated riot, with the knowledge and intention necessary to bring them within these sections. The mob, of which the appellants were the ringleaders, consisted of about one hundred and twenty-five men, said to have been armed with shields, spears, and clubs. One man was killed, and others were injured.

On these facts we hold that the appellants have been properly convicted, and we also think that the sentences passed on them are not too severe. The appeals are, therefore, dismissed.

It is necessary, however, to make some observations on the procedure adopted by the Sessions Judge. He has taken advantage of the terms of s. 309 of the present Code to sum up the evidence for the prosecution and defence to the assessors. This provision has, for the first time, been introduced into our Code, and in our opinion the object is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion.

In the present case we observe that the Judge seems rather to have taken an opportunity of expressing his opinion in emphatic terms on every single matter put in evidence. He observes on one point: "although you may utterly disbelieve the witnesses, as this Court has done, with regard to those persons (who had been acquitted), but yet there is no ground for disbelieving them with regard to those men who have been named from the beginning."

Now, it is impossible to suppose that the assessors could have been otherwise than very much embarrassed in coming to an independent opinion of their

¹ Criminal Appeal, No. 184 of 1883, against the order of *F. J. G. Campbell, Esq.*, Officiating Sessions Judge of Furreedpore, dated the 12th March 1883.

own in the face of the very decided opinion expressed by the Judge. There are other passages in the summing up which might be quoted to a somewhat similar effect.

In the next place, we observe that the summing up has been recorded by the pleader for the prosecution, and accepted by the Judge as correct. We think that such a course should not have been taken by the Judge, and that, if he was incapable himself of recording the heads of the summing up to the assessors, he should have availed himself of the services of some Court-officer, or directed it to be done by some independent person.

We next find that, instead of taking the opinion of each assessor, as is required by law, the Judge has received the opinions of all the assessors combined, as delivered through one of them, whom he thus regards as the foreman of a jury.

We further observe that four other persons, who were under trial along with the appellants, were acquitted by the Sessions Judge at the termination of the evidence for the prosecution. The grounds on which the judgment of acquittal was based are, that the evidence of identification was unworthy of belief.

Under such circumstances it was the duty of the Judge, before passing judgment, himself to ask for and record the opinions of the assessors on that evidence. The Judge, however, has thought it unnecessary to do so, because he considers that there was "no evidence" against the accused, the fact being that there was evidence which the Judge thought unworthy of belief.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

SHEO SARAN TATO v. THE EMPRESS.¹

Sentence—Penal Code (Act XLV. of 1860). s. 75—Previous Conviction.

The object of s. 75 of the Indian Penal Code is to provide for an additional sentence, not a less severe sentence, on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient.

THIS was an appeal from the following finding and sentence of the Judge of Shahabad sitting with assessors on the 19th of March 1883 :—

"The Court, concurring with the assessors, finds that the accused person, Sheo Saran Tato, is guilty as charged, namely, that he, on or about the 18th day of February 1883, at Arrah, committed house-breaking by night with intent to commit theft, he having previously, that is to say, on the 25th August 1874, been convicted of house-breaking by night in order to the committing of theft, such conviction not having been set aside on appeal, and that he thereby committed an offence under s. 457 of the Indian Penal Code punishable under ss. 457, 75 of the same; and, under these sections, the Court directs that the said Sheo Saran Tato be punished with rigorous imprisonment, which shall extend to four years from this date."

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by PRINSEP, J.—There is no reason for questioning the correctness of the conviction of the appellant, and the sentence is not excessive. The appeal is, therefore, rejected.

¹ Criminal Appeal, No. 207 of 1883, against the order of *J. Tweedie, Esq.*, Sessions Judge of Shahabad, dated the 19th March 1883.

1883.

SHADULLA
HOWLADAR

v.
THE
EMPRESS,
9 Cal. 375.

1883.

May 4.

9 Cal. 877.

1883.

SHEO SARAN

TATO

v.

THE

EMPRESS,

9 Cal. 877.

We think it necessary, however, to notice a misconception of the object of s. 75, Penal Code, into which the Sessions Judge has fallen. He seems to think that on a second conviction of any of the offences specified in that section, he is bound to pass sentence thereunder, and he, accordingly, observes that, although for the offence committed (s. 457), the prisoner would be liable to imprisonment for 14 years, he would, under s. 75 of the Penal Code, by reason of a previous conviction, be liable to imprisonment for only ten years. He then states that "it is for the prisoner's advantage, provided he is prepared to take his chance of transportation to admit a previous conviction." The object of s. 75 is to provide for an additional sentence, not for a less severe sentence on a second conviction. Recourse should not be had to s. 75 if the punishment for the offence committed is itself sufficient, and even then the Code of Procedure requires that the prisoner should be first convicted of that offence.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883.

May 28.

9 Cal. 878.

CHAND KHAN v. THE EMPRESS.¹

Appeal—Security for good behaviour—Code of Criminal Procedure (Act X. of 1882), ss. 110, 118, 123.

No appeal lies to the High Court from an order passed by a District Magistrate under the provisions of s. 123 of the Criminal Procedure Code, and, on reference by the Magistrate, confirmed by the Sessions Judge under the same section, requiring a person to be detained in prison, until he should provide security for his good behaviour.

IN this case a rule was issued under s. 110 of the Criminal Procedure Code by the Officiating Magistrate of Patna, calling upon the appellant to show cause why he should not be ordered to provide two good and sufficient securities in Rs. 50 each, and his own recognizance in Rs. 100, to be of good behaviour for three years. On cause shown the rule was made absolute under s. 118 of the Criminal Procedure Code, but the appellant was unable to provide the necessary security. The Magistrate detained him in prison pending the orders of the Sessions Judge. The latter passed the following order: "The respondent, Chand Khan, must give his own recognizance of Rs. 100, and find two securities in Rs. 50 each for three years, as required by the Magistrate, whose order is confirmed under s. 123 of the Code of Criminal Procedure. Failure to comply will entail on the respondent rigorous imprisonment, not exceeding three years until compliance." Chand Khan appealed to the High Court.

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by PRINSEP, J.—We think that no appeal lies in this case. S. 406 provides expressly for an appeal on behalf of a person required by a Magistrate, other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour, and the law nowhere declares that any appeal shall lie in other cases of this class. The order, moreover, is not a conviction on a trial held by a Sessions Judge (s. 410), nor a sentence of the District Magistrate subject to the confirmation of the Sessions Judge (s. 408a), and, therefore, under s. 404, no appeal would lie.

Appeal dismissed.

¹ Criminal Appeal, No. 253 of 1883, against the order of G. A. Grierson, Esq., Officiating Magistrate of Patna, dated the 26th April 1883.

VOLUME X.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF ANAND LALL BERA AND OTHERS.
ANAND LALL BERA AND OTHERS *v.* THE EMPRESS ON THE PROSECUTION OF AZIM PEON.¹

1883.

Aug. 2.

10 Cal. 18.

Public Servant—Resistance to Public Servant—Warrant—Return of Warrant—Penal Code, s. 183.

A person was convicted under s. 183 of the Penal Code for offering resistance to the attachment of property by a public servant. The offence was committed on the 4th of February 1883, but the warrant under which the public servant acted was returnable on or before the previous day. *Held* that the conviction was bad.

In this case the accused were found guilty by the Deputy Magistrate of Tumlook, in that they offered resistance to the taking of property by the lawful authority of a public servant, and thereby committed an offence punishable under s. 183 of the Penal Code. The facts were that one Azim, a revenue-peon in the service of Government, was charged with the execution of a warrant under the Public Demands Recovery Act, 1880, for the attachment of the moveables of one Tulseeram Bera. On the 4th of February last, the peon proceeded to execute the warrant, and, while doing so, he met with obstruction and resistance from the accused. The warrant under which the peon acted was returnable on or before the 3rd of February.

The accused moved the High Court to quash the order of the Magistrate.

Baboo *Jogesh Chunder Dey* and Baboo *Dwarkanath Mookerjee* for the petitioners.

The judgment of the Court (PRINSEP and TOTTENHAM, JJ.) was delivered by

PRINSEP, J.—The petitioners were convicted under s. 183 of the Penal Code for offering resistance to an attachment of the property of one Tulseeram Bera, which the Deputy Collector had ordered in execution of a certificate under the Public Demands Recovery Act (Beng. Act VII. of 1880). The warrant under which the peon acted stated that the return should be made on or before the 3rd February.

The resistance, it has been found in the present case, was offered on the 4th February, and it is contended before us that, under such circumstances, no lawful order was in force, and consequently the prisoner has committed no offence. It appears to us that, having regard to the terms of the second clause of s. 251 of the Code of Civil Procedure, this objection is fatal to the conviction, and that the conviction, therefore, must be set aside, and the fine, if paid, refunded.

Conviction set aside.

¹ Criminal Motion, No. 166 of 1883, against the order of Baboo *U. C. Batanyal*, Deputy Magistrate of Tumlook, dated the 6th April 1883.

APPELLATE CRIMINAL.

*Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.*GOVINDA DASS *v.* DULALL DASS AND OTHERS.¹

1883.

Sep. 4.

10 Cal. 67.

Magistrate, Powers of—Dismissal of Complaint—Discharge of accused—Code of Criminal Procedure (Act X. of 1882), ss. 253, 259.

A Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant in warrant-cases not coming within s. 259 of the Code of Criminal Procedure, except in cases coming within the last clause of s. 253 of the same Code.

In this case a complaint was made before the Magistrate of Rungpore, on the 13th of July 1883, charging a police-constable with extortion. The hearing of the complaint was first fixed for the 23rd July, and afterwards postponed till the 3rd of August. On the latter day, neither the complainant nor his witnesses appeared, and the Magistrate discharged the accused on that ground. The case was then referred to the High Court under s. 438 of the Code of Criminal Procedure by the District Judge of Rungpore, who was of opinion that the course taken by the Magistrate was contrary to the provisions of s. 259 of the Code of Criminal Procedure, the case not being a compoundable one.

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was as follows:—

We think that the Magistrate was not competent in this case—a warrant-case, not compoundable—to dismiss it because the complainant was absent.

It appears that, on the day first fixed for the trial, the complainant attended with his witnesses, but, in consequence of the inability of the accused, a police-officer, to attend, it was postponed, the complainant and witnesses being bound over to attend on the day to which the trial had been postponed. On that day the accused alone appeared, and the Magistrate dismissed the case. Having regard to the terms of s. 259, we are of opinion that in warrant-cases not coming within that section, except under the last clause of s. 253, which is not applicable, a Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant. The Magistrate should, in the case before us, have admitted the accused to bail, and, as the complainant and his witnesses had given recognizances for their appearance, he should have enforced their attendance.

The case must, therefore, be tried.

¹ Criminal Reference, No. 117 of 1883, and letter No. 417S, from J. R. Hallett, Esq., Sessions Judge of Rungpore, dated the 23rd August 1883.

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Pigot.

IN THE MATTER OF OBHOY CHANDRA MOOKERJEE.

OBHOY CHANDRA MOOKERJEE *v.* MOHAMED SABIR.¹*Possession, Order of Criminal Court as to—Dispute likely to cause Breach of the Peace—Duty of Magistrate—Criminal Procedure Code (Act X. of 1882), s. 145.*

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10 Cal. 78.

It is the duty of a Magistrate, before taking proceedings under s. 145 of the Criminal Procedure Code, to satisfy himself whether there is any dispute likely to cause a breach of the peace, and that the suggested apprehension of a breach of the peace is not merely colourable, and made to induce him to deal with matters properly cognizable by the Civil Court.

Mr. *Bell* for petitioner.Mr. *Gregory* for opposite party.

THE facts of this case sufficiently appear from the judgment delivered by

MITTER, J.—I am of opinion that the basis on which the jurisdiction of Criminal Courts under s. 145 of the Code of Criminal Procedure is founded does not exist in this case.

S. 145 says that, "whenever a Magistrate is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists, &c., &c.," then a proceeding under this section may be instituted.

In this case what happened was this: A police-report was submitted to the Magistrate on the 8th November 1882, and in that report the police-officer stated as his opinion that there was a dispute between the parties to these proceedings relating to a chur, and that in his opinion there was a likelihood of a breach of the peace. This opinion was based upon this ground: The police-officer says that, if one of the parties would attempt to collect rent forcibly from the ryots, there was a likelihood of a breach of the peace. Upon that, both the parties to these proceedings were called upon to show cause why they should not be bound down to keep the peace. They appeared and asked the Magistrate to allow them time to settle the matter amicably. For some reason or other this amicable settlement did not take place, and they were directed to enter into recognizances to the amount of Rs. 500 each not to commit a breach of the peace for four months.

Then on the 15th Pous 1289 (corresponding with the 29th December 1882) an application was made by Mohamed Sabir, the opposite party, alleging that the applicant before us, *vis.*, Obhoy Chandra Mookerjee was about to commit acts of oppression upon his tenants, and in that application Mohamed Sabir also stated that some of the tenants had complained against the servants of Obhoy Chandra. On that very day his deposition was taken, and he confirmed the statements made in his application. The Magistrate, without any further enquiry as to whether all these statements were correct or not, on the 2nd January 1883, upon this petition, and the deposition of Mahomed Sabir, ordered the proceeding now before us to be instituted.

It appears to me that it was the duty of the Magistrate to see whether there was any dispute likely to cause a breach of the peace concerning this chur land before instituting these proceedings. He has acted simply on the statement of

¹ Criminal Motion, No. 243 of 1883, against the order of Baboo Dwarkanath Roy, Deputy Magistrate of Burisaul, dated the 16th July 1883.

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Mohamed Sabir, that is to say, he has assumed jurisdiction without really satisfying himself as to whether there was a dispute between the parties. It may be that Mohamed Sabir was anxious to have the question of possession decided in a cheap way, but it was the duty of the Magistrate, under s. 145, to satisfy himself that really there was a dispute likely to cause a breach of the peace concerning this chur land.

On the whole, I am of opinion that the foundation upon which the jurisdiction of the Criminal Courts under s. 145 is based was wanting in this case. We, therefore, set aside the order, dated 16th July 1883, and the rest of the proceedings.

PIGOT, J.—I entirely agree. I only wish to add that it seems to me that Magistrates ought to be very careful in acting under s. 145 of the Code of Criminal Procedure, so as to guard themselves from the danger of assuming jurisdiction in cases not really contemplated by the section, and where the suggested apprehension of a breach of the peace is little more than colourable, and made to induce the Magistrates to deal with matters properly cognizable by the Civil Courts.

Order set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883.

Sep. 4.

10 Cal. 85.

EMPRESS v. PARAMANANDA AND OTHERS.¹

Jurisdiction—Officer invested with special powers—Ss. 30, 34, and 209, Code of Criminal Procedure (Act X. of 1882).

An officer invested with special powers under s. 34 of the Code of Criminal Procedure should rarely, if ever, try a case himself under s. 209 of the Code of Criminal Procedure, where it appears from some of the evidence that the accused might have been charged with an offence beyond the jurisdiction of the Magistrate to take cognizance of.

In this case the accused were charged with culpable homicide not amounting to murder before the Deputy Commissioner of Sibsagar, an officer exercising the special powers conferred upon him under s. 34 of the Code of Criminal Procedure. The accused were convicted and sentenced by the Deputy Commissioner, but, when this finding and sentence were submitted to the District Judge of the Assam Valley for confirmation, he considered, from some portions of the evidence, that the accused might properly have been tried on a charge of murder. He, therefore, submitted the case to the High Court, recommending that the conviction should be annulled, and that the Deputy Commissioner be directed to commit the case for trial to the Sessions Court.

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was as follows:—

The prisoner has been convicted under s. 304 of the Code of Criminal Procedure by an officer invested with the special powers described in ss. 30, 34, of the Code of Criminal Procedure.

The Sessions Judge, to whom the sentence has been submitted for confirmation, has referred the case to this Court as a Court of Revision, to have these

¹ Criminal Reference, No. 118 of 1883, and letter No. 1083, from C. J. Lyall, Esq., Officiating Judge of the Assam Valley District, dated the 21st August 1883.

proceedings set aside, and the Deputy Commissioner directed to commit the case for trial in this Court.

S. 209 empowers a Magistrate holding an enquiry to try the case himself if he thinks that only an offence within his jurisdiction has been committed. This is the course which we understand the Deputy Commissioner has taken, and we cannot, therefore, hold that it is not authorized by law, or that he has acted without jurisdiction, merely because there is some evidence which, if believed, would substantiate the charge of murder, an offence beyond his jurisdiction. At the same time we think that this course should be very rarely, if ever, taken by any officer invested with special powers under ss. 30, 34, of the Code of Criminal Procedure, and that in adopting it any such officer incurs a very grave responsibility. Looking to the evidence on the record, especially the medical evidence, we are not inclined to doubt the correctness of the finding of the Deputy Commissioner, and, therefore, we are unable to set aside the proceedings. The Sessions Judge will, therefore, proceed according to law.

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PRIVY COUNCIL.¹

SURENDRA NATH BANERJEE v. THE CHIEF JUSTICE AND JUDGES
OF THE HIGH COURT AT FORT WILLIAM IN BENGAL.

1883.

July 13 & 18.

10 Cal. 109.

[On Appeal from the High Court at Fort William in Bengal.]

Contempt of Court—Publication of libel reflecting upon a Judge in his judicial capacity—Offence not included in Penal Code—Defamation—Criminal Procedure Code (Act X. of 1882), s. 15—Power of Courts of Record under Common Law—Jurisdiction of High Court to punish summarily.

The High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court, and the powers of the High Courts to punish it, are the same in such Courts as in the superior Courts in England. Those powers, which formed part of the common law, were conferred upon the Supreme Courts, when they were established in the Presidency Towns.

The Indian Penal Code does not provide against a contempt of Court committed by the publication of a libel out of Court, when the Court is not sitting, and neither in Ch. XXI. "Of Defamation," nor elsewhere, provides for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties. Because the publisher can be punished for "defamation" under the Code, it does not follow that he cannot be punished summarily by the High Court for a contempt of Court. He can be so punished with fine, or imprisonment, or both.

The provisions of s. 5 of the Code of Criminal Procedure, 1882, relating to the procedure under which "all offences under the Indian Penal Code," and "all offences under any other law," are punished, do not include a contempt of the High Court committed by the publication of a libel out of Court, when the Court is not sitting, although such contempt may include defamation. Such a contempt is more than mere defamation, and is of a different character.

The jurisdiction of the High Court to commit for contempt has not been affected by the Code of Criminal Procedure, 1882.

By the common law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court.

THIS was a petition for special leave to appeal from an order of the High Court, dated the 5th May 1883, whereby the petitioner, who was the editor and

¹ *Present*: SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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proprietor of a weekly newspaper published in Calcutta, and called the *Bengalee*, was sentenced to a term of imprisonment for two months in the Presidency Jail for a contempt of Court.

The alleged contempt of Court was contained in the following article, which appeared in the *Bengalee* on the 28th April 1883 :—

“The Judges of the High Court have hitherto commanded the universal respect of the community. Of course, they have often erred, and have often grievously failed in the performance of their duties; but their errors have hardly ever been due to impulsiveness or to the neglect of the commonest considerations of prudence or decency. We have now, however, amongst us a Judge, who, if he does not actually recall to mind the days of Jeffreys and Scroggs, has certainly done enough within the short time that he has filled the High Court Bench to show how unworthy he is of his high office, and how by nature he is unfitted to maintain those traditions of dignity which are inseparable from the office of the Judge of the highest Court in the land. From time to time we have in these columns adverted to the proceedings of Mr. Justice Norris, but the climax has now been reached, and we venture to call attention to the facts as they have been reported in the columns of a contemporary. The *Brahmo Public Opinion* is our authority, and the facts stated are as follows :—

“‘Mr. Justice Norris is determined to set the Hughli on fire. The last act of *subburdusti* on his Lordship's part was the bringing of a Salgram (a stone idol) into Court for identification. There have been very many cases both in the late Supreme Court and the present High Court of Calcutta regarding the custody of Hindu idols, but the presiding deity of a Hindu household has never before this had the honour of being dragged into Court. Our Calcutta Daniel looked at the idol, and said it could not be a 100 years old. So Mr. Justice Norris is not only versed in law and medicine, but is also a connoisseur of Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of Calcutta will tamely submit to their family idols being dragged into Court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a quietus to the wild eccentricities of this young and raw dispenser of justice.’”

On the 3rd May the petitioner (together with one Ramcoomar Dey, the printer and publisher of the *Bengalee*) was served with a rule calling upon him to show cause on May 4th why he should not be committed to prison, or otherwise dealt with according to law, for contempt of Court, in his having published the above article, containing contemptuous and defamatory matters concerning Mr. Justice Norris. This rule was issued on affidavits, of which the petitioner obtained copies in the afternoon of the same day (May 3rd).

In reply to these affidavits, the affidavits of Ramcoomar Dey and Surendra Nath Banerjee were produced in the High Court. The affidavit of Ramcoomar Dey stated that he had no concern with any matter which appeared in the paper, nor any power to prevent any matter appearing therein; that he was imperfectly acquainted with the English language, and though able to set up works in English, he did not readily understand the sense and meaning of what he composed and set up; that he had no knowledge that the article in question contained any contemptuous or defamatory matter; and so far as he had any hand in its publication, he expressed his regret that any such matter should have appeared in the paper of which he was printer and publisher, and submitted himself to the favourable consideration of the Court.

The affidavit of Surendra Nath Banerjee was as follows :—

"I, Surendra Nath Banerjee, of No. 33, Neogee Pookur East Lane in the Town of Calcutta, at present residing at Monirampoor, in the district of the 24-Pergunnahs, inhabitant, solemnly affirm and say as follows:—

"1st.—That on Thursday, the 3rd day of May instant, I was served with a rule issued by this Hon'ble Court in this matter on the day previous, calling upon the abovenamed Ramcoomar Dey as the printer and publisher, and myself as the editor of the periodical work, the *Bengalee*, to show cause before this Hon'ble Court on Friday, the 4th day of May instant, at the sitting of the Court, why we should not be committed, or otherwise dealt with according to law, for contempt of Court alleged to have been committed by us in having unlawfully published a certain article in the said periodical work, the *Bengalee* of the 28th day of April last, containing certain contemptuous and defamatory matters of and concerning the Hon'ble John Freeman Norris, one of the Judges of this Hon'ble Court.

"2nd.—That, upon being served with the said rule, I bespoke and thereafter obtained office copies of the grounds upon which the said rule is based, which grounds I have perused.

"3rd.—That I admit that, as is stated in the affidavit of Mr. Henry Adams Adkin, Officiating Solicitor to the Government of India, the abovenamed Ramcoomar Dey is the printer and publisher of the said periodical work, the *Bengalee*, and I am the proprietor and editor thereof.

"4th.—That the said periodical work is made up entirely under my superintendence, and that the said Ramcoomar Dey, who is but indifferently acquainted with the English language, has no authority over any editorial matter appearing in the said periodical work, and further he could not, if he wished so to do, prevent any article or paragraph appearing therein.

"5th.—That the issue of the said periodical work of the said 28th day of April 1883 was made up and published entirely on my responsibility; and to the best of my knowledge, information, and belief, the said Ramcoomar Dey did not read anything contained therein in the editorial columns before the publication thereof.

"6th.—I further say that, except as an Hon'ble and learned Judge of this Hon'ble Court, I have no knowledge whatsoever of the said Hon'ble John Freeman Norris, and that, in writing and publishing what I did in connection with his Lordship, I acted entirely *bona fide*, and, as I believed, in the interests of the public good.

"7th.—That there appeared in the said issue of the 28th day of April 1883 two paragraphs in connection with the said Hon'ble John Freeman Norris, one at page 194 under the heading of "News and Notes" of Tuesday, the 24th day of April 1883, and the other at page 199, amongst the editorial notes. The said two paragraphs are as follows. [Here followed the above paragraph, on which the rule was issued, and another paragraph, relating to different matter, but also reflecting upon the conduct of Mr. Justice Norris.]

"8th.—That the *Brahmo Public Opinion*, referred to in the said paragraph, is a periodical work published in Calcutta every Thursday, and is believed by the public, and I believe it, to be under the editorship of a gentleman practising as an attorney of this Hon'ble Court.

"9th.—That the matter of complaint made in the said first paragraph appeared in the said *Brahmo Public Opinion*, to the best of my knowledge, in-

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formation, and belief, in its issue of Thursday, the 19th day of April 1883, and no contradiction thereof, nor any explanation thereof, appeared either in the said *Brahmo Public Opinion*, or, to the best of my knowledge, information, and belief, in any other newspaper.

"10th.—That the matter of complaint made in the said second paragraph appeared in the said *Brahmo Public Opinion* in its issue of the 26th day of April 1883, and no explanation or contradiction thereof appeared in that paper, or in any other newspaper, before the publication of the said issue of the said periodical work.

"11th.—That I honestly believed the statements in the said *Brahmo Public Opinion* to be true, and the paragraphs aforesaid, which were both written by me, were so written under such belief and under a sense of public duty that conduct, such as was imputed to the said Hon'ble John Freeman Norris, should be brought to the notice of the public and censured.

"12th.—That from the affidavits of Mr. William Robert Fink, the Assistant Registrar and the Officiating Chief Clerk of this Hon'ble Court, and of Baboo Baneymadhub Mookerjee, one of the Interpreters of this Hon'ble Court, the truth of which I entirely and unhesitatingly accept, I now find that the statements contained in the said *Brahmo Public Opinion* relating to the production of the said Salgram in Court were inaccurate and misleading, and that the said Hon'ble John Freeman Norris, instead of acting in a *zubburdusti* manner as alleged, acted under pressure from the parties, who are both Hindus, apparently against his own inclination.

"13th.—That I have received contradictory statements with regard to the statements contained in the said first paragraph, some asserting that they are inaccurate and misleading, others maintaining the contrary; and I have not been able to ascertain which of these contradictory statements represent the truth.

"14th.—I say most emphatically that, if I had known, or had any reason to believe, that the statements of the *Brahmo Public Opinion* aforesaid were in any respect inaccurate, I would not have made the observations I have, and I am truly sorry that I was misled into making them, and I withdraw them unreservedly; but I repeat that my observations were made perfectly *bona fide*, and without any motive of any description whatsoever other than the motive to promote public good.

"15th.—That the circumstances of British India are such, that this Hon'ble Court and the other High Courts in the other Presidencies are looked upon, and I believe justly looked upon, as the staunchest, the most upright, and the most impartial upholders of the just rights and privileges of all sections of the community, and any action on the part of any Hon'ble and learned Judge of these Hon'ble Courts tending to show the least disregard of such rights and privileges is viewed with great alarm by the community, and I conceive that it is the duty of all journalists to maintain that no such disregard is shown.

"16th.—That I express my deep regret at having unwittingly endeavoured to cast an undeserved slur upon the said Hon'ble John Freeman Norris, and I place myself unreservedly in the hands of this Hon'ble Court, being satisfied that the apology which is hereinbefore contained is, under the circumstances, due from me to the said Hon'ble John Freeman Norris and this Hon'ble Court, and I further submit myself to the favourable and indulgent consideration of this Hon'ble Court.

"17th.—That I am advised that this Hon'ble Court has no jurisdiction to issue the said rule, or to deal with me or the said Ramcoomar Dey summarily;

but the question, I am also advised, is one of extreme difficulty, and I know it to be one of great public importance, and one which will require much time and attention to be dealt with as, in my judgment, it should be dealt with.

"18th.—That the said rule was served upon me at half-past eleven o'clock, and I received the said grounds at about a quarter after 2 P.M., and though my attorney and I have made our best endeavours to secure the services of Counsel learned in the law to appear for me and argue the said question, I have not succeeded in getting one prepared to do so this morning, and I humbly pray that time may be granted to me sufficient to enable me to have the said question argued; and I make this prayer entirely subject to the apology which I have made and without in any way detracting from or weakening the same in any particular whatever."

On the 4th May the rule came on for hearing before the Chief Justice and four Judges of the High Court (GARTH, C.J., MITTER, J., CUNNINGHAM, J., McDONELL, J., and NORRIS, J.).

Mr. Bonnerjee appeared to show cause; and, after reading the portion of the affidavits containing the apology for having inserted the article, stated that he was not prepared to support the prayer for an adjournment contained in the 18th paragraph of the affidavit of the petitioner; that, even if that prayer were granted, he would not be in a position to argue the question of the jurisdiction of the Court; and that, if he were in a position to argue it, he would not do so.

The Court on the next day (May 5th) delivered the following judgments on the matter:—

GARTH, C.J. (CUNNINGHAM, McDONELL, and NORRIS, JJ., concurring).—Baboo Surendra Nath Banerjee, you have been guilty of a gross contempt of this Court in publishing in the *Bengalee* Newspaper, of which you are the editor, the article which is the subject of this rule.

We understand from your Counsel, Mr. Bonnerjee, that, whatever your original intention may have been, you now admit that you have been guilty of such contempt; and you have submitted what professes to be an apology to the Court in the affidavit which was read yesterday by your Counsel.

You have certainly acted wisely in not attempting to justify an act which you must be well aware is wholly unjustifiable; and your Counsel has also exercised a wise discretion in not insisting upon a point which we observe is suggested in your affidavit, that this Court had no power to institute these proceedings.

It is impossible that any reasonable man who is acquainted with the real truth of the matter can read the article in question which you admit to have been composed and published by yourself, without seeing that it is a most scandalous and wholly indefensible attack upon Mr. Justice Norris.

You begin the article by accusing that learned Judge of neglecting in the discharge of his judicial duties the commonest consideration of prudence and decency; you go on to compare him with two of the most notoriously unrighteous Judges that ever disgraced the English Bench; and you denounce him to the Indian public as utterly unworthy of his high office, and unfitted by nature to maintain those traditions of dignity which are inseparable from the position of a High Court Judge. As a climax to these accusations, you quote the following passage from the *Brahmo Public Opinion*, reflecting upon the learned Judge's conduct in a particular cause, which was then, and is now, pending in this Court: "Mr. Justice Norris is determined to set the Hugli on fire. The last act of

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subberdusti on his Lordship's part was the bringing of a Salgram (a stone idol) into Court for identification. There have been very many cases both in the Supreme Court and the present High Court of Calcutta regarding the custody of Hindu idols, but the presiding deity of a Hindu household has never before this had the honour of being dragged into Court. Our Calcutta Daniel looked at the idol, and said it could not be a hundred years old. So Mr. Justice Norris is not only versed in law and medicine, but is also a connoisseur of Hindu idols. It is difficult to say what he is not. Whether the orthodox Hindus of Calcutta will tamely submit to their family idols being dragged into Court is a matter for them to decide, but it does seem to us that some public steps should be taken to put a quietus to the wild eccentricities of this young and raw dispenser of justice."

Upon the basis of that statement in the *Brahmo Public Opinion*, without informing yourself whether it was true or false, and without ever making enquiry into the circumstances of the case, you proceed recklessly to comment upon the conduct of the Judge, and to hold him up to public execration in the following language:—

"What are we to think of a Judge who is so ignorant of the people, and so disrespectful to their most cherished convictions, as to drag into Court, and then to inspect, an object of worship, which only Brahmins are allowed to approach, after having purified themselves according to the forms of their religion? Will the Government of India take no notice of such a proceeding? The religious feelings of the people have always been an object of tender care with the Supreme Government. Here, however, we have a Judge, who, in the name of Justice, sets those feelings at defiance, and commits what amounts to an act of sacrilege in the estimation of pious Hindus. We venture to call the attention of the Government to the facts here stated, and we have no doubt due notice will be taken of the conduct of the Judge."

Now, so far from there being the least foundation for this tissue of abuse, it appears from the affidavits upon which this rule was issued (which are now admitted by yourself to be perfectly correct) that the account given in the *Brahmo Public Opinion*, and your own comments upon it, were wholly without foundation.

The truth of the matter was this: In a case which was tried before the learned Judge, a question arose as to the identity of a certain thakoor or idol. It was necessary for the purpose of determining that question to ascertain whether a particular thakoor, which was then in the custody of one Bhuttock Nath Pundit, in the Burra Bazar, was the family thakoor of certain parties to the suit.

For the purpose of determining that question, it was suggested by the Counsel on both sides that the thakoor should be brought into Court for the purpose of identification.

Mr. Justice Norris hesitated to take that course, until he had enquired from the attorneys on either side, who were Hindus, whether there would be any objection to it. Their answer was that there would be none. His Lordship then further enquired from a person named Gouree Kant Burmun, who was in Court, and who was an agent of the plaintiff, whether he saw any objection, and his answer was, that the idol could not be brought into the Court itself on account of the coir-matting with which the floor was covered, but that it might be brought without objection into the corridor.

The learned Judge then, in order to satisfy himself still further, sent for the Court Interpreter, Babu Banimadhub Mookerjee, who is an officer of great

experience and a high-caste Brahmin, and made the same enquiry of him. He asked whether the thakoor was a Salgram, and, finding that it was, made the same answer as Gouree Kant, namely, that it could not be brought into Court on account of the matting, but that it might with perfect propriety be brought into the corridor.

Upon this his Lordship granted the application, and a *subpœna duces tecum* was issued to Bhuttock Nath Pundit to produce the thakoor the same day, and, in order to ensure the orders of the Court being properly carried out, it was further ordered that the Interpreter himself should proceed with the officer to Bhuttock Nath Pundit's house, who was himself a Brahmin, and should see to the proper conveyance of the thakoor to the Court.

We have then the affidavit of Banimadhub Mookerjee himself, who, after confirming the above facts, informs us that, in obedience to the order of the Court, the thakoor was duly conveyed into the corridor by himself and the Pundit, and the learned Judge, attended by Counsel on both sides and the attorneys, left the Court, and went into the corridor for the purpose of inspecting it.

It seems, therefore, impossible for any one, however strict his religious views on such subjects may be, to say that Mr. Justice Norris did not take the utmost pains, in the first place to ascertain whether the thakoor ought to be brought to the Court at all, and in the next place to provide that it should be brought there with all due respect and propriety.

It may be perfectly true that European Judges, and more especially Barrister Judges, are often imperfectly acquainted with the religious views and feelings of the Hindu community, and the utmost they can do, when occasion arises, is to consult those who are best informed upon the subject, and to be guided by their advice.

But we now understand from your own affidavit, as well as from your Counsel, Mr. Bonnerjee, that you admit that the learned Judge did everything in his power to ascertain the truth of the matter, and to avoid giving the least offence to the religious feelings of your countrymen.

It, therefore, only remains for us to consider what punishment we ought to inflict upon you.

It is, indeed, a very lamentable thing, and I trust that your own countrymen will also be of that opinion, to find a gentleman of your position and attainments, who was once a member of the Covenanted Civil Service, and is now an Honorary Magistrate of this city, making use of his influence as a newspaper editor to vilify and bring into public contempt, without any justification whatever, a Judge of the High Court.

If the offence had been committed by any young inexperienced man of no education or knowledge of the world, or by a person in the position of Ramcoomar Dey, who stands beside you, we might ascribe it, in some degree at least, to ignorance or want of consideration. But you have had great educational advantages. You know, or should know, as well as any one, the duties and responsibilities of gentlemen connected with the Press. You profess in your affidavit to justify your offence by putting forward, as the basis of your false charges against Mr. Justice Norris, a statement in the *Brahmo Public Opinion* which you say you believed to be true, and upon which you considered yourself at liberty to enlarge and comment with extreme severity.

Moreover, whilst you profess to admit that your charges were totally false and unfounded, and made without any sort of enquiry on your part, you still

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maintain that you made them "in perfect good faith, and in the interests of the public good."

Furthermore, you have made mention in your affidavit of another article extracted from the *Brahmo Public Opinion*, which is also apparently intended to reflect upon Mr. Justice Norris, and the subject of which has nothing to do with the present proceeding. Your counsel, though invited to do so, has wholly failed to explain to the satisfaction of the Court why that article was inserted. And you must have known perfectly well that the affidavits upon which the rule was issued were not directed to the subject of that article.

These matters in your affidavit, so far from extenuating your offence, appear to the Court to be an aggravation of it.

The Judges are at a loss to understand how a libel so gross could possibly have been inserted in your paper "*in good faith*;" and they find great difficulty in believing that a gentleman of your education, and a newspaper editor, could be so utterly ignorant of the law of libel as to suppose that you were at liberty to publish these attacks upon the conduct and character of a High Court Judge, merely because you found them, though in a less virulent form, in another native newspaper.

The Court is quite willing to make some allowance for your affidavit having been drawn, as your counsel informed us was the case, in a hurry and without consideration. But they cannot look upon it, for the reasons which I have just mentioned, as any extenuation of your offence.

We feel that it is absolutely necessary to vindicate and maintain the authority of the Court, and to guard against the repetition of the grave offence which you have committed by imposing upon you (not a fine, which in your case would be a mere nominal penalty), but such a substantial punishment as may serve as a wholesome warning to yourself and others.

The Court's order is, that you be imprisoned on the civil side of the Presidency Jail for the space of two months.

The majority of the Court regret that, in determining the award of punishment, my brother Mitter's views should not be in accordance with theirs. We are, of course, fully aware of the precedents to which that learned Judge refers; but in the first place, we think the facts of those cases are very different from the present, and in the next place, we find ample precedent in England in cases of gross libel, where a more severe punishment has been awarded.

We fail to see why persons charged with contempt of Court for libel in a proceeding of this nature should be subjected to a less severe punishment than if the proceeding had been by criminal information or by the more ordinary process at the criminal sessions.

Had your affidavit disclosed a more honest and candid avowal of your guilt, without making mention of those matters which the Court cannot find to have been introduced for any useful purpose, or from any proper motive, they might have considered it sufficient for the ends of justice to have visited you with a more lenient punishment.

Ramcoomar Dey, you have also been guilty of a contempt of this Court, for having been the means, as the printer and publisher of the *Bengalee* newspaper, of circulating the article in question.

We are, of course, by no means prepared to say that, as a rule, the printer and publisher of a newspaper is not fully responsible, both civilly and criminally, for everything that is inserted in that paper. But we find in this instance, not

only from your own affidavit, but from that of Babu Surendra Nath Banerjee, who has very properly done his best to protect you, that you know the English language very imperfectly, and that you have evidently been the mere instrument of the editor, under whose orders you acted.

We, therefore, think that you may with propriety be discharged.

MITTER, J.—I concur in the finding that both Ramcoomar Dey and Surendra Nath Banerjee are guilty of contempt of Court. But after giving my best consideration to the question of the punishment that should be inflicted, I am unable to agree in the view of the majority of the Court. There have been in this Court two cases of a similar nature since its establishment. One is *In the matter of Piffard*.¹ The other case is not reported in any authorized report, but is well known as *Taylor's case*. In both these cases, at the first hearing, the persons charged with contempt did not admit their guilt. The matter was discussed fully, and after the Court had pronounced its decision that they were guilty, suitable apologies were made.

In the case before us, the persons charged with contempt have at once admitted their guilt, and have expressed their deep regret at having unwittingly cast an undeserved slur upon a learned Judge of this Court.

In the first-mentioned case, Sir Barnes Peacock, C.J., in delivering the judgment, said: "Although the majority of the Judges were of opinion that both these gentlemen," *i. e.*, the persons charged with contempt, "has acted in contempt of Court, they did not wish to visit the offence with any punishment. The Court would be content with an apology, nor need the apology be an abject one, but simply such as would convey the expression of their sorrow at having committed that which the Court considered to be contempt." In accordance with this expression of opinion, a suitable apology was made, and no punishment was inflicted.

In the other case, the sentence of the Court was that Mr. Tayler should stand committed for one month to the civil side of the Presidency Jail, and that he should pay a fine of Rs. 500, and that he should be further imprisoned till the fine was paid.

There, Sir Barnes Peacock, C.J., referring to an apology which had been published by Mr. Tayler, before this sentence was passed, said :

"If you think fit to add to the apology which you have already published (and it is for you to decide whether you can conscientiously do so or not), the Court is willing to mitigate the sentence. If, after what you have heard, you state that, upon reflection, you find that the charges which you made against Mr. Justice Dwarkanath Mitter were unwarranted and wholly without foundation, and that you are sorry for having made them, you may do so, and you may add, if you wish it, either that you did not intend to cast any reflection upon any of the other Judges, or that the reflection cast was unfounded ; and if you publish that apology in the *Englishman*, you may apply on Monday, the 3rd of May next, for your discharge on payment of the fine."

This sentence was passed on Saturday, the 24th April 1869, and on the 27th April following, Mr. Tayler, having made a suitable apology, was released, the remaining term of his imprisonment having been remitted.

I have gone into these details, because it seems to me that, in determining the amount of punishment to be inflicted on Surendra Nath Banerjee, we

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¹ 1 Hyde 79.

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should take these cases as our guide. The complexion of guilt in the case of Mr. Tayler is certainly not of a lighter character than that of Surendra Nath Banerjee.

On the question of punishment, therefore, I should have been inclined to adopt the course which was adopted in these cases.

From this sentence, Surendra Nath Banerjee preferred a petition to Her Majesty in Council for special leave to appeal.

The petition, after setting out the facts, and the articles complained of, and referring to the matters stated in his affidavit as above set out, continued :—

“ That your petitioner, immediately on learning from the affidavits the facts therein stated, determined to express fully and unreservedly his sincere regret at having, through ignorance of the said facts, written the article in the *Bengalee*, and in accordance with such determination, the affidavit filed by him in answer to the said rule, a copy whereof is appended to the memorial hereinafter referred to, and hereto annexed, after setting forth the facts and circumstances stated, and exonerating Ramcoomar Dey from all responsibility for the article, which your petitioner admitted was composed by himself, and published on his own and sole responsibility, stated that he found from the affidavits, the truth of which he entirely and unhesitatingly accepted, that the statements contained in the *Brahmo Public Opinion* were inaccurate and misleading, and that the said Mr. Justice Norris, instead of acting in a *zubberdusti* (violent) manner as alleged, had acted under pressure from the parties to the said proceeding, who were both Hindus, and that, had he known, or had he had any reason to believe, that the statements of the *Brahmo Public Opinion* respecting the said Mr. Justice Norris were in any respect inaccurate, he would not have made or published the observations respecting that learned Judge which he did, and that he was truly sorry he had been misled into making them. The petition, after setting forth matters to show that there had been no waiver on his part of the point of jurisdiction, inasmuch as his Advocate had said what he did, “ not under your petitioner’s instructions, or by his authority,” further stated that “ your petitioner is advised that, even if there had been any waiver by his Counsel of your petitioner’s right to question the jurisdiction of the High Court to proceed against him in a summary way, as for contempt of Court, by reason of his publication of the aforesaid article, such waiver does not, nor can affect your petitioner, or confer a jurisdiction upon the said Court which it did not by law possess.”

After setting forth the facts of the judgment and sentence upon him, and that he was advised that such sentence was passed without jurisdiction, he went on to state :—

“ That your petitioner, upon being so sentenced and imprisoned, prepared and presented to His Excellency the Viceroy a memorial ” (a copy of which was annexed to the petition), “ praying His Excellency in Council to forward the same to Your Most Gracious Majesty, in order that Your Majesty might, if graciously pleased so to do, refer the said memorial to the Judicial Committee of Your Majesty’s Privy Council under the provisions of the 3 & 4 Will. IV., c. 41, s. 4, for hearing and consideration, and that Your Majesty might also be graciously pleased to suspend the operation of the sentence passed upon your petitioner pending the hearing and consideration of the said memorial by their Lordships of the Judicial Committee, should Your Majesty be pleased to refer the matter of the memorial to them.”

This memorial had (the petition stated) been forwarded to the Secretary of State for India in Council.

On the hearing of this petition,

Mr. *T. H. Cowie, Q.C.* (with whom was Mr. *J. T. Woodroffe*), appeared for the petitioner.—The publication of this article did not tend directly to obstruct the course of justice in the determination of the then pending suit, nor was it a contempt committed in view of the Court. Although it affected the administration of justice generally, it was not aimed at interference with the decision in a suit, but was a libel on a Judge in his judicial capacity in reference to his conduct at a trial. The question of jurisdiction might be thus stated: (a) whether in an Indian Court, which was a Court of Record, summary proceedings for contempt were the authorized course in the case of a libel, out of Court, on a Judge in his judicial capacity in reference to his conduct at a trial; (b) whether such proceedings were now authorized, regard being had to the terms of the Indian Codes, *viz.*, the Indian Penal Code and the Code of Criminal Procedure.

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Whatever might have been the powers of the Supreme Court to punish for a contempt in or out of Court, the only legal mode in which the High Court could punish such an act as that of the petitioner was by enforcing an appropriate section of the Indian Penal Code, upon proceedings taken according to the Code of Criminal Procedure, 1882. Viewed as a contempt, this act was of the class of criminal contempts which, as explained in *Wellesley's case*,¹ and *In re Pollard*,² were in the nature of offences. That there were provisions, in Chs. X. and XI. of the Indian Penal Code, directed against contempts of the lawful authority of public servants, and against offences against public justice, affected the question whether the summary powers exercised at common law for the protection of Courts had remained in force; although insults and interruptions to a public servant sitting in any stage of a judicial proceeding, provided for in s. 228, Indian Penal Code, were restricted to such acts done in Court. Other provisions of the Indian Penal Code, *viz.*, those of Ch. XXI. (Of Defamation), would meet this case viewed as a libel. To these considerations must be added the apparent intention of the Code of Criminal Procedure, 1882.

The Stat. 13 Geo. III., c. 63, which authorized the issue of the Letters Patent of 1774, in s. 13 empowered the Court, of which it authorized the establishment, "to do all such things as shall be found necessary for the administration of justice, and the due execution of all or any of the powers which by the said Charter may be granted and committed to the said Court." The same section enacted that "the Court shall, at all times, be a Court of Record." The Letters Patent of 1774 declared, in s. 4. that "the Chief Justice and Puisne Justices of the Supreme Court should have such jurisdiction and authority as the Justices of the Court of King's Bench had, and might lawfully exercise in that part of Great Britain called England by the common law thereof." This conferred the ordinary jurisdiction, which alike on the Plea, Equity, and Crown sides, as well as the Admiralty and Ecclesiastical jurisdictions, were separately conferred. But neither in the Statute, nor in the Charter, was there any general clause declaring the general powers of the English Courts to belong to the Supreme Court. [SIR R. COUCH observed that the practice of issuing the writ of *habeas corpus* had been referred to this authority.] The exercise of that power was within the words to do all such things as might be necessary. And it might be noticed that Act X. of 1882 provided for the issue of the *habeas corpus*. The summary process for contempt could hardly be put on the same ground after the legislation that had taken place.

¹ 2 R. and M. 639.

² L. R., 2 P. C. 106.

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The powers of the Supreme Court had not been quite co-extensive with those of the superior Courts in England. The learned Counsel referred to the issue of the writ of *Mandamus* from the Queen's Bench : also to the judgment of Cockburn, L., C.J., in *The Queen v. Lefroy*,¹ who said that the superior Courts at Westminster were originally all divisions of the *aula regia*. There had been no office in the Supreme Court directly corresponding to that of the Master of the Crown Office, and it had been doubted how far the *ex-officio* powers of the Advocate-General extended in obtaining leave to file criminal informations.

He did not allege, having regard to *Macdermott v. The Justices of British Guiana*,² and other cases, that no Courts of Record, other than the High Courts of Justice in England, could exercise powers to commit for contempt. But if these powers belonged to the Supreme Court, the question still remained whether they had been transmitted to the High Court. By s. 9 of the Charter of 1861, issued under the authority of the Stat. 24 and 25 Vic., c. 104, the High Court was to exercise jurisdiction, and every power and authority, in any manner vested in the Courts then abolished, with the reservation, important to the argument, that "this was to be subject and without prejudice to the legislative powers of the Governor-General in Council." The legislative power had been exercised. The Indian Penal Code had come into force as Act XLV. of 1860, enacting in s. 2 that no person should be liable to punishment for any offence otherwise than under that Code or "under any special or local law." In both the Charters of 1862 and of 1865 (in s. 29 in the former, and s. 30 of the latter), it was declared that all persons brought for trial before the High Court charged with any offence for which provision was made by the Indian Penal Code should be liable to punishment under such Code, and not otherwise. Reference was made to Chs. X. and XI. of the Indian Penal Code ; also to Ch. XXI. ; and it was argued that the contemplation of law, as shown in the legislation referred to, was that all offences capable of being dealt with under the Indian Penal Code should be so dealt with.

The introduction of the Code of Criminal Procedure within the local limits of the Original Jurisdiction of the High Court had followed. By Act X. of 1882, s. 1, it extended to all British India ; although, in the absence of any specific provision to the contrary, nothing therein contained was to affect any "special or local law in force," or any "special jurisdiction," or "power conferred," by any other law in force.

These terms "special law" and "local law," also used in the Indian Penal Code, to which, for their explanation, the last clause of s. 4 of Act X. of 1882 referred, meant, the one, a law applicable to a particular subject, and the other, a law applicable to a particular part of British India. It was further enacted in s. 5 that all offences under the Indian Penal Code should be inquired into and tried according to the procedure enacted in this Code, and that all offences under any other law should be inquired into and tried according to the same provisions ; but subject to any enactment, for the time being in force, regulating the manner or place of inquiring into or trying such offences. The conclusion was that the summary process for contempt was not a special or local law within the meaning of the above, nor in force under any enactment regulating it. The Code of Criminal Procedure was, therefore, applicable to this offence, not being excluded by its own provisions.

To this might be added an argument derived from s. 480 of Act X. of 1882, which enacted that, when certain offences within s. 175, 178, 179, 180, or s. 228 of the Indian Penal Code had been committed in the view of a Court, it

¹ L. R., 8 Q. B. 134.

² 5 Moore's P. C. N. S. 466.

might cause the offender to be detained in custody and punished with fine, itself taking cognizance of the offence. Part of the reasoning of the judgment in *The Queen v. Lefroy*¹ was that, because special provision had been made in the Statute 9 and 10 Vic., c. 95, enabling County Courts to punish summarily contempts committed in their view, it was, therefore, not the intention of the Legislature that such Courts should possess the general powers exercised by the superior Courts to punish contempts committed out of their view. By analogy the giving express power in s. 480 to punish in a certain class of contempts excluded the inference that the Legislature intended that other powers of a similar sort should remain.

The general result was that the provisions in the Indian Penal Code and the Code of Criminal Procedure, 1882, effected this; that an act, such as that of the petitioner, in the nature of a libel on a judge in his judicial office, and in reference to his mode of conducting a trial, was remitted to the general head of defamation to be punished under Ch. XXI. of the Indian Penal Code.

[SIR B. PEACOCK referred to Lord Hardwicke's division of contempts in his judgment in *The Champion*.²]

Mr. Cowie, Q.C., said that his contention was that, unless the libel had a direct tendency to interfere with the course of justice in a pending case, the proper mode of proceeding was not to deal with it as a contempt. What constituted contempt was fully explained in the judgment of the Irish M. R. in *Birch v. Walsh*.³ Reference was also made to *In re Pollard*;⁴ *In re Ramsay*;⁵ *R. v. Creevey*;⁶ *McDermott v. The Justices of British Guiana*;⁷ *Smith v. The Justices of Sierra Leone*;⁸ *Rainy v. The Justices of Sierra Leone*.⁹ Reference was made to the opinion expressed in *Morgan v. Leech*¹⁰ in regard to the reservations contained in the Statute 3 and 4 Will. IV., c. 4, as covering a grant of leave to appeal in the case of matters not strictly an appealable grievance. Also to *In re Skinner*,¹¹ in which it had been held that leave to appeal under the general powers of s. 4 of that Statute might be granted, although the alleged grievance might not be appealable under the Letters Patent of the High Court. Also in connection with this, *In re Ramsay*⁵ was referred to.

On a subsequent day, July 18th, their Lordships' judgment was delivered by

SIR B. PEACOCK. — The one question to be determined is, whether the High Court had jurisdiction to commit the petitioner for a contempt of Court in publishing the libel set out in the petition.

Their Lordships took time to consider, in order that they might carefully examine the provisions of the Code of Criminal Procedure, 1882, which came into force in January 1883. Having done so, they are clearly of opinion that, notwithstanding that Code, the High Court had jurisdiction.

The Penal Code for British India was referred to by the learned Counsel for the petitioner, and in particular Ch. XI., s. 228, and Ch. XXI., "Of Defamation." But that Code merely defines the several offences thereby created, and provides the punishments to which offenders are to be liable. It does not at all affect the procedure by which offenders are to be brought to

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¹ L. R., 8 Q. B. 134.² 2 Atkyn's Rep. 469.³ 10 Ir. Eq. Rep. (1847-48) 93.⁴ L. R., 2 P. C. 106.⁵ L. R., 3 P. C. 427.⁶ 1 M. and S. 273.⁷ 5 Moore's P. C. C., N. S., 466.⁸ 3 Moore's P. C. C. 361.⁹ 8 Moore's P. C. C. 47.¹⁰ 3 Moore's P. C. C. 368.¹¹ L. R., 3 P. C. 451.

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punishment. It is only by the Code of Criminal Procedure, read in conjunction with the Penal Code, that the jurisdiction of the High Court to commit for contempt was, if at all, affected.

S. 228 of the Penal Code, which was referred to in the argument, does not apply to the present case; it relates merely to insult or interruption to a public servant while sitting in a stage of judicial proceedings. It does not provide against a contempt of Court committed by the publication of a libel out of Court when the Court is not sitting.

The Ch. XXI., "Of Defamation," does not define "contempt of Court," or make any provision for the punishment of a contempt of Court by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties. The offence, as a case of defamation, might doubtless have been punished under that chapter with simple imprisonment not exceeding two years, or with fine, or with both. If the procedure of the Criminal Procedure Code had been adopted, and the petitioner had been convicted of simple defamation under Ch. XXI. of the Penal Code, and, after his apology, had been sentenced by the Court to two months' imprisonment, there would have been no pretence for an application for special leave to appeal against the conviction.

But it is not because the publisher might have been punished for defamation that he could not be punished summarily as for a contempt of Court.

Lord Hardwicke, in the case of *The Champion*,¹ says: "To be sure, Mr. Solicitor-General has put it upon the right footing that, notwithstanding this should be a libel, yet, unless it is a contempt of Court, I have no cognizance of it; for whether it is a libel against public or private persons, the only method is to proceed at law."

The libel in the present case was clearly a contempt of Court. It is contended, however, on the part of the petitioner that, by reason of the Code of Criminal Procedure, 1882, the Court could not deal with it as a contempt of Court, or punish the offender by commitment in a summary manner.

Several sections of that Code were referred to.

S. 198 enacts, amongst other things, that no Court shall take cognizance of an offence under Ch. XXI. of the Indian Penal Code, *i.e.*, the chapter "Of Defamation," except upon a complaint made by some person aggrieved by such offence.

Complaint is defined in s. 4a to mean "the allegation made orally or in writing to a Magistrate with a view to his taking action," &c.

S. 195 enacts that "no Court shall take cognizance of an offence under s. 228 of the Indian Penal Code" (*i.e.*, the offering insult to a public servant whilst sitting in any stage of a judicial proceeding), "when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint of, such Court, or of some other Court to which it is subordinate."

It is scarcely possible to suppose that the procedure above pointed out was intended to apply to the case of an insult to, or a libel upon, the High Court, or a libel upon one of the Judges thereof, imputing corruption or misconduct or incapacity in the discharge of his public duties, or a libel such as that set out in the petition.

¹ 2 Atkyn's Rep. 469.

S. 480 and the two following sections of the Code of Criminal Procedure were referred to in the argument in support of the petition, but they do not apply to a case of libel or defamation out of Court whilst the Court is not sitting, and have no direct bearing on the present case.

S. 5 was also referred to, and it was contended on the part of the petitioner that, according to the provisions of that section, the procedure provided by the Code of 1882 was the only one which could be adopted.

That section is in the words following :—

“All offences under the Indian Penal Code shall be inquired into and tried according to the provisions hereinafter contained; and all offences under any other law shall be inquired into and tried according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of inquiring into or trying such offences.”

Their Lordships are of opinion that a contempt of the High Court by a libel, such as the present, published out of Court when the Court is not sitting, is not included in the words “offences under the Indian Penal Code,” although the contempt may include defamation. Such an offence is something more than mere defamation, and is of a different character. It is an offence which by the common law of England is punishable by the High Court in a summary manner by fine or imprisonment, or both. That part of the common law of England was introduced into the Presidency-towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it, are the same there as in this country, not by virtue of the Penal Code for British India and the Code of Criminal Procedure, 1882, but by virtue of the common law of England (5 Moore’s P. C. C., N. S., 497).

The words “all offences under any other law” in s. 5 cannot be intended to include a contempt like the present, for which no provision is made by the Code. It is unnecessary, therefore, to consider what is the true construction of the words, “any special jurisdiction or power conferred by any other law now in force,” in s. 1.

Their Lordships having decided that the libel was a contempt of Court, and that the High Court had jurisdiction to commit the petitioner for a period of two months, the case is not a proper one for an appeal to Her Majesty.

In the case of *Rainy v. The Justices of Sierra Leone*,¹ upon an application for leave to appeal to enable the petitioner to get rid of certain fines imposed upon him by the Court of Sierra Leone for contempts of Court, it was said: “It is the opinion, not only of the members of the Committee who heard the petition, but also of the other members who usually attend here, to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every Court of record is the sole and exclusive judge of what amounts to a contempt of Court.” That case was referred to as an authority by the Judicial Committee in the case of *McDermott v. The Justices of British Guiana*.²

In the latter case an application was made *ex parte* for leave to appeal from an order of the Supreme Court of Civil Justice in British Guiana, by which the petitioner was, for a contempt of Court in publishing certain libels commenting on the administration of justice, and upon one of the Judges of the Court, com-

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¹ 8 Moore’s P. C. C. 47, at p. 54.

² 5 Moore’s P. C. C., N. S., 466.

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mitted to jail for a period of six months, or until further orders. (See S.C., p. 490, and 4 Moore's P. C. C., N. S., 110, 120.) Leave to appeal was granted without prejudice to the question of the competency of Her Majesty in Council to entertain an appeal from an order of a Court of record inflicting punishment by fine, or imprisonment for a contempt of Court, which question was to be open to argument on the hearing of the appeal. The case came on for argument, and it was contended by the Solicitor-General that the leave to appeal ought not to have been granted, as a Court of Record is the sole judge of what constitutes a contempt. He stated, however, that he was prepared to support the order upon the merits, but he was not called upon to do so.

In delivering the opinion of the Judicial Committee, Lord Chelmsford, after stating that the leave to appeal was conditionally granted, said the respondents might have come in to discharge the order upon the very ground which had been taken, namely, that there could be no appeal against an order of a Court of Record committing a person for contempt, and that, in order to support the propriety of the leave to appeal, the appellant must show either that the Court was not a Court of Record, or that, if it was a Court of Record, yet that there was something in the order committing the appellant which rendered it improper, and therefore the subject of appeal. Then, after deciding that the Court at Sierra Leone was a Court of Record, his Lordship says (498): "Not a single case is to be found, where there has been a committal by one of the colonial Courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description." Again, after referring to the authorities, and amongst others to *Rainy's case*, his Lordship concluded by saying: "Under these circumstances, their Lordships entertain no doubt whatever as to the propriety of deciding that in this case the leave to appeal ought not to have been granted; that the Supreme Court of Justice was a Court of Record; and that, as a Court of Record, it had power to commit for the particular contempt. As their Lordships do not enter into the merits of the case, they will say nothing as to the character of the libel upon which the Court thought it proper to commit the publisher for contempt."

Acting upon these authorities, and holding that the High Court had jurisdiction to commit the publisher of the libel in question for contempt, their Lordships will say nothing as to the character of the libel, or as to the extent of the punishment awarded. They will humbly advise Her Majesty to dismiss the petition.

Solicitor for the petitioners: Mr. T. L. Wilson.

Petition dismissed.

APPELLATE CRIMINAL.

*Before Mr. Justice Prinsep and Mr. Justice Tottenham.***HURRY CHURN CHUCKERBUTTY AND ANOTHER v. THE EMPRESS.¹**

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At the close of the evidence for the prosecution, the attorney for the defence, in answer to the Judge, stated that he meant to call witnesses. The Court then adjourned, and on the following day the attorney stated that, on re-consideration, he did not intend to call witnesses. The Judge allowed the prosecutor to reply.

Held that, though the strict interpretation of ss. 289 and 292 of the Criminal Procedure Code would warrant this course, it was never meant by the Legislature that the prosecutor should have a reply when no witnesses are called for the defence, the object of the law being evidently to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor in such a case as the present.

A well-known treatise, such as Taylor's Medical Jurisprudence, may be referred to in the course of trial. *Hatim v. The Empress*² followed.

It is improper on the part of a Judge, when examining a prisoner under s. 342 of the Criminal Procedure Code, to cross-examine him. The only questions which are permissible are such as will enable the prisoner to explain any circumstances appearing in the evidence against him.

Although s. 303 of the Criminal Procedure Code empowers a Judge to ask the jury such questions as are necessary to ascertain what their verdict is, it was never contemplated that, on ascertaining that the jury are not unanimous, the Judge should make minute enquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. Whatever may be the opinion of the Judge, if he goes so far as to ask the jury what is the exact majority, and what is the opinion of the majority, he ought to receive that verdict without hesitation, and if he differs from it he should proceed as directed by s. 307.

A prisoner, or his Counsel, is at liberty to offer evidence or not, as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another.

Mr. *Amir Ali* and Baboo *Taruck Nath Sen* for the appellants.

The *Officiating Deputy Legal Remembrancer* (Mr. *White*) for the Crown.

THE facts of this case sufficiently appear from the judgment of the Court (Prinsep and Tottenham, JJ.), which was delivered by

PRINSEP, J.—The two appellants before us, Hurry Churn Chuckerbutty and Gopal Chunder Chuckerbutty, gomasthas of two co-sharer zemindars, have been tried on charges of culpable homicide not amounting to murder under s. 304 of the Indian Penal Code, voluntarily causing grievous hurt under s. 325, and voluntarily causing hurt under s. 323. The jury unanimously acquitted them of the offence of culpable homicide not amounting to murder, and by a majority of three to two convicted them on the second charge. The Judge, in accepting this verdict, expressed his disapproval of the acquittal on the first charge, but in view of the unanimity of the jury in respect of that ac-

¹ Criminal Appeal, No. 309 of 1883, against the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 31st May 1883.

² 12 C. L. R. 86.

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quittal accepted the verdict under both heads, and accordingly sentenced the prisoners to the extreme sentence of imprisonment allowed by the law, and also inflicted a fine.

There are many objections which have been taken to, and are indeed patent in, the Judge's proceedings, both as regards those during the trial, and his summing up to the jury.

It appears that, at the close of the evidence for the prosecution, and before rising for the day, the Sessions Judge inquired and learnt from the attorney for the accused that he meant to adduce evidence for the defence. When the trial was resumed on the following day, the attorney intimated that, upon reconsideration, he did not intend to adduce any evidence. On this the Sessions Judge apparently informed him that the prosecutor would nevertheless have the right of reply, and on its being claimed, in spite of an objection raised, he conceded it.

Now, no doubt, the strict interpretation of the terms of ss. 289 and 292 would warrant this, but we think that this was never contemplated by the Legislature, and certainly should not have been allowed by the Judge, when, in fact, no evidence was produced for the defence. The object of the law evidently is to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor, simply because the pleaders for a prisoner may, after consultation during an adjournment, have had an opportunity of considering what was best for the interests of their client. The incautious reply of the attorney at the end of the day should not have prejudiced his client on the resumption of the trial, and can properly be regarded only as the expression of an intention then entertained subject to further consideration.

Then, again, we think that, when the attorney for the defence wished to read such a well-known book as Taylor on Medical Jurisprudence on a point so obscurely and unsatisfactorily determined by the medical evidence in this case, the Sessions Judge would have exercised a wise discretion if he had allowed a reference to that book to be laid before the Court. The case relied upon by the attorney of *Hatim v. The Empress*¹ is an authority for referring to such a treatise, and although it may be that in an unreported case a single Judge sitting on the Original Side of the Court may have held an opinion to the contrary, we think that, in accordance with the usual practice, the Judge should have followed rather the reported case, especially as it had been decided by a bench of two Judges.

Next, we regret extremely to find that, in spite of repeated judgments of this Court on appeal against orders passed by the Sessions Judge, he should still persist in the practice of conducting what is nothing else than a cross-examination of the prisoners. S. 342 of the Code of 1882 requires a Sessions Judge to put such questions to an accused generally on the case as he considers necessary after the witnesses for the prosecution have been examined, but that is to be done only for the purpose of enabling *the accused to explain any circumstances appearing in the evidence against him*. Now, in the present case, we find a very long cross-examination of the prisoner Hurry Churn Chuckerbutty. The questions are so put as to extend over the entire transaction relating to the present case, and, more than that, they are so directed as to obtain from him answers on matters really irrelevant to the matters in issue, but calculated seriously to prejudice him before the jury, and also to incriminate the

¹ 12 C. L. R. 86.

co-accused Gopal Chunder by connecting him with the execution of the decree which forms the foundation of the present case. Many of the questions are certainly what we should expect to find from a Counsel cross-examining an adverse witness. For instance, the accused was asked, "How was Jadub hurt?" *Answer*: "How can I say?" *Question*: "Are you of opinion, then, that Behary got Jadub hurt?" *Answer*: "No." *Question*: "If neither you nor Behary was instrumental in getting him hurt, while the Doctor maintains that Jadub was wounded severely, how then came he to be hurt?" *Answer*: "That I do not know." *Question*: "Why does the pleader say that he saw you, the peadah, and Jadub go to his lodgings?" *Answer*: "He is Behary Sen's pleader; at the instance of Behary he says so." Then, again, the Judge asks many questions which are extremely irrelevant. *Question*: "After the deceased was brought to the Court, did you pay his diet-money, or was the amount of decree realized?" *Answer*: "He was neither sent to the jail, nor was the amount realized." *Question*: "If he was not sent to the jail, and at the same time the amount of the decree was not realized, then tell me what followed?" Such questions are not, in our opinion, questions which are contemplated by the law for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. The tenor of the questions is clearly to entangle the accused, and so to prejudice him with the jury.

Lastly, the manner in which the verdict was taken is, in our opinion, objectionable. The summing of the Judge, to which reference will presently be made, clearly contemplates a conviction for culpable homicide, and it was so understood by all the members of the jury, except the foreman, for they informed the Judge that they thought that they had only to consider this charge. This necessitated a further explanation from the Sessions Judge. The jury then, after a short retirement, came back and said that they were unanimous on the first charge, but not on others, their verdict on the first charge being one of acquittal. The Judge thereupon asked: "How are you divided on the charge of grievous hurt?" *Answer*: "We are three to two on both the remaining charges." *Question*: "What is the verdict of the majority on the charge of grievous hurt?" *Answer*: "Guilty." *Judge*: "I need not, therefore, take your verdict on the remaining charge." Now, s. 301 declares that, when the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority. S. 302 says: "If the jury are not unanimous, the Judge may require them to retire for further consideration." After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous. S. 303, no doubt, empowers the Judge to ask the jury such questions as are necessary to ascertain what their verdict is, but it was never, in our opinion, contemplated that, on ascertaining that the jury were not unanimous, the Judge should make minute enquiries to learn the nature of the majority, and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict, according as it coincides with his own opinion or not. The manner in which the Judge has acted on the present occasion raises much doubt in our minds whether that was not the motive for the course he took, and inclines us to think that, if he had been told that the verdict of the majority was for acquittal on those charges, he would not have accepted it. If we are wrong in concluding this, we think that we are at least bound to express our opinion on the matter, so as to prevent any misconception regarding what we consider to be the proper practice. Whatever may have been the individual opinion of the Judge in this matter, if he went so far as to ask the jury what was the exact majority, and what was the opinion of the majority, we think that he ought

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to have received that verdict without hesitation; and if he differed from it, he should have proceeded as directed by s. 307. If the jury, in the present instance, had been required to retire without having informed the Judge as to the exact result of their deliberations, it is quite possible that, on further discussion, what was the majority might have become the minority, and we think that, in all fairness to the prisoners, the course indicated by us should be followed.

It next becomes necessary to consider the nature of the charge made by the Judge to the jury. The general impression left by such a charge cannot be other than a painful impression that it is rather an address of the Counsel for the prosecution than a fair and impartial summing up of the evidence for and against the prisoner. None of the weak points in the evidence for the prosecution have been mentioned to the jury, and many important considerations and inconsistencies have been entirely overlooked. One point in the case, and a most material point, seems to have been altogether misapprehended by the Judge, and this notwithstanding that it was prominently brought to his notice by the attorney for the defence when the case had closed. The point in question is the exact time at which the deceased was found by his relative, Adari, and taken to her house, and the time of his death. This is an extremely important point, because, from the unusual character of the injuries from which the deceased is said to have died, it would seem doubtful on the medical evidence, as recorded, whether the ribs were broken before or after death. Although the medical officer states his opinion that these injuries were caused during life, he also intimates that they were recent; and if it had been pointed out to him (as it ought to have been) that it was alleged that these injuries were inflicted eight days before death, it is not improbable that he would have modified his opinion both as to the time at which they had been inflicted, and as to whether they caused the death of the deceased. The woman Adari is very positive in stating that she found the deceased lying under the *tal* tree on Monday, the 4th Bysack. We find that this date was also stated in her examination in the Magistrate's Court given within about ten days from the death, so that, at that time at least, whatever may have happened in the interval before the sessions trial, her memory was probably clear. In the Sessions Court, too, she not only repeats that statement, but gives reasons for fixing the date. It is quite possible, as the Sessions Judge remarks in his charge to the jury, that she has made a mistake, and that, when she says the 4th of Bysack or 16th April, she must have meant the 18th of April, the medical evidence showing that the deceased must have died on the 19th, but this discrepancy was never properly laid before the jury. It is a most important allegation for the defence that the ribs were broken after death, for the interval between the assault and death would go very far to weaken the medical evidence given without knowledge of the fact that the beating was administered some eight days before the death. Then, again, supposing, as the Judge intimated to the jury, that the woman did make a mistake, and that she really meant 18th when she said 16th of April, there was a previous interval, certainly of two, if not more, days during which the movements of the deceased are altogether unexplained. The Judge has cursorily endeavoured to explain this away by referring to the evidence of Adari that during this time the deceased was at Jehanabad, but, even supposing that the deceased had stated to her that he had been kept at Jehanabad, it was the duty of the Judge to put it more prominently to the jury, so as to enable them to determine what weight was due to it. There are other very important points in the medical evidence to which reference might be made, which have been similarly overlooked or misapprehended by the Sessions Judge in his

charge to the jury. At all events, with such evidence before him, given by a comparatively inexperienced medical officer, it is much to be regretted that the Sessions Judge, having present in his Court the Civil Surgeon, did not think fit to examine him as an expert regarding the value of the testimony of his subordinate. But not only are the details of the Judge's charge to the jury, and the manner in which he has presented the evidence to them, objectionable, but the manner in which he has presented the entire case in its different parts is, in our opinion, one which cannot but have seriously prejudiced the prisoner under trial. Before laying the evidence before the jury in detail, he asks the jury to consider whether, having regard to the previous relations between the deceased and the prisoner arising out of previous litigation, the accused were not likely to have committed the offence charged. This was certainly reversing the order in which such matters are usually laid before a jury. It is the practice of our Courts first of all to lay before the jury the direct evidence against the prisoners, and then to tell them that in determining the value of that evidence they should consider the evidence of the motive which is attributed as the cause of the offence. In presenting the case in the manner in which he has done, the Sessions Judge cannot but have seriously prejudiced the accused, because they are represented as decidedly inimical to the deceased, and, therefore, as *prima facie* guilty. As the Judge puts it: "This is important as supplying a possible motive for the subsequent treatment of the deceased as deposed to in the evidence." There are also several parts of the evidence which materially affect the appellants now before us which have not been laid before the jury, for instance, the evidence of the pleader describing what the deceased said when he was being brought under arrest to the Civil Court. In explaining to the pleader the treatment he had received, the deceased nowhere mentioned the prisoner Gopal as one of those who had been concerned in the assault. The Sessions Judge, however, has altogether overlooked this point, which was of very great importance to the prisoner Gopal. Next, in dealing with the evidence of Bhooth Nath Adhicari and Kedar Bagdi, the Sessions Judge pointed out that Bhooth Nath Adhicari speaks from the point of the beating of the deceased under the eaves of his house, and Kedar from the point of deceased being brought to the bank of his own tank. The Sessions Judge adds: "I need not refer to the evidence of these witnesses at length." Now, if we refer to the evidence of these two witnesses, it is to be found that the one man, Bhooth Nath, says that when he arrived he saw the deceased lying under the eaves of his house, and that neither then, nor at any other time, did he see the deceased beaten, although he saw him removed thence to the tank and on to the chowkeydar's house in the village. Kedar, on the other hand, speaks to beating on the bank of the tank, and also to the further carrying off of the deceased. Kedar's evidence, therefore, so far as regards the beating at the tank, is inconsistent with that of Bhooth Nath.

As regards the taking of the deceased in a *dooly* to the Civil Court, the case of the prosecution is that that was necessary in consequence of the severe beating that he had received; while for the defence it is alleged that the infirm state of health of the deceased prevented his walking to Jehanabad, a distance of five *cos*. The Judge, in reference to this point, says: "The next stage of the case is the acknowledged hiring of a *dooly* to take the deceased to Jehanabad, as he could not walk. This is acknowledged even by the defence." This was hardly a fair way of putting this part of the case to the jury. Then, the return that the peon made of the arrest of the deceased on the 14th of April mentions the fact that he was taken in a *dooly*. The Judge, in referring to this matter, states: "It is to be observed that the return itself mentions that the

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man had to be brought in a *dooly* ;" but at the same time he omits to suggest to the jury and leave it for their consideration, as he should have done, whether it was likely, if a severe beating had been administered, as stated by the prosecution, that the peon would have mentioned the fact of the deceased being carried in a *dooly* to corroborate, as it were, any complaint that might be made of such ill-treatment by himself.

Another very important part of the case seems to have escaped proper attention. The deceased was brought under arrest to the Civil Court at Jehanabad on the 13th or 14th April. The prisoner, Hurry Churn Chuckerbatty, in his first examination before the Magistrate, stated that the deceased had compromised the decree against him by executing a *kabulliat* in his favour, which was registered on the same date. No enquiry was made in the Registration Office regarding what took place on this occasion. The Judge seems to have thought it sufficient to comment on the position of the men who were witnesses to the registration, and to have made the Registrar's endorsement on the document a means of explaining the movements of the deceased between the 14th of April, the date of the presentation of the document for registration, and the 16th, when the registration being completed the document was returned. The Judge has assumed merely from these proceedings that the deceased remained all this time at Jehanabad with the prisoners. It is quite possible that this may have been the case, but, in the absence of evidence on this point, it was not a fair presumption, for it is quite as likely that, if the *gomash-ta* desired to obtain the *kabulliat* after its registration, he should have attained this end by getting from Jadub, the executant of the deed, what is called the ticket or receipt of the Registration Office, a good return of which would entitle the holder to obtain the document after its registration.

Mr. Amir Ali, who appeared for the appellants, next objects, and we think with good reason, that in laying the evidence in this case before the jury, if the defence did not have an opportunity to cross-examine his witnesses who had been examined in the Magistrate's Court, and had deposed in favour of the prisoners, it was the duty of the Sessions Judge at least to notice this matter for consideration by the jury. We would next remind the Sessions Judge that in the case of *Dhunno Kazi*,¹ which was an appeal from his own decision, as well as in a more recent appeal, two Division Benches of this Court have pointed out to him that the prisoner or his Counsel is at liberty to offer evidence or not as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another. Notwithstanding this instruction, the Sessions Judge has taken to task the accused, or those who conducted the case for them, for having at one time stated that they meant to adduce evidence, and having, on a subsequent occasion, stated that they had changed their minds and intended to offer no evidence. The Judge says on this part of the case that the accused not having called such witnesses, "you," that is the jury, "are entitled to presume that they could not contradict the prosecution as to this." It was, however, entirely open to the defence to adduce no evidence at all, but to rely upon the evidence of the witnesses for the prosecution, and certainly, in this case, there was room for forming two opinions. The Judge next states : "The only parts of the prosecution story which are denied are what incriminate the accused, the trespass into the house, the dragging out and beating, the carrying off, the meeting with the pleader ;" but all these, "if not true, are capable of contradiction, and the accused had

¹ I. L. R., 8 Cal. 121.

witnesses in attendance for some such purpose, yet they did not call a single one." He also comments on the fact that amongst these witnesses were present the Civil Surgeon and the Deputy Magistrate himself, who were not examined. Our regret has already been expressed that the Sessions Judge, in the exercise of his discretion in this case, did not, for the ends of justice, examine the Civil Surgeon. His evidence would have been important as an expert to test the evidence of the Assistant Surgeon. The reason for which the Deputy Magistrate was called is not apparent. However that may be, the Judge was not at liberty to draw a presumption adverse to the accused from the circumstance that these witnesses were not examined. For these reasons we think that there have been serious misdirections in this case by the Judge to the jury which have caused a failure of justice, and that the prisoners must be re-tried on the charge on which they have been convicted. The proceedings in the Sessions Court of Hooghly are accordingly hereby set aside, and the appellants may be at large on bail pending re-trial. Lastly, having regard to the very strong opinion which the Sessions Judge of Hooghly entertains in this case, we think it desirable that a new trial should be held by some other officer, and we accordingly direct that the case be tried by the Sessions Judge of the 24-Pergunnahs.

Conviction set aside, and re-trial ordered.

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APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF NOBIN KRISHNA MOOKERJEE.
NOBIN KRISHNA MOOKERJEE v. THE CHAIRMAN OF THE SUBURBAN MUNICIPALITY.¹

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Nov. 22.
10 Cal. 194.

Bench of Magistrates—Municipal Offence—Salaried Officer of Municipality, Disqualification of—Criminal Procedure Code (Act X. of 1882), s. 555.

Notwithstanding anything contained in s. 555 of the Criminal Procedure Code, a conviction for an offence against any municipal law or regulation, had before a Bench of Magistrates, which includes a salaried officer of the Municipality, is bad.

Baboo *Dwarkanath Chuckerbutty* for the petitioner.

Baboo *Ram Churn Mitter* for the Municipality.

THE facts of this case, so far as they are material for the purposes of this report, appear from the judgment of

FIELD, J.—In this case the accused has been convicted for failing to remove or alter the spouts of his house which discharge water on the high road, and the conviction has been had, as for a breach of Bye-law No. 19 of the Suburban Municipality, made under the provisions of s. 313, Beng. Act V. of 1876.

The first point raised before us is, that the conviction is bad, because it was had before a Bench of Magistrates consisting, amongst others, of Mr. Sterndale, the Vice-Chairman, and a salaried officer of the Municipality. We think that this objection is a sound one, anything contained in s. 555 of the present Code of Criminal Procedure notwithstanding. That section enacts "that no Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try any case to or in which he is a party,

¹ Criminal Motion, No. 246 of 1883, against the order of Baboo *P. N. Mullick* and Mr. *R. C. Sterndale*, Honorary Magistrates of Alipore, dated the 30th day of August 1883.

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or personally interested;" and then there is an exception as follows: "A Judge or Magistrate shall not be deemed to be a party or personally interested within the meaning of this section to or in any case, merely because he is a Municipal Commissioner." It appears to me that the object of this exception was to remove a disqualification which existed according to the law as laid down in a case decided by this Court before the passing of the present Code of Criminal Procedure, a disqualification that is which, to a gentleman who, being merely a Municipal Commissioner, and having no further interest in the subject-matter of the case, was reasonably thought to be unnecessary in the interests of justice. But we think that the present case is altogether different. A gentleman who, without remuneration, is merely discharging a public and honorary office, and who has no personal interest in the proceedings of the Corporation or Municipality, may well be supposed to be free from that bias which the jealousy of the law presumes in other persons more immediately interested. Such immediate and disqualifying interest does, we think, exist in the case of a gentleman, whose time and services are, in consideration of a salary, given to carry on the work of a Municipal Corporation. The jealousy of the law must presume that such a person, however upright and honourable be his character, is disqualified from taking part in judicial proceedings in which the Municipality is *ipso facto* the prosecutor. (The rest of the judgment is not material for the purposes of this report.)

MITTER, J.—I entirely concur in the judgment just delivered. I desire only to add, with reference to the first point, that it seems to me that the Legislature in s. 555 has, by implication, upheld the principle upon which the case of *Wood v. Municipality of Calcutta*¹ was decided. In the explanation in s. 555, it is simply laid down that "a Judge or Magistrate shall not be deemed to be a party or personally interested within the meaning of this section to or in any case, merely because he is a Municipal Commissioner." Having that case before them, the Legislature simply limited the explanation to the disqualification of a Commissioner in a case in which the Municipality or Corporation may be interested; they did not include in the explanation the case of a salaried officer of a Municipality or Corporation, and the principle on which the case of *Wood v. The Municipality of Calcutta*² was decided, was that a salaried officer of the Municipality is incompetent to sit as a Judge in a case in which that Municipality is interested.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

1883.
 Nov. 23.
 10 Cal. 207.

IN THE MATTER OF THE PETITION OF CHUNDI CHURN BHUTTA-
 CHARJEA AND ANOTHER.
 CHUNDI CHURN BHUTTACHARJEA AND ANOTHER v. HEM CHUN-
 DER BANERJEA.³

*Criminal Procedure Code (Act X. of 1882), s. 437—Further enquiry under—
 Proceedings against accused—Notice.*

No order affecting an accused in a criminal matter should be made without giving him notice, so as to enable him to appear and show cause against it.

¹ 1. L. R., 8 Cal. 891.

² Criminal Motion, No. 255 of 1883, against the order of *J. P. Grant, Esq.*, Sessions Judge of Hooghly, dated the 18th August 1883.

A Sessions Judge has no power, under s. 437 of the Criminal Procedure Code, to direct a particular Magistrate by name to make the further enquiry contemplated by that section.

The further enquiry contemplated by s. 437 of the Criminal Procedure Code is an enquiry upon further materials, not a re-hearing of the matter upon the same evidence which was before the Magistrate who held the first enquiry.

In this case proceedings had been instituted against the petitioner under ss. 342, 379, and 426 of the Indian Penal Code in the Court of the Deputy Magistrate of Serampore. The Deputy Magistrate, who was vested with the powers of a Magistrate of the first class, dismissed the complaint, and discharged the petitioner. The Sessions Judge of Hooghly, on the application of the complainant, asking that the case might be remanded to the lower Court for the purpose of re-taking the evidence, made the following order :—

“I consider that the judicial enquiry into the petitioner's complaint has been most perfunctory. The complainant prosecuted for alleged offences of assault, wrongful confinement, theft, and unlawful assembly, committed when he was proceeding with a Civil Court peon to have possession of some property given over to him under a decree. Among the witnesses are the *peada*, the drummer, and a police-officer, to the latter of whom the complainant says he was compelled to fly for refuge from his assailants. A false complainant would not appeal to such witnesses as these, and it is evident that there is a real foundation for his complaint. It seems that for some reason the above witnesses are not very willing to state the whole truth ; the *peada* will not speak to the accused's identity, and the police-officer gives the ridiculous reason for refusing his aid, in what is the first duty of every police-officer, namely, the preservation of the peace, that he is attached to the detective branch ! But any Magistrate accustomed to deal with evidence should know how to deal with such witnesses. The record of the evidence by the Deputy Magistrate is a perfect burlesque of justice.

“Under s. 437 of the Code of Criminal Procedure, I direct Second-class Magistrate, Shama Churn Dass, to make further enquiry into this case.

No notice was given to the petitioner of the proceedings before the Sessions Judge, and the above-stated order was made *ex-parte*. The petitioner now moved to have the order set aside.

Baboo *Juggut Chunder Banerjee* for the petitioner.

Baboo *Shama Churn Banerjee* for the complainant.

The following judgments were delivered by the Court (MITTER and FIELD, JJ.) :—

MITTER, J.—We are of opinion that the order complained of must be set aside. The first point that was urged before us was that no notice of the application upon which the order in question was passed was given to the petitioner. The complainant's vakil, who appeared before us in support of the order of the Sessions Judge, admits this defect. The order is, therefore, bad upon this ground. The second objection taken before us is that the Sessions Judge, under s. 437, has no power to direct a particular Magistrate by name to make the further enquiry contemplated in that section. It appears to us that this contention is also well-founded. The language of s. 437 leaves no room for doubt that the Sessions Judge has not the power which he has exercised in this case, *vis.*, of directing a particular Subordinate Magistrate by name to make the further enquiry under this section. The third point taken before us, and upon which we think the order must be altogether set aside, is that the complainant did not complain to the Sessions Judge that he was not allowed to adduce before the Magistrate any

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evidence which he was ready to adduce, or which he, being in a position now to adduce, would adduce if a further enquiry were made. It does not appear that any additional evidence would be forthcoming if the order of the Sessions Judge were to be carried out. S. 437 contemplates a further enquiry, that is to say, allowing the complainant to adduce further evidence, when necessary, on a further enquiry, but this is not what the complainant in this case asked for. What the complainant asked for was to remand the case to the lower Court for the purpose of re-taking the evidence that had been already taken, and for the Magistrate to come to a decision upon the evidence so taken. That is not what is contemplated by s. 437.

We are, therefore, of opinion that on all these grounds the order which has been passed is bad in law, and we accordingly set it aside.

FIELD, J.—I also think that the order complained of must be set aside. In the first place, no notice was given to the petitioner before us, and an order affecting him in a criminal matter ought not to have been passed without giving him an opportunity to appear and show cause. In the second place, the Sessions Judge has directed a particular Subordinate Magistrate by name to make the further enquiry. The words of s. 437 are that the Court of Session may direct the Magistrate by himself or by any of the Magistrates subordinate to him to make further enquiry. It is clear that the order ought to have been made in these words. The Legislature appears to have contemplated that the Magistrate of the district should exercise a discretion as to the selection of any Magistrate subordinate to him, and this discretion seems to have been vested in the District Magistrate, and not in the Sessions Judge. In the third place, s. 437 contemplates a *further enquiry*, that is, as I understand it, an enquiry upon further materials or further evidence, not a re-hearing of the matter upon the same evidence which was before the Magistrate who held the first enquiry. Now, in this case there was no contention that further materials or further evidence was forthcoming; and, although the Magistrate who first made the enquiry left three witnesses named in the petition of complaint unexamined, no contention was raised before the Sessions Judge that these persons ought to have been examined, or, if examined, would have thrown further light upon the case. I, therefore, agree in setting aside the order.

Order set aside.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice McDonell.

1883.

Dec. 12.

10 Cal. 256.

IN THE MATTER OF THE PETITION OF KRISTO LALL NAG.¹

Legal Practitioners Act (XVIII. of 1879), ss. 15 and 40—Interim Suspension—Police-papers.

Depositions of witnesses, or confessions taken at a police-investigation, are not, as far as their subject-matter is concerned, any more the property of the police than the property of the prisoners, and a pleader is not guilty of misconduct of any kind in making use of such documents for the benefit of his client, when delivered to him by the client, however improperly the client may have become possessed of such documents, provided the pleader is neither party nor privy to their obtainment.

The power of *interim* suspension given under s. 14 (cl. 5) of Act XVIII. of 1879 when read with s. 40 of the same Act can only be exercised after the pleader has been heard in his defence, and pending the investigation and orders of the High Court.

¹ Rule, No. 1142 of 1883, against the order of *Mr. H. W. Barber*, Deputy Magistrate of Noakhally, dated the 30th August 1883.

In this case one Kristo Lall Nag, a first-grade pleader, practising at Noakhally, whilst defending one Chand Myan on a preliminary enquiry into a case of dacoity, put certain questions to the witnesses, which tended to show that he was in possession of copies of certain police-investigation papers. It subsequently was proved that he had in his possession copies of the confessions of two men who were charged jointly with his client. At the preliminary enquiry Chand Myan was discharged, but the other prisoners were committed to the Sessions fixed for the 10th September, and at the Sessions Court Kristo Lall Nag was engaged to defend them.

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On the 30th August, Mr. Barber, the Deputy Magistrate of Noakhally, passed an order calling upon Kristo Lall Nag to appear and show cause why he should not be dismissed or otherwise punished for misconduct in using copies of police-papers, and suspending him, pending the hearing of the rule, from practising as a pleader. This order of suspension was specially sanctioned by the District Magistrate, and an application made to the Sessions Judge against the order was rejected. Mr. Ghose, on the 12th September 1883, applied to the High Court for a rule to show cause why the proceedings of the Deputy Magistrate should not be set aside on the following grounds:—

(1) That the pleader had been guilty of no misconduct; and (2) that the Magistrate had no right to suspend him from practice under the Legal Practitioners Act.

The High Court granted a rule calling upon the Deputy Magistrate to show cause why his *interim* order of suspension should not be set aside.

It appeared that, on the 2nd October 1883, after the granting of the last-mentioned rule, and before it came on for hearing, the Deputy Magistrate heard the case against Kristo Lall Nag on the 21st September 1883, and found him guilty of dishonest and unprofessional conduct, and recommended that he should be suspended for one month.

At the hearing of the rule granted by the High Court, Mr. Ghose and Baboo Kashi Kanto Sen appeared for Kristo Lall Nag. The Deputy Legal Remembrancer (Mr. Kilby) for the Crown.

The following was the order passed by the Court (GARTH, C.J., and McDONELL, J.):—

GARTH, C.J.—In this case Mr. Ghose applied to this Bench in September last for a rule under the following circumstances:—

A preliminary enquiry had taken place at Noakhally before the Deputy Magistrate, Mr. Barber, with regard to several persons, who were charged with dacoity. One of the prisoners, Chand Myan, was defended by a first-grade pleader named Kristo Lall Nag, who, in the course of the enquiry, asked questions of the witnesses, which showed that he was in possession of copies of certain police-investigation papers.

It afterwards appeared that he had copies of confessions which had been made to the police by three of the prisoners (other than the man he was defending), and also copies of depositions of certain witnesses also taken by the police; and he made use of these copies in conducting his client's case.

As copies of these papers are not allowed by the police-authorities to be given to anybody, the Deputy Magistrate considered that those which the pleader used must have been obtained improperly, if not dishonestly; and after some communication with the Officiating District Magistrate, Mr. Cooke, an enquiry was instituted in the Police Office, the result of which was that some of the mohurrirs employed in that office were punished.

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Meanwhile, Chand Myan, the prisoner whom the pleader defended, was discharged by the Deputy Magistrate; but some others of the prisoners were committed for trial upon the charge of dacoity. The Sessions at which the case was to come on were fixed for the 10th of September last, and the pleader, Kristo Lall Nag, was retained to defend some of the prisoners.

In this state of things it seems that, on the 30th of August, after the enquiry at the Police Office had closed, Mr. Barber, the Deputy Magistrate, with the sanction, and apparently by the direction of Mr. Cooke, made an order calling upon the pleader to show cause why he should not be dismissed or otherwise punished for misconduct in using these copies of the police-papers, and, meanwhile, suspending him from practice as a pleader.

This order, so far as it is material for our present purpose, was in the following terms:—

“In conducting the preliminary enquiry, and while witnesses were being examined against his client, Chand Myan, on the 27th June and 5th July 1883, the pleader asked certain questions, which tended to show that he was in possession of copies of certain police-investigation papers.

“In a subsequent investigation it was proved that he had in his possession copies of the confessions made to the police by Eda Ghazi, Ram Kanai Jugee, and Wajuddin, who were jointly charged with his client, and the depositions taken by the police of the witnesses Hasan Ali, Womaid Ali, Abdul, and Tita Ghazi, and that he made use of some of these copies in the dacoity case.

“Copies of the police-investigation papers are never given by authority, and this pleader, in obtaining and making use of such copies, which were got by fraudulent and dishonest means, has laid himself open to a grave charge of very unbecoming and unprofessional conduct, such as cannot be countenanced in any mukhtar, much less a pleader.

“As the pleader has confessed in his statement that he had in his possession, and made use of, these papers, it is necessary that he should be called on to show cause why he should not be dismissed or otherwise punished. In the meantime, I think, he should be suspended pending the investigation.

“Ordered, therefore, that, with the District Magistrate's sanction, the pleader Kristo Lall Nag be suspended, and that he be noticed under s. 14 of the Act to appear on the 17th September next to answer to these charges. The witnesses, the names of whom appear in the police-papers, will be summoned on that date, and special sanction to the suspension be solicited.”

This order of suspension was specially sanctioned by Mr. Cooke; and it seems that Mr. Rees, the Sessions Judge, upon being applied to, refused to interfere.

Upon an affidavit disclosing these facts, Mr. Ghose applied to this Bench on the 12th of September last for a rule to show cause why the proceedings of the Deputy Magistrate should not be set aside upon two grounds:—

- (1) That the pleader had been guilty of no misconduct; and
- (2) That the Magistrate had no right to suspend him from practice under the Legal Practitioners Act.

Mr. Ghose further urged upon us that the suspension was the more unjustifiable, because, as the trial of the dacoity case was fixed for the 13th of September, the pleader was prevented from defending the prisoners for whom he was retained.

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After hearing this application, we thought it right to issue a rule in the following form :—

“ Let a rule issue, calling upon the Deputy Magistrate of Noakhally to show cause why the order of suspension of the pleader in question should not be set aside. Meanwhile, let the record of the proceedings be sent for ; and we direct that the order of suspension be itself suspended, until the High Court has had an opportunity of investigating and deciding the matter.

“ A copy of this rule will be served on the District Magistrate, as well as the Deputy Magistrate, and it will be heard in due course before the Vacation Bench.

“ We may add that, so far as we can ascertain from the facts brought before us, the only charge made against the pleader was, that he had in his possession copies of certain police-papers, which, for aught that appears, he may have obtained by perfectly honest means. Even assuming that the Deputy Magistrate had any authority by law to suspend the pleader, which at present we much doubt, it certainly seems a very arbitrary proceeding, not only as regards the pleader himself, but the prisoners whom he was defending, that he should be suspended from practice pending the enquiry, without any opportunity having been given him of showing cause against the suspension.”

Our object in making this Rule returnable in the vacation was that the matter should be disposed of with as little delay as possible ; but it seems to have been considered desirable that the Rule should be heard by the Bench which granted it.

It was, therefore, brought on again by Mr. Ghose before this Bench on the 22nd of last month ; and we have now had an opportunity of reading the record of the proceedings, as well as a statement, dated the 19th of September last, prepared by Mr. Cooke, in which that gentleman explains his view of the matter, and the reasons why proceedings were taken against the pleader.

No cause has been shown against the Rule by the Deputy Magistrate, Mr. Barber, and he appears, notwithstanding our order, to have heard the case against the pleader on the 21st of September. We have received his final judgment, returned with the other papers, dated the 2nd of October, in which he finds the pleader guilty of dishonest and unprofessional conduct, and recommends that he should be suspended from practice for one month.

This non-compliance with our order appears to have been due to some misunderstanding upon the part of Mr. Cooke. His clear duty was, upon receiving that order, to have forwarded it to Mr. Barber, with directions that it should be at once obeyed. We desired to have the record sent up with Mr. Barber's own explanation, in order that this Court might decide whether the case against the pleader should be proceeded with at all, and whether he had been legally suspended ; and we were specially desirous of having an explanation from Mr. Barber himself, because we wished to know whether, at the time when he issued the order of suspension, he was aware that the pleader had been retained to defend the other prisoners. We now find no reason to suppose, upon a perusal of the papers, that he was aware of that fact. If he had been, we should have considered it our duty to deal with the matter in a very different way, and to have brought it to the notice of His Honour the Lieutenant-Governor.

We have now to consider the two main points, upon which the Rule was originally obtained by Mr. Ghose, namely :—

1st.—Whether there was any ground for the finding of the Deputy Magistrate that the pleader had been guilty of misconduct.

I. L. R., Cal. 67.

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2ndly.—Whether, under the Legal Practitioners Act of 1879, the Magistrate had any power to make the *interim* order of suspension. As our first impression upon both these questions was entirely opposed to the view which has been taken, not only by the Magistrates concerned, but also, as it would appear, by the Sessions Judge, we thought it more than usually important that the Government should be represented at the hearing; and, as we found that Mr. Kilby, the Deputy Legal Remembrancer, had not been sufficiently instructed, we postponed the hearing for some days, in order that he might have an opportunity of considering the papers, and consulting, if necessary, the Advocate-General upon the subject.

We have now heard the case discussed a second time; and we find that Mr. Kilby, having consulted the Advocate-General, is not prepared to uphold the decision of the Magistrate upon either point.

It, therefore, only remains for us to give our reasons for overruling that decision.

As regards the first point, it appears from the judgment of Mr. Barber that the only ground upon which he considered, and has since found, the pleader guilty of misconduct was, that he had in his possession, and had used in the defence of his client, certain copies of depositions of witnesses which had been taken against the prisoners by the police, and of confessions which had been also made to the police by some of the prisoners.

We understand that these depositions and confessions had been taken down in writing, and were in the custody of the mohurrirs employed in the police-office, and it was no doubt the duty of those persons not to allow copies of them to be taken.

It has not been proved, nor even alleged, as against the pleader, that he was himself either party or privy to the procuring from the police-office the copies which he had in his possession; but the Deputy Magistrate seems to think that, as he must have known what the rules of the office were, he was guilty of dishonest, or at any rate dishonourable and unprofessional, conduct in using copies which had been improperly obtained.

The Officiating Magistrate, we observe, goes further. He compares the conduct of the pleader with that of a receiver of stolen goods.

We consider that this view of the case is entirely erroneous, and that it is based on misconception, not only of the duties of an advocate, but of the nature of the right, which the police-authorities had, to the depositions and confessions, which were taken down in writing. There was nothing, so far as we can see, in the subject-matter of those depositions or confessions, which gave the police-authorities any special property in them, or which prevented the pleader, upon either legal or moral grounds, from using them on behalf of his client.

If any one of the prisoners or other persons who were present at the time when the depositions were taken, or the confessions made, had been a sufficiently good scribe to take down in writing what either the prisoners or the witnesses said, or had a sufficiently good memory to have correctly related what took place to the pleader, it is clear that the latter would have been perfectly justified in using the information for the benefit of his client in any way which the rules of evidence allowed.

The only impropriety, if there was any, was in the manner in which the copies of these documents were obtained from the police-office; and to that, so far as appears, the pleader was neither party nor privy.

If the subject-matter of the documents had been of a private or personal nature, the case might be different ; but there is nothing either in the depositions of the witnesses, or in confessions of a prisoner at a police-investigation, which makes them, *so far as their subject-matter is concerned*, any more the property of the police than the property of the prisoner.

Nor is there anything inconsistent either with justice or morality in the pleader's using the information for the benefit of his client. As a matter of fact and of practice, it constantly happens that copies of police-papers are obtained and used at criminal trials. Mr. Ghose, who has had a large experience in criminal cases in the mofussil, informs us that there is hardly any case of importance, in which Counsel are engaged to defend a prisoner, in which some copies or statements of proceedings which have taken place in the police-office are not handed to Counsel by way of instructions. And Mr. Kilby, who has also had considerable experience in such matters, and who has appeared here in this case on behalf of the Government, is not prepared to deny that statement, or to justify the Magistrate in the course which he has taken.

We are of opinion, therefore, that the facts found by the Magistrate disclose no misconduct of any kind, professional or otherwise, on the part of the pleader.

The next question is, whether in making the order of the 30th of August, calling on the pleader to show cause why he should not be punished, the Magistrate had any right to suspend him in the meantime from practice?

Here, again, we consider that both the Magistrates and the District Judge have taken an erroneous view of the law.

Reading s. 14 of the Legal Practitioners' Act, 1879, in conjunction with s. 40, we have no doubt whatever that the power of *interim* suspension which is given by cl. 5 of s. 14 can only be exercised after the pleader has been heard in his defence, and pending the investigation and the orders of the High Court.

This, indeed, appears to us to be the natural interpretation of the clause, even when read by itself ; but, coupled with s. 40, the meaning is still more clear. And it seems only right and reasonable that this should be its meaning, because it would seem a dangerous and arbitrary power to entrust to any Court, to suspend a pleader from practice, before he has had an opportunity of being heard in his defence.

This very case is a remarkable illustration of the injustice that might be done, not only to the pleader himself, but to his clients, by the exercise of such a power without any legal ground.

The High Court, so far as we are aware, does not possess any such power ; and it certainly tends to strengthen our view of the meaning of the Act, that under s. 42 there is an express provision, that the Chief Court of the Punjab is not to dismiss or suspend an advocate until he has had an opportunity of being heard in his defence.

The Rule will, therefore, be made absolute to set aside *ab initio* the proceedings of the Deputy Magistrate.

Rule absolute.

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APPELLATE CRIMINAL.

Before Mr. Justice McDonell and Mr. Justice Field.

1884.

Jan. 14.

10 Cal. 268.

IN THE MATTER OF THE PETITION OF NOBIN KRISTO MOOKERJEE.

NOBIN KRISTO MOOKERJEE *v.* RUSSICK LALL LAHA.¹*Criminal Procedure Code (Act X. of 1862), ss. 435, 437—Further enquiry, Power of District Magistrate to direct—"Inferior Criminal Court"—Notice to accused.*

The words "inferior Criminal Court" in s. 435 of the Criminal Procedure Code mean, inferior so far as regards the particular matter in respect to which the superior Court is asked to exercise its revisional jurisdiction.

A criminal charge instituted before a Magistrate of the first class was finally disposed of by him by an order discharging the accused. Subsequently the Magistrate of the District, proceeding under s. 437 of the Code of Criminal Procedure, directed a further enquiry to be made by a Subordinate Magistrate. This order was made without notice to the accused.

Held that the Magistrate of the District had no jurisdiction to direct a further enquiry.

Semble that, as a matter of strict law, the accused was not entitled to be heard by the District Magistrate before granting the order directing the enquiry.

Mr. *Evans*, Baboos *Umbica Charan Bose*, *Grish Chunder Chowdhry*, *Saroda Prosad Roy*, *Harendra Nath Mookerjee*, and *Dwarkanath Chuckerbutty* for the petitioner.

Mr. *Allen* for the opposite party.

THE facts of this case sufficiently appear from the judgment of the Court (McDonell and Field, JJ.), which was delivered by

FIELD, J.—In this case a rule was granted by Maclean and Norris, JJ., on the 20th December last, calling upon one Russick Lall Laha to shew cause why a certain order made by the Magistrate of the 24-Pergunnahs under s. 437 of the Code of Criminal Procedure, and dated the 5th December last, should not be set aside.

The facts of the case are briefly these: On or about the 27th day of September 1881, one Baboo Romanath Laha lent a sum of Rs. 5,000 upon a mortgage-bond to a person who represented himself to be one Khirode Chunder Mookerjee. This person was identified by Nobin Kristo Mookerjee, the petitioner now before us. The sum so lent upon mortgage was payable upon the expiry of six months. The money not having been paid, a demand was made on behalf of the mortgagee upon the real Khirode Chunder Mookerjee, who denied any knowledge whatever of the transaction, and repudiated liability under the mortgage-bond. Subsequently, Khirode Chunder Mookerjee instituted a suit in the Civil Court to have the mortgage-bond cancelled, on the ground that he had not executed it, and that the whole transaction was an attempt to commit a fraud upon him. That suit was decreed; and, immediately after its being so disposed of, a criminal charge was preferred by Russick Lall Laha, the brother of Romanath Laha (who had in the meantime died), against the petitioner before us, Nobin Kristo Mookerjee, and another person, who is said to have been the broker in the transaction. The broker absconded, and the criminal charge proceeded as against Nobin Kristo Mookerjee alone. This criminal charge was instituted, on the 20th June 1883, before a Magistrate of the

¹ Criminal Motion, No. 351 of 1883, against the order of *C. C. Stevens, Esq.*, Magistrate of 24-Pergunnahs, dated the 5th December 1883.

first class sitting at Sealdah ; and after numerous postponements, it was finally disposed of by him three months later, viz., on the 25th September 1883, by an order discharging the accused person. Subsequently, an application was made to the Magistrate of the district, that is, the Magistrate of the 24-Pergunnahs, and the Magistrate of the district, proceeding under s. 437 of the Code of Criminal Procedure, made, on the 5th of December 1883, the order which is now sought to be set aside. By that order the District Magistrate, after referring briefly to the facts of the case, directed that a further enquiry be made, and for the purposes of making this enquiry he made over the case to a Subordinate Magistrate. It is now contended before us that the order of the District Magistrate of the 24-Pergunnahs is bad, and ought to be set aside on two grounds, *first*, because the order of discharge having been made by a Magistrate of the first class, the District Magistrate had, upon the proper construction of s. 435 of the Code of Criminal Procedure, no jurisdiction to call for the record, and therefore had no jurisdiction under s. 437 to direct a further enquiry; *secondly*, because the order was made without notice having been given to the accused person, and therefore without such accused person having had an opportunity of being heard before the District Magistrate proceeded to make an order to his prejudice. We shall deal with these two points *seriatim*.

With reference to the *first* point, s. 435 of the present Code of Criminal Procedure provides as follows: "The High Court or any Court of Session or District Magistrate, or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court," &c. Then s. 437 provides as follows: "On examining any record under s. 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself, or by any of the Magistrates subordinate to him, to make, and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged." Now, we have first to consider what is the meaning of the term "inferior Criminal Court" in s. 435, and, in order to determine what the correct meaning of this expression is, we must resort to a usual mode of construction, that is, we must examine the present Code as compared with the provisions of the previous Code upon the same subject. S. 435 of the present Code corresponds with s. 295 of the Code of 1872, and in that section the words used are "any Court subordinate to such Court or Magistrate." Now, we may observe that, as to the meaning of the term "subordinate," no question can now arise. The subordination of the Magistrates in a district, other than the District Magistrate, to the Magistrate of the district, was provided for by the second paragraph of s. 295 of the Code of 1872; and these provisions are re-enacted and amplified by s. 17 of the present Code. It being then clear that the Legislature has made no change in the subordination of Magistrates, we have to consider what is the intention which is to be gathered from the substitution of the term "inferior Criminal Court" in the present Code for the words "subordinate to such Court" in the former Code. It appears to us unreasonable to suppose that this new expression has been substituted without any definite object; and the conclusion to which we are ultimately led is this, that the term "inferior Criminal Court" must be construed to mean "judicially inferior," that is, a Court over which the Court or Magistrate proceeding under s. 435 of the Code has appellate jurisdiction. It was contended before us by the learned Counsel, Mr. Allen, that a subordinate Magistrate of the first class is a Criminal Court *inferior* to the Magistrate of the district, because there are in the present Code certain

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provisions under which a Magistrate of the first class is in certain matters subject to the appellate jurisdiction of the Magistrate of the district. These provisions are to be found in ss. 406 and 515. Undoubtedly there is much weight in this argument, which we have carefully considered. It appears to us, however, that a construction can be put upon s. 435, which will, in no wise, be contradicted by the existence of the appellate jurisdiction given to the Magistrate of the district over First-class Magistrates by ss. 406 and 415. We think that the words "inferior Criminal Court" in s. 435 must be construed to mean inferior, so far as regards the particular matter in respect of which the superior Court is asked to exercise its revisional jurisdiction. In arriving at this conclusion, we have considered, as I have already stated, the intention to be gathered from the substitution of the word "inferior" in the existing Code for the word "subordinate" in the Code of 1872. But there is another and a material circumstance which has also influenced our minds. It was settled law under the old Code that when a Magistrate, other than the Magistrate of the district, had discharged an accused person after hearing the evidence for the prosecution, the Magistrate of the district had no jurisdiction to direct a further enquiry, or revive the prosecution upon the same evidence. It was held in two cases, the case of *Mohesh Mistri*,¹ and the case of *Donnelly*,² that, if the District Magistrate was of opinion that further proceedings should be taken upon the evidence on the record (in a case, that is, where no fresh evidence is forthcoming, see p. 411 of the Report in the latter case), he must refer the case for the orders of the High Court. The District Magistrate had, at the same time, the power of directing a further enquiry in one particular case, that is, where a complaint had been made, and such complaint had been summarily dismissed without the examination of witnesses (see s. 298 of the Code of 1872 as amended by s. 31 of Act XI. of 1874). S. 437 of the present Code extends this power to *the case of any accused person who has been discharged* (see the last ten words of the section); and it is very reasonable to suppose that the Legislature, in conferring upon the District Magistrate a new power—a power, that is, which he was not competent to exercise under the law of 1872—considered it proper that this power should be exercised by him over those Magistrates only who are subject to his appellate jurisdiction. We think that this is a reasonable construction; and when we further construe the term "inferior" used in s. 435 to mean, as I have already said, inferior, so far as regards the particular subject-matter, we are enabled to put upon the Code a construction which reconciles sections at first apparently conflicting.

But, then, it is contended that the words "or otherwise" in s. 437 give the District Magistrate a power quite independent of the power conferred upon him in cases in which he has proceeded under s. 435. We have considered this argument, and we are unable to accede to it. We think that these words "or otherwise," being words of general import, following the particular words "under s. 435," must be construed according to the usual rule, and that they mean not "in any other way whatsoever," but in any other way provided by the Code. For example, in the case of an appeal, the Appellate Court is empowered by s. 423 to send for the record, and this would be a case in point. Then, there is the further argument that, if we were to put upon the words "or otherwise," the wide and general construction contended for, the whole of the limitation necessarily implied in the provisions of s. 435 would become unnecessary; and such a result would suppose in the Legislature an absence of all intention, which we think ought not to be imputed or presumed.

¹ 1 L. R., 1 Cal. 282.

² 1 L. R., 2 Cal. 405.

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We now come to the second contention, *viz.*, that no notice was given to the accused, and that no order could have been made without giving him an opportunity of being heard. S. 440 provides as follows: "No party has any right to be heard either personally or by pleader before any Court when exercising its power of revision, provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader," &c. This is the general rule provided by the Legislature; and it must be taken to be a legislative *recission* of the usual principle that persons are entitled to be heard before any order affecting them to their prejudice can be made. To this general rule, so laid down by the Code, there are two exceptions to be found in the Code itself. The first is to be found in cl. a of the provision to s. 436. The second is contained in the second paragraph of s. 439. The case now before us does not come within either of these exceptions. We therefore think that, as a matter of strict law, it is impossible to say that the petitioner in this case was entitled to be heard by the District Magistrate of the 24-Pergunnahs before the order complained of could be made. But this Court, in the exercise of its revisional jurisdiction, is competent to question, not only the *legality*, but the *propriety* of any finding, sentence, or order; and we therefore think that it is quite open to us to deal with the question whether a District Magistrate, in exercising the power conferred upon him by s. 437, exercises a proper discretion in proceeding to make an order for further enquiry without giving notice to the accused, and allowing him an opportunity of being heard. As the present case can, however, be sufficiently disposed of upon the first point, we do not propose to enter into the merits, or to express any opinion whether the District Magistrate in the present instance exercised a proper discretion in making the order complained of without giving notice to the accused person. A case was quoted by the learned Counsel for the petitioner in which Mr. Justice Mitter and myself thought that the accused ought to have had notice. That opinion had reference to the particular facts of that case; and we laid down no general rule. In the case now before us, having read the petition which was presented to the District Magistrate, the inclination of our minds is that that petition contained arguable matter—matter upon which it would have been fair to the accused to have heard him in person or by Counsel before an order was made, which was followed immediately by a warrant issued for his arrest. But, as I have already said, inasmuch as the present case can be sufficiently disposed of upon the first point, we think it unnecessary to come to any definite conclusion upon the second point.

It appears to us that, for the reasons which I have stated, the Magistrate of the 24-Pergunnahs had no jurisdiction to make the order of the 5th December 1883 complained of, and we must, therefore, set aside that order. We were asked by Mr. Allen, the learned Counsel for the opposite party, to take up this case under s. 429, and proceed to exercise our revisional jurisdiction after entering into the merits. We have considered this application, and we think that it is not one with which we can comply. The accused person has had no notice of such an application, and has not come here prepared to meet such a case. If we thought that we ought to exercise our revisional jurisdiction, it would be necessary to issue a fresh notice, and appoint a further day for the hearing of the case upon its merits. But, having regard to the fact that, if the prosecutor desires to proceed further, the Court of the Sessions Judge of the 24-Pergunnahs, which has jurisdiction, is close at hand, we think it unnecessary that the time of the High Court should be taken up in disposing of a matter which can be dealt with by that tribunal.

The rule will be made absolute.

Rule absolute.

APPELLATE CRIMINAL.

*Before Mr. Justice Mitter and Mr. Justice Field.*IN THE MATTER OF THE PETITION OF SURAT DHOBN¹

1884.

Jan. 24.

10 Cal. 302.

Evidence Act (I. of 1872), s. 6—Statement made to third person by person injured.

The only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person, immediately after the commission of the offence. The prisoner did not, when the statement was made, deny that she had done the act complained of.

Held that the evidence was admissible under s. 6 and s. 8, ill. g, of the Evidence Act.

In this case the prisoner had been convicted by the Assistant Commissioner of Dibrugarh, under s. 324 of the Indian Penal Code, of having voluntarily caused hurt to her daughter-in-law, by burning her with a red-hot pair of tongs. The only evidence in support of the charge was a statement made in the presence of the prisoner by the daughter-in-law to a neighbour immediately after the commission of the offence. It appeared also that the prisoner did not deny that she had inflicted the injuries. The prisoner appealed to the Officiating Judge of the Assam Valley Districts, who held that the statement was so closely bound up with the occurrence itself that it was clearly a relevant fact, and admissible in evidence under s. 6 of the Evidence Act, and affirmed the conviction.

The prisoner preferred a petition to the High Court.

Baboo *Jogesh Chunder Roy* for the petitioner.

No one appeared for the Crown.

The following judgments were delivered by the Court (MITTER and FIELD, JJ.) :—

FIELD, J.—The additional evidence which we directed to be taken by our order of the 11th December last has now been sent up by the Sessions Judge. In consequence of my learned colleague having some doubt, I have very carefully considered the question with which we have to deal. In the case of *Rex v. Osborne*,² referred to in my learned colleague's judgment, Creswell, J., said : "What the prosecutrix said at the time of the committing of the offence would be receivable in evidence, on the ground that the prisoner was present, and the violence going on ; but if the violence was over, and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence." That was a case of rape, and I do not understand Creswell, J., to have meant that, in order to render the statement of the prosecutrix admissible in evidence, both the presence of the prisoner and the continuance of the violence must have co-existed with the making of the statement. I understand the learned Judge to have been speaking with reference to the circumstances of the case before him rather than to have been laying down any fixed rule which would require for its application the co-existence of the two circumstances just mentioned. In the case of *Rex v. Foster*,³ before three learned Judges—Park and Patteson, JJ., and Gurney, B.—the

¹ Criminal Motion, No. 275 of 1883, against the order of C. J. Lyall, Esq., Officiating Judge of the Assam Valley Districts, dated the 4th August 1883.

² 1 C. and M. 624.

³ 6 C. and P. 325.

prisoner was charged with manslaughter, in killing a certain person by driving a cabriolet over him. A waggoner was called as a witness, and he said that he was driving his waggon, and that he saw the cabriolet drive by at a very rapid rate, but did not see the accident; and then he went on to say that immediately after, on hearing the deceased groan, he went up to him, and asked him what was the matter. It was objected that what the deceased said in the absence of the prisoner as to what had caused the accident was not receivable in evidence, but the three learned Judges were agreed that, under the circumstances, it ought to be received. This appears to me to be a case more immediately in point than that of *Rex v. Osborne*.¹ It must, however, be borne in mind that these English cases can be referred to only by way of illustration. They are not in any way binding upon us, regard being had to the provisions of cl. 1 of s. 2 of the Evidence Act. What, therefore, we have really to consider is whether the evidence is admissible under the Indian Evidence Act, and having given to the matter my most careful consideration, I have come to the conclusion that it is admissible. It is clear from the additional evidence, now submitted by the Sessions Judge, that the statement made by the girl was made in the presence of the prisoner, and almost immediately after the infliction of the injuries by the tongs. I think, therefore, that it falls within the purview of s. 6 [see ill. a] of the Indian Evidence Act. I think, further, that it falls within s. 8, ill. g, inasmuch as the accused person was present and made no answer denying that it was she who had inflicted the injuries upon the girl. The witness, upon a re-examination, has added certain matter, which we are both agreed that we ought not to consider; but excluding this matter, the case, in my opinion, falls within the illustration just quoted. The occasion was certainly one upon which the prisoner, if she had not inflicted the injuries upon the girl, would, in all probability, have denied the charge made against her by the girl, and the fact that she did not do so appears to me to have been an acquiescence in the truth of the charge so made by the girl. As to the sufficiency of the evidence, it is unnecessary for us to express any opinion. We are hearing this case merely in the exercise of our revisional jurisdiction, and the point to which we are agreed to limit ourselves is whether there is legal evidence upon which the prisoner might have been convicted, and this question I feel compelled for myself to answer in the affirmative.

MITTER, J.—I concur. I had some doubt upon the point fully discussed in the judgment of my learned colleague. But, after considering the authorities referred to in it, I come to the same conclusion to which he has come.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Pigot.

BRAE v. THE QUEEN-EMPRESS.²

Rioting—Penal Code, s. 156—Manager of Indigo-factory.

In order to convict the manager of an indigo-factory under s. 156 of the Penal Code, it must be shown by legal evidence (1) that a riot was committed; (2) that the riot, if committed, was committed for the benefit of the accused; and (3) that the accused had reason to believe that a riot was likely to be committed.

THIS was a prosecution under s. 155 of the Penal Code against the manager of an indigo-factory, by which he was charged with not having used

1884.

IN THE
MATTER OF
THE PETITION
OF SURAT
DHOBN, I,
10 Cal. 302.

1883.

Sep. 22.

10 Cal. 338.

¹ 1 C. and M. 624.

² Criminal Appeal, No. 533 of 1883, against the order of *Mr. W. G. Deare*, Sub-divisional Magistrate and Justice of the Peace of Jhenidah, dated the 28th August 1883.

I. L. R., Cal. 68.

1223.

BRAE

v.

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EMPRESS,

10 Cal. 338.

all lawful means to prevent a certain riot, which it was alleged had taken place between his servants on the one side, and some other parties, tenants of an adjacent land-owner, on the other; the same having been committed for his benefit, and he having had reason to believe that it was likely to occur.

The case for the prosecution was that, for a considerable time, a dispute had been going on between the factory-people and certain ryots concerning some lands, which the former had taken by force from the latter, and on which they had sown indigo; that suits had been brought in respect of these lands by the ryots; that decrees had been obtained; and that, finally, they had been put in possession of them two days before the alleged occurrence took place. That several of the servants of the factory were present when possession was given by the nazir of the Civil Court, and that there was indigo six inches high growing on the lands at this time. That on the morning of the 9th March, at about 7 A.M., Brae, the manager of the factory, had been seen riding in the direction of the lands in dispute, and that later in the morning, he, together with some of his own men, had passed close to, and inspected, the indigo growing on them. That at about 10-30 or 11 A.M., a large body of factory-servants armed with *lalties*, and one of them with a gun, went to the lands where the decree-holders were commencing to plough up the indigo, that a riot occurred, and that one of the tenant's party was killed, having been shot by the jaj-ameen of the factory. That Brae was at his house two miles off when the riot occurred, and that he had taken no steps whatever to prevent it.

Mr. *Dunne* for the appellant. A manager can only be charged under s. 156, and not 155; and, in order to make him liable, it must be shown that the acts committed were either directly or indirectly instigated by him, and were for the benefit of the owner or occupier of the land.

In this case there is nothing to show that a riot did actually take place, as no facts have been spoken to from which a common object can be inferred, except the death of the man who is said to have been shot. But it cannot be suggested that Brae instigated such a proceeding as this, nor can it be said to have been for the benefit of the owner or occupier. The prosecution have also failed to show that the manager had any reason to anticipate a riot, for the fact of possession having been given to the decree-holders would not of itself be sufficient to raise a presumption to that effect. Further, there is nothing to show that Brae had any means at his command to prevent a riot of the kind alleged.

The *Deputy Legal Remembrancer Offg.* (Mr. *White*) for the Crown. These sections are intended to put a stop to riots committed, or abetted by managers of indigo-factories; and as regards the evidence to be given in prosecutions under them, nothing more than a *prima facie* case need be made out in the Magistrate's Court. The Legislature, when framing these sections, evidently contemplated that a trial of the original riot-case should have taken place, and that the offenders had been punished by the Sessions Court, where the evidence would be of a minute and voluminous nature, and that, after that case had been decided, a proceeding of this kind should be taken to bring the manager to book. There is abundant evidence to show that a riot was committed. We show that a man was killed, and by one of the factory-servants who was provided with a gun. We show that Brae passed and inspected the lands in the morning with some of his men; that a little after a number of his people went out in a body, armed; and that they went to the decree-holders' land; and, whatever the dispute was, a man was killed. The indigo on the land was of great value to Brae; the object that these men had in view was to prevent its being ploughed up, and if they had done so, it would have been a decided bene-

fit to the owner. O'Kinealy's Penal Code, p. 54, and the case of *The Queen v. Hurnath Roy*,¹ were referred to.

The following judgments were delivered by the Court (MITTER and PIGOT, JJ.) :—

MITTER, J.—The appellant in this case has been convicted by the Sub-divisional Magistrate of Jhenidah under s. 155 of the Indian Penal Code. It is quite clear, and it is not disputed, that that is not the right section under which he should have been convicted. The appellant was simply the manager, and not the owner of the land respecting which the alleged riot took place. The section under which he should have been charged is s. 156, but it appears to me that on three essential points the evidence that has been adduced is not sufficient to establish an offence under s. 156.

The first point that is necessary to be established is that a riot was committed, but there is no evidence to prove that a riot, as defined in the Penal Code, was committed. It is necessary to show that there was an assembly of more than five persons, who had a common object in view; but, in this case, there is no evidence to show that the servants of the factory, who are alleged to have constituted the unlawful assembly, had any such common object. It is said that their object was to prevent the indigo-plants being uprooted, but no evidence of this has been adduced on behalf of the prosecution. Therefore, there is no legal evidence to establish that a riot was committed.

The second point upon which evidence for the prosecution is wanting is that it is not shown, supposing that a riot was committed, that it was committed for the benefit, or on behalf, of the person who was the owner or occupier of the land respecting which such riot took place. If the common object was to prevent the indigo-plants being uprooted, then in that case no doubt it could have been reasonably inferred that the riot was committed for the benefit or on behalf of the owner of the land, but, that being not established, it follows that it is not shown that the riot, if it was committed, was committed for the benefit or on behalf of the owner or occupier of the land.

The third point is that it is not shown that the appellant before us had reason to believe that any riot was likely to be committed. No doubt, this fact can very seldom be established by direct evidence, but there must be circumstances from which it may be reasonably inferred. In this case the only circumstances that have been established are, that Mr. Brae was in the factory at the time that the alleged riot took place, and that amongst the rioters were some servants of the factory; but these facts are not sufficient to give rise to the inference that before the riot took place—if any riot at all took place—the appellant had reason to believe that it was likely to take place.

Upon all these three points it seems to me that the evidence is not sufficient. Therefore, the conviction and sentence will be set aside, and the fine, if realized, will be refunded.

PIGOT, J.—I entirely agree. I would only add that, in applying the sections which give the magistracy powers of such startling magnitude, it is, in my opinion, incumbent upon those entrusted with the exercise of such powers to act, not upon inferences or suspicions, but upon evidence. Whatever may have been the object of the Legislature, whether as explained by the learned Counsel for the prosecution or not, whatever may have been the occasion of the insertion in the Code of these most formidable sections, we must hold that the law thereby enacted is not intended to be applied upon surmise, but upon proof.

Conviction set aside.

1883.

BRAE

v.

THE
QUEEN-
EMPRESS,
10 Cal. 338.

¹ 3 W. R., Cr., 54.

APPELLATE CRIMINAL.

*Before Mr. Justice McDonell and Mr. Justice Field.*NATHU SHEIKH AND OTHERS *v.* THE QUEEN-EMPRESS.¹

1884.

Feb. 7.

10 Cal. 405.

False Evidence—Separate Trial—Procedure when more than one person is charged with having given false evidence in the same proceeding—Criminal Procedure Code (Act X. of 1882), s. 161—Penal Code (Act XLV. of 1860), s. 193.

In order to sustain any conviction for giving false evidence upon an alternative charge when no evidence is offered to prove the falsity of either statement in particular, it must be clear that the two statements are contradictory.

The law laid down by the Full Bench in the case of the *Empress v. Kassim Khan*² has been altered by the provisions of s. 161 of the Code of Criminal Procedure (Act X. of 1882), and a witness, who makes a false statement to a police-officer, in reply to a question which he is bound to answer, would be guilty of intentionally giving false evidence.

When four persons were accused of having given false evidence in the same proceeding, and the Sessions Judge, while professing to try each accused separately, heard the evidence of the witnesses only once, *held* that this was substantially trying the four prisoners together, and was an improper mode of procedure.

THIS was an appeal against a conviction under s. 193 of the Penal Code. The appellant, with three other accused, were charged with similar offences arising out of the same enquiry, and were each convicted and sentenced to six months' rigorous imprisonment. The offence charged in each case was based upon statements made to the police during the enquiry instituted with reference to the death of one Abuchi Bewa and another, and contradictory statements made when the cases came before the Joint-Magistrate for enquiry.

At the trial the four accused were, to use the words of the District Judge, tried separately, though the evidence of the witnesses was heard only once, and the Sessions Judge, in his judgment, stated that this course had been taken to prevent any possible allegation of illegality, though he considered that it was by no means clear that, under s. 239 of the Criminal Procedure Code, the accused might not have been tried together. The nature of the statement upon which the conviction was based, and sought to be upheld, sufficiently appears in the judgment of the High Court. No one appeared to argue the case on either side.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by FIELD, J.—The appellant, Nizam Sheikh, was tried upon the following charge: "That you, on or about the 21st of May 1883, at Azugerah, in thanah Shazedpore, in the course of the enquiry into the cause of death of Abuchi Bewa and Kefat Chokra by the Subordinate Inspector of Shazedpore, stated in evidence, 'I came to the place of occurrence on hearing the screams of Abuchi Bewa. I saw Mora, Dhanoo, and Pana carrying the dead body of Abuchi towards her house,' and that you, on the 14th day of August 1883, at Serajgunge, in the course of a judicial enquiry into the cause of death of Abuchi Bewa and Kefat Chokra by the Joint-Magistrate, stated in evidence, 'I did not see Mohar, Panulla, and Dhanoo dragging Abuchi Bewa on to her *bari* by night. I did not hear that night any one call out, 'Help! I am killed.' I did not see Mohar and his companions put Abuchi Bewa's body in the *ghar* facing east,' one of which statements you either knew or believed to be false, or did not believe to be true; and thereby committed an offence punishable under s. 193 of the Indian

¹ Criminal Appeal, No. 731 of 1883, against the order of F. H. McLaughlin, Esq., Sessions Judge of Pubna and Bogra, dated the 11th December 1883.

² I. L. R., 7 Cal. 121.

Penal Code, and within the cognizance of the Court of Session," &c. The prisoner has been convicted upon this alternative charge, and has appealed.

Under the provisions of s. 161 of the Code of Criminal Procedure, a witness examined by a police-officer making an investigation is bound to answer truly all questions relating to such case put to him by such officer other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture. A witness, therefore, who made a false statement to a police-officer, in reply to a question which he is bound by that section to answer, would be guilty of intentionally giving false evidence, and the law laid down in the Full Bench case of the *Empress v. Kassim Khan*¹ must be taken to have been altered by the Legislature.

In order to sustain any conviction for giving false evidence upon an alternative charge when no evidence is offered to prove the falsity of either statement in particular, it must be clear that the two statements are contradictory. This is not clear in the present case. The statements before the police were:—

- (1.) I came to the place of occurrence.
- (2.) I heard the screams of Abuchi Bewa.
- (3.) I saw A, B, and C carrying the *dead body* of Abuchi towards her house.

The statements before the Magistrate were—

- (1.) I did not see A, B, and C dragging Abuchi Bewa on to her *bari* by night (whether she was alive or dead is not stated).
- (2.) I did not hear that night any one call out, "Help ! I am killed."
- (3.) I did not see Mohur and his companions put Abuchi Bewa in the *ghar* facing east.

It is obvious that no one of the first three statements is necessarily contradictory of any one of the second three statements.

Then there is a further error in the proceedings before the Sessions Judge, which would, in all probability, have proved fatal to the conviction. The Sessions Judge says in his judgment: "By request of accused's pleader, the witnesses have been heard only once, but the four cases [that is, the case of Nizam Sheikh, and of the three other persons who were charged with similar offences] have been tried separately." How, if the witnesses were heard once only, the four prisoners could have been tried *separately*, the Sessions Judge does not explain, and it is not easy to understand. If the Sessions Judge means that four separate records were made up, while the examination of the witnesses, which was the substantial portion of the trial, was conducted only once for all four prisoners, this is substantially trying the four prisoners together, and that this is an improper mode of procedure has been pointed out on more than one occasion (see for example *Empress of India v. Anant Ram*.² We direct that the prisoner Nizam Sheikh be acquitted and discharged. This judgment will govern the case of Nathu Sheikh, the case of Jatu Sheikh, and the case of Chamu Chowkeedar.

Appeal allowed.

¹ I. L. R., 7 Cal. 121.

² I. L. R., 4 All. 293.

1884.

NATHU
SHEIKH
v.
THE
QUEEN-
EMPRESS,
10 Cal. 405.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

IN THE MATTER OF GAMIRULLAH SARKAR.

GAMIRULLAH SARKAR v. ABDUL SHEIKH.¹

1884.

Feb. 25.

10 Cal. 408.

Magistrate, Jurisdiction of—Summary Trial—Criminal Trespass—Mischief—Penal Code, s. 427—Code of Criminal Procedure (Act X. of 1882), s. 260.

A person may be tried summarily for criminal trespass and mischief unless there is a *bond fide* claim of right depriving the Magistrate of jurisdiction. *Shakur Mahomed v. Chunder Mohun Sha*² disapproved.

In this case the accused were sentenced to three months' rigorous imprisonment by a Bench of Magistrates. The Sessions Judge of Rungpore transmitted the record to the High Court, under s. 438 of Act X. of 1882, with the following report :—

"The complaint was one of criminal trespass and mischief. The accused were charged with destroying some *kalai* belonging to complainant, partly by turning their cattle into it, and partly by ploughing it up. They set up a claim to the land, which they said they held under a third party. The case was tried summarily; and the accused sentenced to three months' rigorous imprisonment. The judgment appears to rest principally on two documents referred to in it, which are not evidence against accused at all, the one marked A being a copy and not admissible till the original is accounted for, and the one marked B being a decree between complainant and a third party. The Deputy Magistrate, in his explanation herewith appended, says that there was other evidence besides these documents. In that case the judgment is bad for not recording the valid reasons, if there were any, for the conviction.

"Besides this, the case, it seems to me, is not one which should have been tried summarily—*Shakur Mahomed v. Chunder Mohun Sha*,³ and *In the matter of Issur Chunder Mundle*.³ I therefore recommend that this conviction be quashed, and that, if the Court think fit, the case be sent back to be re-tried by the ordinary procedure."

The District Judge admitted the accused to bail, stating that more than half the sentence had then expired. The Deputy Magistrate in the explanation forwarded by him to the Sessions Judge said, with regard to (1) the evidence on which the accused were convicted, and (2) the summary procedure adopted in trying the accused :—

"With regard to (1), I most humbly beg to submit that the Bench of Magistrates did not convict the accused solely on the strength of the two documents mentioned in the judgment. Independent witnesses were examined from both sides, and the two documents have been mentioned simply as corroborative evidence for believing one set of witnesses in preference to the other. The Bench did not say that Mahabut Ali or the accused were bound by the decree of the Civil Court; but, as the matter was once adjudicated by the Civil Court, no one had a right to disturb the order of the Civil Court. If any party was aggrieved, his remedy lay in moving the Civil Court and getting its order set aside by the same or any superior authority, and not to try himself to make

¹ Criminal Reference, No. 15 of 1884, and letter No. 77, from the order made by J. R. Hallett, Esq., Sessions Judge of Rungpore, dated the 18th February 1884.

² 21 W. R., Cr., 38.

³ 25 W. R., Cr., 65.

the order of the Civil Court inoperative. A Criminal Court is bound to accept the person put in possession by order of the Civil Court as being really in possession of that property.

"With regard to point (2), I beg to submit that I have not with me the Weekly Reporter, and cannot, therefore, say what impediment there is in this case being tried summarily. When a person has been once put in possession of certain landed property by order of the Civil Court, the Bench believed that no private person had any right to dispossess him of it; but any person aggrieved by the order might either prefer a claim, or bring a regular suit for getting the order set aside. Every man's property would be at the mercy of his rich opponent if for every act of aggression he is compelled to seek the assistance of the Civil Court, for which reason the Bench believed that the Criminal Court would be justified in interfering in such cases."

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The petitioners have been convicted in a summary trial of mischief and criminal trespass.

The Sessions Judge has submitted the proceedings in order that the conviction and sentence may be quashed. First, because "the judgment appears to rest principally on two documents referred to in it, which are not evidence against the accused at all." This objection, however, is effectually disposed of by the fact that there is ample legal evidence, and, therefore, under s. 167 of the Evidence Act, we cannot interfere.

The Sessions Judge next relies on the cases of *Shakur Mahomed v. Chunder Mohun Sha*¹ and *Issur Chunder Mundle v. Rohim Sheikh*.² With regard to the first case, we would refer to the case of *Sonai Sardar v. Bukhtar Sardar*,³ explaining it as no authority for the proposition quoted; and with regard to the other case, we would remark that the present case cannot be regarded as a *bona fide* claim of right depriving the Magistrate of jurisdiction, so that the case quoted is not in point. We therefore see no reason to interfere.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Maclean.

QUEEN-EMPRESS v. NOWAB JAN.⁴

Criminal Procedure Code (Act X. of 1882), ss. 248, 259, 345, 437—Further enquiry, Power of District Magistrate to direct—"Subordinate Magistrate"—Compoundable offence.

A criminal charge under s. 448 of the Indian Penal Code having been instituted, the accused was sent up by the police before a Deputy Magistrate of the first class. Previous to any evidence being taken, the complainant intimated to the Magistrate that the case had been amicably settled, and that he did not wish to proceed further in the matter, upon which the Magistrate recorded an order, "Compromised; defendant acquitted." Subsequently, the Magistrate of the district, relying upon ss. 248 and 259, and professing to act under s. 437 of the Criminal Procedure Code, directed the Deputy Magistrate to send up the parties, and proceed regularly with the case.

¹ 21 W. R., Cr., 38.

² 25 W. R., Cr., 65.

³ 25 W. R. 46.

⁴ Criminal Reference, No. 37 of 1884, and letter No. 396, from the order made by T. M. Kirkwood, Esq., Officiating Sessions Judge of Moorshedabad, dated the 17th March 1884.

1884.

GAMIBULLAH
SARKAR

v.

ABDUL
SHEIKH,
10 Cal. 408.

1884.

April 3.

10 Cal. 551.

1884.

QUEEN-
EMPRESS

v.

NOWAB JAN,

10 Cal. 551.

Held that ss. 248 and 259 had no bearing on the case, and that the mere fact of the accused having been sent up by the police did not prevent the offence, which was legally compoundable, from being compromised, and that consequently the order of the Deputy Magistrate was perfectly correct and legal.

Held further that, in addition to the Magistrate's order not being warranted by the fact, it was *ultra vires*, inasmuch as the Deputy Magistrate was a Magistrate of the first class, and not "inferior" to the District Magistrate; and to give the District Magistrate jurisdiction to call for a record under s. 435 from another Magistrate, and to act under s. 437, the latter must be inferior. *Nobin Kristo Mookerjee v. Russick Lall Laha*¹ followed.

THE facts of this reference were as follows :—

On the 2nd December 1883, Pir Bux complained to the police at thanna Mahinapore against Nowab Jan, charging him with house-trespass. The police sent up the accused to the Deputy Magistrate of Lalbagh for trial, under s. 448 of the Indian Penal Code, on the 6th December. After two adjournments, when no evidence had been taken, the case being fixed for the 21st December, an application was made by Pir Bux to the Deputy Magistrate on the 20th December, informing him that the matter had been arranged, and that he did not wish to proceed with the prosecution. The case being one under s. 448 of the Indian Penal Code, and being one in respect of a compoundable offence, the Deputy Magistrate on the same day recorded an order, "Compromised; defendant acquitted," and the defendant was accordingly released.

Thereupon, the District Magistrate on his own motion, or at the instance of the police, recorded certain remarks to the effect that, when a case had been sent up by the police, no withdrawal by any private person could stop its being proceeded with, and relied upon ss. 248 and 259 of the Criminal Procedure Code in support of that view. He thereupon ordered the Deputy Magistrate, "under the closing portion of s. 437, to send for the parties, and to proceed regularly with the case."

This course having been pursued, and having resulted in the conviction of the accused, and in a sentence of imprisonment being passed, the Sessions Judge, on the proceedings being brought to his notice, submitted the record for the order of the High Court, addressing at the same time a letter to the Registrar of the High Court, of which the following is an extract :—

"The District Magistrate was wrong in thinking he could set aside that order of acquittal. S. 437 of the Criminal Procedure Code dealt with a different condition of things. He was wrong in discussing ss. 248 and 259, which have nothing whatever to do with s. 345 of the Criminal Procedure Code, and deal with altogether different contingencies. The offence being under s. 448 of the Indian Penal Code, and the person whose property had been trespassed on having compounded it, the Deputy Magistrate was compelled to acquit. Nowab Jan having been acquitted, and rightly so, was not liable to be tried again for the same offence, and to be convicted and sentenced."

No one appeared on the hearing of the reference.

The judgment of the Court was delivered by

MITTER, J. (MACLEAN, J., concurring).—We have no doubt that the District Magistrate has mistaken the law throughout.

It appears that, on a charge preferred by Pir Bux, the police sent up one Nowab Jan for trial under s. 448 of the Penal Code.

¹ I. L. R., 10 Cal. 268.

Pir Bux subsequently, on 19th December, petitioned the Magistrate (of the First Class), asking that, as the case had been amicably settled, and that as he did not wish to proceed with the case, it might be disposed of.

The Magistrate accordingly endorsed the petition. "Compromised; defendant acquitted."

As it appears that Pir Bux was the person described in the third column of the table attached to s. 345, and that the offence is described in the second column of that table, it is clear that the order of the Magistrate of 20th December is quite correct and legal.

Neither s. 259 nor s. 248 of the Criminal Procedure Code has any bearing on the case; as all that is necessary regarding the compounding of the offence that was under investigation is to be found in s. 345, and we do not understand the law to be that no Magistrate, under any circumstances, has power to allow a case that is sent up by the police to be withdrawn.

The District Magistrate's order, purporting to be passed under s. 437, was, therefore, not warranted for the reasons given above; and it was also *ultra vires* from the fact that Mr. Beames is a First-class Magistrate, and is not, therefore, inferior to the District Magistrate. To give the District Magistrate jurisdiction under s. 435 to call for a case from another Magistrate, the latter must be "inferior." See *Nobin Kristo Mookerjee v. Russick Lall Laha*.¹

We set aside all the proceedings subsequently to the 20th December, including the conviction of Nowab Jan, dated 27th February 1884, and the sentence passed upon him.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Norris.

JAN MAHOMED AND JABAR MAHOMED (APPELLANTS) *v.* QUEEN-EMPRESS (RESPONDENT), AND WARI MEAH *v.* QUEEN-EMPRESS.²

1884.
April 17.

Penal Code, ss. 24, 25, 464, 467, 471—Using as genuine a forged document with intent to defraud—A sanad, conferring a title of dignity, is not a valuable security.

10 Cal. 584.

The accused, in order to obtain a recognition from a Settlement Officer that they were entitled to the title of "Loskur," filed a *sanad* before that officer, purporting to grant that title. This document was found not to be genuine. The Sessions Judge convicted the accused under ss. 471, 464 of the Penal Code. *Held, on appeal*, that, even supposing the accused had used the document knowing it not to be genuine, they could not be found guilty, as the intention of the accused was not to cause wrongful gain or wrongful loss to any one; their intention being to produce a false belief in the mind of the Settlement Officer that they were entitled to the dignity of "Loskur," and that this could not be said to constitute "an intention to defraud."

A *sanad*, conferring a title of dignity on a person, is not a valuable security within the meaning of the Penal Code.

On the 4th March 1883, Jan Mahomed and Jabar Mahomed presented a petition to the Settlement Officer of Cachar, in which they stated that their father, Rizak Mahomed, had received from the Rajah of Cachar a *sanad*, conferring on him the title of "Loskur," and that this *sanad* had been lost, and asked that

¹ I. L. R., 10 Cal. 268.

² Criminal Appeals, Nos. 87 and 104 of 1884, against the judgment of *H. Muspratt, Esq.*, Sessions Judge of Cachar, dated the 16th January 1884.

1884.

JAN
MAMOMED
v.
QUEEN-
EMPRESS,
10 Cal. 584.

certain respectable people living in the neighbourhood might be examined, and that the petitioners' title might be recognized in the new settlement. Subsequently, on the 31st August, they filed another petition to the same end, with a *sanad*, which they stated was in the name of their grandfather, and further stated that the petition of the 4th March was incorrect. The *sanad* then filed purported to bear the seal of the Rajah of Cachar.

On the matter coming up before the Deputy Collector, Jan Mahomed and Jabar Mahomed were committed to the Sessions, and charged under ss. 464 and 471 of the Penal Code; and at the same time he sent up one Waris Meah for having used as genuine a true pottah, but to which an addition had been made after his name of the letter signifying the title of "Loskur," and with having filed it before the Settlement Officer with the same view in end as the two other accused in the case firstly mentioned.

The Sessions Judge found (agreeing with the assessors) that the appearance of the paper led to the conclusion that it was not so old as it purported to be; and that the seal, when compared with a seal of the Rajah on a true *sanad* filed in Court, was obviously a forgery, and bore no resemblance to the true seal; and holding that the *sanad* was a "valuable security," as the Rajah sold the titles to persons under these *sanads*, and that the accused, in filing the *sanad*, acted fraudulently, as they filed the *sanad* with intent to defraud the Settlement Officer into the belief that the forged *sanad* was a true document, and that they were entitled to be called "Loskur" in the new settlement papers, convicted them of fraudulently using as genuine a document which was a valuable security, and which they knew to be a forged document, and sentenced them each to rigorous imprisonment for 18 months under ss. 471 and 464 of the Penal Code.

With regard to the case against Waris Meah, the Sessions Judge, agreeing with the assessors, found that the accused had attempted by forgery to defraud the Settlement Officer, and to make him believe that his title of "Loskur" had been recognized by the Rajah of Cachar, and that the said title should by right be entered in the new settlement, and that the pottah was a valuable security, and gave to the accused a legal right to the land; he therefore convicted him of using as genuine a forged document which he knew to be a forged document, and, under ss. 471 read with 467 of the Penal Code, sentenced him to six months' rigorous imprisonment and a fine of Rs. 50, or in default to a further period of six months.

The prisoners in these two cases appealed to the High Court.

No one appeared for the prisoners.

The judgments of the Court were delivered by

MITTER, J.—I do not think there is sufficient evidence in this case to prove that the Exhibit A is a false document. The Sessions Judge has relied upon some *roobakarees* which, on their bare production only, cannot be treated as evidence. Excluding these, the conviction stands mainly upon two grounds: *1st*, on a comparison of the seal upon the Exhibit A with that of another document proved to have been executed by the Rajah of Cachar, the Sessions Judge is of opinion that the two impressions of the seals do not tally; *andly*, the appearance of the paper shows that it is not so old as it purports to be.

These grounds are, in my opinion, insufficient to support the conviction. It may be that the Rajah changed his seal, and this circumstance may account for the difference between the impressions of the seals.

The second ground is based upon mere conjecture. Then, even granting that the Exhibit A is a forgery, I do not think that it has been shown that the appellants knew it to be so. Further, on accepting all the facts as correctly found by the Sessions Judge, I do not think that the appellants are guilty of any offence under the Penal Code. The facts are simply these: The appellants, in order to get a recognition from a Settlement Officer that they are entitled to the title of "Loskur," produced a *sanad* purporting to have been granted by the Rajah of Cachar. The document is found not to be genuine. The question is, supposing the appellants used this document knowing it to be not genuine with intent to obtain recognition of their alleged "Loskur" title from the Settlement Officer, is it an offence under s. 471 of the Indian Penal Code, or under any other penal law of the country? The Sessions Judge found the appellants guilty under s. 471 of the Indian Penal Code. In using this document, if they had no fraudulent or dishonest intention, they cannot be guilty under s. 471 of the Indian Penal Code.

S. 24 of the Code defines the word "dishonestly." It is to the following effect: "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly.' Now, the intention of the appellants was not to cause wrongful gain or wrongful loss to any person."

The word "fraudulently" is thus defined in s. 25 of the Code: "A person is said to do a thing 'fraudulently' if he does that thing with intent to defraud, but not otherwise."

In this case evidently the intention of the appellants was to produce a false belief in the mind of the Settlement Officer that they are entitled to the dignity of "Loskur," and in order to produce this belief they produced the *sanad* "A," which has been found to be not genuine. Without defining precisely what would constitute "an intent to defraud," we are clear that it cannot be held in this case that the appellants produced the *sanad* to "defraud" the Settlement Officer, and, therefore, it cannot be said that they used the document "fraudulently," as defined in s. 25 of the Indian Penal Code. We are, therefore, unable to agree with the Sessions Judge that the appellants are guilty under s. 471 of the Indian Penal Code. Nor does the act of the appellants, in our opinion, amount to any other offence. We therefore set aside the conviction, and acquit the appellants.

MITTER, J.—In the appeal by Waris Meah, which is against the conviction by the same Sessions Judge, the same question of law arises. For the reasons given in Appeal No. 87, we are of opinion in this case also that, taking the facts found by the lower Court as correct, the appellant is not guilty of any offence. The Sessions Judge has convicted the appellant of using a document which he finds to be a valuable security. The document in question in this case is a *sanad* of a similar description conferring a certain dignity upon the grantee. A document of this description cannot, in our opinion, be held to be a valuable security, as defined in the Indian Penal Code. We therefore set aside the conviction of the appellant in this appeal also.

Appeals allowed.

1884.

JAN
MAHOMED
v.
QUEEN-
EMPRESS,
10 Cal. 584.

CRIMINAL REFERENCE.

*Before Mr. Justice Tottenham and Mr. Justice Norris.*QUEEN-EMPRESS *v.* BATESAR MANDAL.¹

1884.

Mar. 24.

19 Cal. 604.

False statement before a Registrar—Prosecution under the Registration Act (III. of 1877), s. 82, cl. a, and s. 83—ss. 72 and 73.

Where the accused was tried for intentionally making a false statement in the course of certain proceedings taken before a Registrar, *held* that, even assuming that such proceedings were taken under s. 72 of the Registration Act, and not as they should have been under s. 73, the appearance of the accused before the Registrar, and his taking no objection to the form of the proceedings, will cure the irregularity for the purposes of a criminal trial under the provisions of the Registration Act. Nor under similar circumstances will the want of verification of a petition of appeal on the part of the applicant, as provided by s. 73 of the Act, oust the jurisdiction of the Criminal Court.

Reg. v. James Berry; ² *The Queen v. Thomas Fletcher*; ³ *Turner v. Post Master General*; ⁴ *The Queen v. Hughes*; ⁵ *The Queen v. Smith*⁶ followed.

Held also that, except as directed by s. 82 of Act III. of 1877, the Magistrate has no authority on his own mere motion to frame a charge against the accused, in consequence of evidence given in the course of the trial by the Registering Officer, in respect of certain statements made before him during registration-proceedings.

In this case one Batesar Mandal was alleged to have executed a *kabuliat* in favour of the Maharajah of Durbhanga, and his presence or testimony being necessary for the registration of the document, he was summoned before the Sub-Registrar; and, after having been duly affirmed, denied having signed the *kabuliat*, registration of which was accordingly refused. In due course, the manager of the Maharajah presented a petition to the Registrar, purporting to be an appeal, with the following declaration at foot: "I do declare that what is set forth in this petition is true and correct to the best of my knowledge and belief.—(Signed) Abdul Wahid, Mukhtar." After the petition had been filed, it was marginally marked in the Registration Office, "Appeal No. 15 of 1883." The Registrar, after the necessary inquiries and the examination of Batesar Mandal and others, gave this decision: "I have not the slightest doubt that the witnesses of the respondent, and the respondent himself, have deliberately given false evidence in the case. The appeal is decreed, and the *kabuliat* is directed to be registered. Batesar Mandal is directed to give security for his appearance on the 10th instant before the Magistrate, to whom he and his six witnesses are made over with a copy of the judgment." Pursuant to this order the accused afterwards appeared before the Joint-Magistrate. In the course of the investigation by the Joint-Magistrate into the alleged false statement made before the Registrar, the Sub-Registrar was examined as a witness, and, in consequence of his evidence, the Magistrate on his own motion further charged the accused with having made a false statement before the Sub-Registrar. When the case was ripe for judgment, a petition was presented to the Sessions Judge, praying him to send for the record, and refer the case to the High Court. The Sessions Judge referred the case to the High Court. Mr. Gasper for the accused contended (1) that, as regards the charge, the whole proceedings before the Registrar were *coram non judice*, inasmuch as they were

¹ Criminal Reference, No. 17, and letter No. 29, from *F. Cowley, Esq.*, Sessions Judge of Purneah, dated the 25th February 1884.

² 28 L. J. (M. C.) 86; 8 Cox C. C. 121.

³ L. R., 1 C. C. R. 320.

⁴ 5 B. and S. 756.

⁵ L. R., 4 Q. B. D. 614; 14 Cox C. C. 285.

⁶ L. R., 1 C. C. R. 110; 11 Cox C. C. 10.

taken by way of appeal, and not, as they should have been, under s. 72 of Act III. of 1877; (2) that, inasmuch as the application made to the Registrar had not been verified in manner required by law for the verification of complaints, the whole proceedings before that officer were null and void; (3) that, as regards the charge of giving false evidence before the Sub-Registrar, inasmuch as there was no sanction whatever for the prosecution, the Joint-Magistrate had no authority to frame a charge against the accused.

The judgment of the Court (TOTTENHAM and NORRIS, JJ.), so far as it is material for the purpose of this report, ran as follows:—

With regard to the first point, we were, during the argument, inclined to think that Mr. Gasper's contention was well-founded; but upon consideration, and on examination of the authorities, we are of opinion that it cannot be sustained. For the purpose of this case, we assume that the proceedings before the Registrar were taken under s. 72 of the Act, and not, as they should have been, under s. 73; and that what the Registrar heard was an appeal, and not an application. Now, no doubt, the accused, when he appeared before the Registrar, might have pointed out this irregularity, and might have asked the Registrar to make no order or to dismiss the appeal; but he appeared, made no objection to the form of the proceedings, and must be held to have waived the irregularity. Under these circumstances, we are of opinion that upon the authority of *Reg. v. Barry*,¹ *Queen v. Fletcher*,² *Turner v. Post Master General*,³ *Queen v. Hughes*,⁴ that the accused may properly be charged with giving false evidence at the enquiry before the Registrar. We are also of opinion that the accused waived any irregularity in the verification of the petition of appeal treating that document as an application under s. 73, and that the second contention by Mr. Gasper fails. See the cases above cited and *Queen v. Smith*.⁵

As to the third point raised, we are of opinion that the Joint-Magistrate had no authority to frame the second charge. The prosecution for the offence of giving false evidence before the Sub-Registrar was neither commenced by him or by any of the officers mentioned in s. 83, nor was it sanctioned by any or either of them. These being our views on the case, the Magistrate will proceed to dispose of the first charge against the accused as he may think proper, having regard to the evidence before him, of the sufficiency of which we offer no opinion. The proceedings on the second charge must be set aside.

Additional charge quashed.

¹ 28 L. J. (M. C.) 86; 8 Cox C. C. 121.

² L. R., 1 C. C. R. 320.

³ 5 B. & S. 756.

⁴ L. R., 4 Q. B. D. 614; 14 Cox C. C. 285.

⁵ L. R., 1 C. C. R. 110; 11 Cox C. C. 10.

1884.

QUEEN-
EMPRESS

v.

BATESAR
MANDAL,

10 Cal. 604.

CRIMINAL MOTION.

*Before Mr. Justice Mitter and Mr. Justice Norris.*IN THE MATTER OF JHABBU SINGH AND OTHERS (PETITIONERS).¹1884.
April 22.

10 Cal. 642.

Limitation Act (XV. of 1877), s. 12—Exclusion of time in obtaining copy of judgment.

Certain accused persons were convicted on the 29th February 1884, and made their first application for a copy of the judgment on the 25th March, tendering stamped paper for such copy on the 26th and 29th March. The copy was prepared on the 30th, and the prisoners, who had been admitted to bail on the 5th March, presented their appeal on the 7th April 1884, which was rejected as being out of time. *Held* that the appeal ought to have been admitted.

ON the 29th February 1884 two men were convicted of rioting, and sentenced to six months' rigorous imprisonment. On the 5th March they presented a petition through a mukhtar, stating that they had been unable to appeal, because they were unable to obtain a copy of the judgment (at that time they had, as a matter of fact, made no attempt to do so); but that they would appeal as soon as they obtained a copy, and they further asked to be admitted to bail. The Sessions Judge released them on bail. The prisoners applied for a copy of the judgment on the 25th March, the stamped sheets of paper for the copy being filed on the 26th and 29th March; on the 30th March the copy was ready for delivery. The memorandum of appeal with the judgment were presented on the 7th April 1884; the portion of the order of the Subordinate Judge refusing to receive the appeal ran as follows: "It appears at first sight that the appeal is out of time; it should have been presented by the 30th March; it remains to be seen how many days are to be deducted in calculating the period of thirty days allowed by law."

"On examining the copy of judgment, I find that the application for the copy was made on the 25th March; the requisite stamped sheets were filed on the 26th and 29th, and the copy was ready for delivery on the 30th. How many days are there to be deducted?"

"In my opinion only two, because by 'the requisite stamped sheets' is meant the full number of stamped sheets required. But the appellant's pleader asks, how could the appellant know the number required? I answer that he had had from the date of his release to the date of his application for copy (nearly three months) to find out. The appellant says he had not funds; but if he had applied from the jail for a copy, he would have received it without any cost. If he had applied for a copy within a few days of his conviction, I should have said that he had a right to claim a deduction of the whole time. I find that the appeal is presented out of time, and therefore decline to receive it."

The prisoners applied to the High Court under the revisional sections of the Code of Criminal Procedure.

Baboo *Juggut Chunder Bannerjee* and *Taruck Nath Dutt* for the applicants.

No one appeared for the Crown.

The opinion of the High Court was delivered by

MITTER, J.—We think that the appeal was within time, and should have been registered. We accordingly direct it to be registered and heard by the Sessions Judge.

Order reversed.

¹ Criminal Motion, No. 123 of 1884, from an order of *W. H. Page, Esq.*, Officiating Sessions Judge of Bhagulpore, dated the 8th April 1884.

CRIMINAL REFERENCE.

*Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.*QUEEN-EMPRESS *v.* NGA THA MOUNG AND OTHERS.¹

1884.

April 4.

10 Cal. 643.

Burmah Courts—Transfer of Case—Criminal Procedure Code, s. 178—Reference to High Court—Burmah Courts' Aft (Aft XVII. of 1875), s. 80.

The Local Government has no power under s. 178 of the Code of Criminal Procedure to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon; but the Local Government has the power to transfer a case from the District of Rangoon to the Sessions division of Pegu.

THIS was a reference under s. 80, cl. *b*, of the Burmah Courts' Aft (Aft XVII. of 1875) from the special Court constituted by that Aft. The question referred was whether the Local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon. The facts of the case are fully set out in the opinions of the Judicial Commissioner of British Burmah, Mr. Jardine, and of the Recorder of Rangoon, Mr. Egerton Allen, which are as follows:—

MR. JARDINE.—The prisoners in this case were prosecuted before a Magistrate having jurisdiction in the town of Rangoon, the town being a district in which the Recorder of Rangoon exercises the powers of a Court of Session under s. 60 of the Burmah Courts' Aft of 1875. The same section declares that, for the purposes of s. 64 (*a*) of the Code of Criminal Procedure, the Court of the Recorder shall be deemed to be a High Court, and s. 61 confers on the Recorder all the powers of a High Court under the Code of Criminal Procedure in respect to the proceedings of the Magistrates of the town.

Under s. 3 of the Criminal Procedure Code of 1882, the reference to s. 64 (*a*) must be taken to be made to s. 527 of the same Code. In other respects s. 1 of the same Code preserves the special legislation of the Local Courts' Aft where there is no specific provision to the contrary.

The Magistrate committed the prisoners for trial before the Recorder's Court. No doubt about the jurisdiction of the Recorder to hold the trial seems to have been suggested, and no reference was made to the Judicial Commissioner under s. 185, nor any proceeding taken to quash the commitment under s. 215.

The learned Recorder wrote to the Secretary to the Chief Commissioner to request that the Local Government will be pleased, under the provisions of s. 178 of the Criminal Procedure Code, to direct the transfer of the cases to the Pegu Sessions division for trial by the Sessions Court of that division.

The order of the Chief Commissioner is contained in a letter of 20th September 1883 from his Secretary to the Recorder, directing that the cases be tried in the Sessions division of Pegu. Upon this the learned Recorder forwarded the Record to the Commissioner of Pegu, who, under s. 35 of the Burmah Courts' Aft, "is deemed to have the powers of a Sessions Judge." The Commissioner tried the prisoners in his Sessions Court sitting at Rangoon; the prisoners appealed to me as a Judicial Commissioner; and I admitted their appeals, and then referred them to the special Court for disposal, as I had doubts about the validity of the order of transfer, and the jurisdiction of the Commissioner to determine the merits of the appeals.

¹ Criminal Reference, No. 1, and letter No. C. R. 9-1, from Registrar, Special Court of British Burmah, dated Rangoon, the 10th January 1884.

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I am of opinion that s. 178 does not deal with transfers of cases from one Court to another; a separate chapter (44) is given to such transfers. So far as the present case is concerned, ss. 526 and 527 apply. Under s. 526 the High Court can only act for specific reasons, the power of transfer being evidently one which ought to be rarely exercised under s. 527, the equivalent of the old s. 64 (a). The order of the transfer must come from the Governor-General of India in Council.

S. 178 appears to me to allow the Local Government to direct the trial of cases in a place outside the local jurisdiction of the trying Court, or in a separate portion of the local jurisdiction. For example, if the Commissioner of Arakan is directed by the Government under s. 10 of the Courts' Act to hold his Civil Court in Rangoon, the Government might also, under s. 178, order the same officer to hold trial of Arakan criminal commitments at Rangoon. The same as to the Recorder's Court, under s. 45 of the local Act. In this way I would try to reconcile s. 178 of the Criminal Procedure Code with ss. 70 and 77 of the local Act, and s. 527 of the Criminal Procedure Code. S. 77 gives the Chief Commissioner a power to transfer any criminal case pending in the Recorder's Court to the special Court, but not to any other Court, the principle of the law being apparently that the transfer shall not be to an inferior Court. The special Court is superior, and the Commissioner's Court inferior in powers to the Recorder's Court.

I am bound to take notice of a construction of the local Act by Mr. R. Crosthwaite, Judicial Commissioner in 1880, when the Chief Commissioner passed an order under s. 59 of the local Act transferring to the Judicial Commissioner's Court a criminal case pending for trial in the Recorder's Court on a due commitment. At that time the Judicial Commissioner sat in a jurisdiction transferred from the Commissioner of Pegu and with the powers of a Sessions Judge. Mr. Crosthwaite held that s. 59 did not apply to criminal cases, and it does not seem to have occurred to either him or the Local Government that s. 63 of the Criminal Procedure Code then in force (the equivalent of s. 178) was in any way relevant. The concluding part of Mr. Crosthwaite's judgment in that case (*Queen-Empress v. Abdul*) explains his view of the effect of s. 60 of the Burmah Courts' Act, and, as I am of the same opinion, I quote the passage:—

"The last clause of s. 60 of the Act was apparently intended to provide for cases like the present as well as for others, for it enacts that, for the purposes of s. 64 (a) of the Code of Criminal Procedure, the Court of the Recorder shall be deemed to be a High Court. The present case then may, under this section, be regarded, for the purpose of s. 64 (a) of the Criminal Procedure Code, as pending before a High Court; and, if it is necessary to transfer the case, the Governor-General in Council can do so under s. 64 (a). The transfer cannot perhaps be made to the Judicial Commissioner, because he cannot try criminal cases as a High Court, and the transfer must be made from one High Court to another High Court. But as to this I need give no opinion. There is, it seems to me, a remedy provided for difficulties of the present description by the last clause of s. 60, and if under that clause the Governor-General can only transfer the trial of a criminal case from the Court of the Recorder to a chartered High Court, it is very possible that the Legislature so intended that, and it did not intend that any Court other than a chartered High Court should exercise the jurisdiction over European British subjects conferred by the Act upon the Recorder.

"I am of opinion then that, as the terms of s. 59 plainly do not relate to the transfer of criminal trials, and that, as the provisions of s. 60 give the Governor-

General in Council the power to transfer criminal trials from the Recorder's Court where it is expedient to do so, the construction contended for would be bad in itself, and would be opposed to other provisions of the law, and I therefore conclude that I have no jurisdiction to try this case, and I am bound under these circumstances to decline to try it."

The Court of the Recorder is the creature of the local Act, and is unique in its powers, some of these being those of a Court of Session, others those of a High Court, and these considerations appear to me to give force to Mr. Crosthwaite's reasoning. If the Legislature had intended to give greater power of transfer than what s. 77 gave already, I think it would have used clearer words for that purpose. The Recorder's jurisdiction in many respects resembles the Original Side in a Presidency-town.

As my learned colleague differs in opinion, we must refer the point to the High Court of Bengal, and I would do this before disposing of the merits.

MR. C. F. EGERTON ALLEN.—"Whether the Local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon."

In my opinion, the Local Government may, acting under the provisions of s. 178 of the Code of Criminal Procedure, direct that a case committed for trial to my Court acting as a Court of Session may be tried by the Court of the Sessions division presided over by the Commissioner of Pegu, subject to the proviso to s. 178.

There can be no doubt that the Court of the Recorder of Rangoon is differently constituted from any other Criminal Court, and, therefore, it is impossible to apply the section of the Criminal Procedure Code to it in all respects. But with regard to s. 178 it seems to me applicable in this way that, when the Court sits as a Court of Session, it applies, but not when it sits as a High Court.

In cases where I sit as a High Court, if it was desirable to transfer, for trial elsewhere, a case committed to me, I think such transfer would be made, not by the Local Government, but by the Governor-General in Council.

As I read Mr. Crosthwaite's judgment, the point was not decided by him, his opinion only being given. The point for decision before Mr. Crosthwaite was whether the Local Government could transfer a criminal case from the Recorder's Court to a Court of Session under the provisions of s. 9 of the Burmah Courts' Act, and he held it could not be done, as that section applied to civil and not to criminal cases.

The point referred by the learned Judges of the special Court was: "Whether the Local Government has power to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon."

The *Advocate-General* (Mr. Paul) for the Crown.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the other side.

The judgment of the Court was delivered by

PRINSEP, J.—This case arises out of a reference by the special Court of British Burmah made under s. 80, cl. b, of the Burmah Courts' Act.

The point submitted for decision is stated to be whether the Local Government has power to transfer for trial to the Court of the Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon.

I. L. R., Cal. 70.

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We would, however, premise by stating that the point on which the Judges of the special Court in British Burmah have differed is not accurately expressed, in so far as it has arisen from the case before them. We find rather from the record that the case really for our decision is whether the Local Government has power to direct that a case duly committed to the Recorder of Rangoon in which the accused are natives shall be transferred and tried in any Sessions division, or, as in the present case, in the Sessions division of Pegu.

By s. 60 of the Burmah Courts' Act the Recorder is empowered to exercise the powers of a Court of Session within the local limits of his ordinary civil jurisdiction. This we understand to be the powers of a Court of Session as defined in Ch. III. of the Code of Criminal Procedure. In order to provide for the passing of sentence of death, which, when passed by a Court of Session, is subject to the confirmation of a High Court, it is provided that, when a sentence of death is passed by the Recorder as a Court of Session, it shall be subject to the confirmation of the special Court. These are the general powers of the Recorder's Court, except as regards the trial of European British subjects; in other respects it is deemed to be a High Court, and not a Court of Session. Cl. 3 of s. 60 of the Burmah Courts' Act declares that, for the purposes of s. 64 (a) of the Code of Criminal Procedure, that is, s. 527 of the present Code of Criminal Procedure, the Court of the Recorder shall be deemed to be a High Court. Under s. 61 the Recorder is given the powers of a High Court under the Code in regard to revision of proceedings of the Magistrates within his local jurisdiction. And under s. 62 of the same Act the Recorder is given the powers of a High Court for the trial of, or otherwise with reference to, European British subjects, and persons charged jointly with them. Looking, therefore, at these sections, it appears to us that, in the exercise of revisional jurisdiction, or in the transfer of cases triable by him from his Court to any High Court, and in all matters connected with the trials of European British subjects and persons charged jointly with them, the Recorder possesses all the powers of a High Court. But in other respects he exercises only the powers of a Court of Session.

This is a case which does not fall within s. 527 of the present Code of Criminal Procedure, nor is it a case connected with the revisional jurisdiction of the Court of the Recorder, nor is it a case in which a European British subject, or persons charged jointly with him, is to be tried.

Therefore, in our opinion, it falls within the jurisdiction which the Recorder possesses, acting merely as a Court of Session. Under s. 178 of the present Code of Criminal Procedure, "the Local Government may direct that any case or class of cases committed for trial in any district may be tried in any Sessions division." In regard to such cases Rangoon is a district, and the Recorder's Court is the Court of Session of the Sessions division. The conclusion is, therefore, inevitable that under this section the Local Government is empowered to direct that any ordinary case (such, for instance, as the case before us) committed for trial by the Recorder's Court at Rangoon shall be transferred for trial by the Sessions division of Pegu. But if the Local Government went further, and directed that the case should be tried by a particular Court, we think that such direction and order cannot be sustained, as it is beyond s. 178 of the Code. It has been urged against this view that, under s. 77 of the local Act, the Chief Commissioner may direct that any criminal case pending in the Court of the Recorder of Rangoon shall be transferred to, and tried before, the special Court, and that, hence, we should presume that it was not the intention of the Legislature that any such transfer should be made to a

Court of Session. But the answer to this objection is obvious. The special Court has been created by the local Act; it is not recognised by the Criminal Procedure Code; and if it were intended to transfer a case from the Recorder of Rangoon to the Judicial Commissioner, it could only be done by the special provisions contained in the local Act. This does not, as appears to have been held by the Judicial Commissioner, necessarily or by implication lead to the conclusion that the Legislature never intended any case committed to the Court of Rangoon should not be tried in another Sessions division.

Strictly speaking, therefore, the answer we should give to the reference by the special Court should be that the Local Government has no power under s. 178 of the Criminal Procedure Code to transfer for trial to the Court of the Commissioner a criminal case duly committed for trial by the Court of the Recorder of Rangoon, but that the Local Government has the power to transfer a case from the district of Rangoon to the Sessions division of Pegu.

Attorney for both parties: The Government Solicitor, Mr. R. S. Upton.

APPELLATE CRIMINAL.

Before Mr. Justice McDonell and Mr. Justice Field.

QUEEN-EMPRESS v. UZEER.¹

Confession—Inducement to confess—Criminal Procedure Code (Act X. of 1882), s. 163—Evidence Act (Act I. of 1872), s. 24.

A Deputy Magistrate, before taking down a statement from a person brought before him by the police, noted on the paper on which he was about to take down the statement, the following words, which, after excluding the police-officers from his presence, he had verbally addressed to the accused: "After excluding from my presence the police-officers who brought him, I warned the accused that what he would say would go as evidence against him; so he had better tell the truth." Held that the use of such language was calculated to hold out an inducement to the prisoner to confess, and that such a confession was, therefore, inadmissible in evidence against him.

In this case one Uzeer was charged with murder. It appeared that, when brought before the Deputy Magistrate by the police, the accused made a statement to the following effect, *viz.*, that, owing to a refusal on the part of his wife to get him a light, he had dragged her by her hair into an inner room and slapped her, and that, on his getting a light and seeing that his wife was insensible, he, in his fright, cut her throat with a *dao*, and told the neighbours that she had committed suicide. This statement was prefaced with the following note by the Deputy Magistrate: "After excluding from my presence the police-officers who brought him, I warned the accused that what he would say would go as evidence against him; so he had better tell the truth."

The accused was subsequently committed to the Sessions Court on two charges: (a) murder, s. 302 of the Penal Code; (b) culpable homicide, s. 304 of the Penal Code. The Judge differed from the assessors, and, mainly relying upon the confession, found the accused guilty under s. 302, but sentenced him to transportation for life, as it had not been established that the accused had any intention at the time to cause death, although he knew that he was likely to cause death.

¹ Criminal Appeal, No. 198 of 1884, against the order of H. Muspratt, Esq., Sessions Judge of Sylhet, dated February 8th, 1884.

1884.

QUEEN-
EMPRESSNGA THA
MOUNG,
10 Cal. 643.

1884.

May 15.

10 Cal. 775.

1884.

QUEEN-
EMPRESS

v.

UZEER,
10 Cal. 775.

The prisoner appealed to the High Court. No one appeared on the appeal.

The judgment of the High Court (McDONELL and FIELD, JJ.) was delivered by

FIELD, J.—The appellant in this case, Sheikh Uzeer, has been convicted of the murder of his wife, and has been sentenced under s. 302, Indian Penal Code, to transportation for life.

We have read the proceedings of the Sessions Judge, and we are of opinion that the conviction cannot be supported. The prisoner and his wife were sleeping alone in their homestead on the night of the occurrence; the woman's throat was cut, and she died from the injury thus inflicted, and the consequent loss of blood. The theory of the prosecution is, that the prisoner cut his wife's throat. The medical evidence does not support this theory. On the contrary, the native doctor considered that the wound might have been self-inflicted. It may be said that the opinion of a native doctor on a question of this kind is not of very great value, but this is the medical evidence, whatever it may be worth. There is no testimony of a medical expert to support the theory of the prosecution that the wound was inflicted by the prisoner, and the only medical evidence on the record is against that theory, and in favour of the statement made by the accused on more than one occasion. The Sessions Judge permitted the witness Sarai Bibee to say that the accused said to the darogah that his wife refused to give him water when he wanted to go out and ease himself, so he struck her once, and she fell insensible, and then he cut her throat. This evidence being inadmissible, the Sessions Judge should not have recorded it. The conviction is mainly based upon a confession alleged to have been made by the accused to the Deputy Magistrate. This confession is prefaced with the following note: "After excluding from my presence the police-officers who brought him, I warned the accused that what he would say would go as evidence against him; so he had better tell the truth." A Magistrate of the first class ought to know that to tell a prisoner that he had better tell the truth is a violation of the provisions of the law. (See s. 163 of the Code of Criminal Procedure.) The use of this language has been repeatedly decided to render a confession inadmissible, and we think that, in consequence of this inducement having been held out to the prisoner, the confession in the present case must be rejected. We may observe that it is no part of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him. Putting aside the inadmissible confession and the evidence of a further confession made to the police, there remains no legal evidence upon which the prisoner can be convicted. We therefore set aside the conviction, and direct that the appellant be acquitted and released. A copy of this judgment should be sent to the committing Magistrate.

Appeal allowed.

CRIMINAL REFERENCE.

*Before Mr. Justice Prinsep and Mr. Justice Macpherson.*QUEEN-EMPRESS *v.* DHANANJOI CHAUDHURI AND OTHERS.¹

1884.

Witnesses—Summoning and attendance of Witnesses—Compelling attendance of Witnesses—Evidence—Criminal Procedure Code (Act X. of 1882), s. 257.

June 26.

10 Cal. 931.

Certain witnesses who had been summoned for the accused failed to appear on the day of trial, and the Deputy Magistrate refused to adjourn the hearing or to issue fresh processes for the attendance of the defendants' witnesses, on the ground that they were all friends of the accused, who would come to Court if the accused desired it. The prisoners were convicted.

Held the conviction must be set aside, the Magistrate having once granted processes he was bound to assist the accused in enforcing the attendance of his witnesses.

THIS was a reference under s. 438 of the Code of Criminal Procedure from the Sessions Judge of the 24-Pergunnahs, who recommended that the order passed by the Deputy Magistrate in this case should be quashed as illegal. The fact of the case sufficiently appears in the judgment of the Court.

No one appeared on the reference.

The judgment of the Court (PRINSEP and MACPHERSON, JJ.) was as follows :—

The Deputy Magistrate in this case has convicted the accused without examining certain witnesses who had been summoned for the defence. It appears that on the day of trial these witnesses were not present, and the accused asked for fresh processes. The Deputy Magistrate refused to postpone the trial, or to issue fresh processes, on the following ground : " The witnesses are all friends of the accused, and could have been produced to-day, even if they did not receive the summonses. I therefore decline to grant this petition." Having once granted the processes for the attendance of these witnesses, this was not sufficient ground for the refusal to assist the accused in obtaining their evidence. If the Deputy Magistrate in the first instance considered, under s. 257 of the Code of Criminal Procedure, that the application for summons for these witnesses was made for purposes of vexation or delay, or for defeating the ends of justice, he might have refused to summon them at all. But, having once granted the processes, he was bound to assist the accused in enforcing the attendance of the witnesses. The conviction and sentence must, therefore, be set aside, and the trial must proceed, processes being issued for the attendance of these witnesses.

Conviction quashed.

CRIMINAL REVISION.

*Before Mr. Justice Prinsep and Mr. Justice Macpherson.*QUEEN-EMPRESS *v.* SADHEE KASAL AND OTHERS.²

1884.

Pardon—Criminal Procedure Code (Act X. of 1882), s. 337, read with s. 338—Offences not exclusively triable by Court of Session.

July 1.

10 Cal. 936.

A Sessions Judge cannot tender a pardon to an accused under s. 338 of the Criminal Procedure Code, where the offence for which he has been committed is not " triable exclusively by the Court of Session."

¹ Criminal Reference, No. 80 of 1884, from an order of the Deputy Magistrate of Basirhat, dated the 31st May 1884.

² Criminal Motion, 201 of 1884, from a decision of A. Smith, Esq., Judge of Gya, dated 17th May 1884.

1884.

QUEEN-
EMPRESS

v.

SADHEE
KASAL,
10 Cal. 936.

ON inspection of the statement of the Criminal Session of the Judge of Gya for the months of April and May, the High Court, under s. 435 of the Criminal Procedure Code, called for the record of the above-mentioned case, in which Chowri Kasal and Sadhee Kasal had been charged under s. 411 of the Penal Code with dishonestly receiving and retaining certain stolen property, knowing it to be stolen. It appeared that in the Sessions Court Chowri Kasal had been granted a pardon under s. 338 of the Criminal Procedure Code and released, and Sadhee Kasal was found by both assessors to be guilty under s. 411 of the Penal Code, and was sentenced to rigorous imprisonment for two years by the Sessions Judge. After perusing the record, the Court (PRINSEP and MACPHERSON, JJ.) passed the following order :—

As the case is now presented to us on review of the Sessions Judge's statement, and on perusal of the record we think it sufficient to point out to the Sessions Judge that the offences under trial not being exclusively within the jurisdiction of the Court of Session, the Sessions Judge was not competent to tender pardon under s. 338 of the Criminal Procedure Code to Chowri Kasal.

CRIMINAL REVISION.

Before Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Norris.

1884.

April 28
& July 7.

10 Cal. 937.

HABIBULLAH (ACCUSED) v. QUEEN-EMPRESS (COMPLAINANT).¹

Alternative charge and conviction—False evidence—Penal Code (Act XLV. of 1860), s. 193—Criminal Procedure Code (Act X. of 1882), ss. 233, 554, and sch. 5, XXVIII., II. (4).

A prisoner was convicted on an alternative charge in the form provided by sch. 5, XXVIII., II. (4) of the Criminal Procedure Code (Act X. of 1882), of having given false evidence, such evidence consisting of contradictory statements contained in *one* deposition while he was under cross-examination and re-examination as a witness in a judicial proceeding. There was no finding as to which of the contradictory statements was false.

Held (NORRIS, J., dissenting) that s. 233 of the Criminal Procedure Code did not affect the matter, and that the conviction was good.

Semle per WILSON, J.—The decision in *The Queen v. Bedoo Noshyo*,² though a guide to the discretion of Courts in framing and dealing with charges, was not intended to, and does not, affect the law applicable to the matter.

THIS was a rule to show cause why the conviction of the petitioner under s. 193 of the Indian Penal Code before the Joint-Magistrate of Dacca, affirmed on appeal by the Sessions Judge, should not be set aside as bad in law.

The facts of the case were as follows :—

The petitioner was charged in the alternative with having committed perjury in a deposition given by him during the hearing of certain suits in the Court of the Second Subordinate Judge of Dacca. He was examined as a witness on behalf of the defendants in those suits, and during his cross-examination, which commenced on the 12th September, he admitted that certain entries in account-books and certain letters were in his handwriting. On the 13th September he was re-examined (his cross-examination having terminated late on the evening of the 12th), and on his re-examination he contradicted his statements as to the entries and the letters, and swore positively that they were not in his handwriting. It was in respect of these contradictory statements that

¹ Rule No. 66 of 1884, against the order of *E. Staley, Esq.*, Officiating Joint-Magistrate of Dacca, dated the 10th day of December 1883, affirmed by *T. Smith, Esq.*, the Sessions Judge of Dacca, dated the 14th January 1884.

² 12 W. R., Cr., 11.

sanction to prosecute was given, and that the charge was brought. The Joint-Magistrate, finding that he had a strong motive for contradicting his first statement, and that it was not a mistake made through inadvertence, without deciding as to which of the statements was false, convicted the accused upon two similar charges, one in respect of the statement as to the entries in the account-books, and the other in respect of the statement as to the letters, and sentenced him to a year's rigorous imprisonment on each charge.

This decision was upheld on appeal by the Sessions Judge.

The petitioner then applied to the High Court in the exercise of its revisional powers, to send for the record with a view of quashing the Magistrate's order, on the ground that an alternative charge of giving false evidence under s. 193 of the Indian Penal Code would not lie, when the charge was based upon contradictory statements contained in one and the same deposition.

On the hearing of the application, Mr. Pugh and Mr. M. P. Gasper appeared on behalf of the petitioner, and the Court issued the present rule.

The rule came on to be heard before a Division Bench of the High Court consisting of TOTTENHAM and NORRIS, JJ.

Mr. Pugh, Mr. M. P. Gasper, Baboo Doorga Mohun Dass, and Baboo Umbica Churn Bose for the petitioner.

The Advocate-General (Mr. G. C. Paul) and Baboo Chunder Madhub Ghose for the opposite party.

The Advocate-General in showing cause against the rule cited *The Queen v. Mussamat Zumeerun*¹ and *The Queen v. Mahomed Humayoon Shah*.²

Mr. Pugh in support of the rule referred to *Empress of India v. Niaz Ali*,³ the judgment of Jackson, J., in *The Queen v. Mahomed Humayoon Shah*,² and upon the question of the effect of illustrations to an Act, to *Keylas Chunder Ghose v. Senatun Chung Barooie*.⁴ He also referred to *Taylor on Evidence*, 7th edition, 708; *Roscoe on Evidence*, 825; and *Peake's Nisi Prius*, 52.

The nature of the arguments appears sufficiently from the judgments of the Division Bench, which were as follows:—

TOTTENHAM, J.—This is a rule to show cause why the conviction of the petitioner under s. 193 of the Indian Penal Code before the Joint-Magistrate of Dacca, affirmed by the Sessions Judge on appeal, should not be set aside as bad in law.

The charge upon which the petitioner was convicted was in the alternative form, of which an example is given in the fifth schedule of the Code of Criminal Procedure, and in respect of two contradictory statements made by the petitioner in the course of one and the same deposition; the one being made one day in cross-examination, and the other the following day in re-examination.

The ground on which we have been asked to interfere, and set aside the conviction, is, that a charge, in the alternative form, of intentionally giving false evidence by making contradictory statements, cannot legally be framed where the statements in question are contained in one single deposition, but is allowable only in case the statements are contained in distinct separate depositions.

¹ 6 W. R., Cr., 65; B. L. R., F. B., 521.

² 21 W. R., Cr., 72; 13 B. L. R. 324.

³ I. L. R., 5 All. 17, p. 22.

⁴ I. L. R., 7 Cal. 102, p. 135.

1884.
HABIBULLAH
v.
QUEEN-
EMPRESS,
10 Cal. 957.

1884.

HABIBULLAH

v.

QUEEN-
EMPRESS,
10 Cal. 937.

The particular form given in the schedule to the Code clearly refers to separate depositions made on distinct occasions, *viz.*, in an enquiry before a Magistrate, and at the subsequent trial in the Sessions Court. It is contended that there is no warrant in law, except in this form and in s. 554, which authorizes its use, for a single alternative charge of giving false evidence; and it is submitted that the law should not be stretched in this direction, so as to have a charge in the alternative made in respect of contradictory statements made in the course of one deposition. And it is argued that, if such a charge is good in law, no witness could safely correct an erroneous statement once made; for, by so doing, he would render himself liable to prosecution, and, if prosecuted, his conviction would inevitably follow should there be no obligation on the prosecution to prove which of the two statements was false.

After giving the matter the most careful consideration in my power, I am of opinion that there is nothing illegal in the charge before us; and that the conviction had upon it is good in law. In this country it has more than once been held that a conviction for intentionally giving false evidence may be had upon a charge in an alternative form, and without any finding as to which statement is false. The Full Bench cases, *Queen v. Mussamat Zumeerun*¹ and *Queen v. Mahomed Humayoon Shah*,² establish this proposition, and the present Code of Criminal Procedure, by providing a form for such a charge, has continued the state of the law previously existing. And there seems to be no authority for holding the contrary view, or for confining that view to cases in which two distinct proceedings are in question; and little reason except supposed expediency. The argument that, because the form given as an example in the schedule to the Code deals with a case in which the two statements were made in distinct proceedings, therefore no similar form may be used in respect of statements made in one and the same proceeding, appears to me not entitled to any weight.

For s. 554, which prescribes the use of the forms in the schedule, expressly provides for such modifications in the forms as the circumstances of cases may require. A witness may, and sometimes does, make as flagrantly contradictory statements in the same proceeding as he may make in two distinct proceedings, and it may be as difficult in one case as the other to determine which is false. I see no reason to suppose that the Legislature intended to give immunity in the one case, but to allow a prosecution in the other. It seems to me only reasonable to suppose that it was intended that the same peril should attend the witness in either case.

And as to the argument, that this view of the law renders it unsafe for a witness even to correct or alter a statement which he has once made, I do not think that an honest witness has any reasonable ground for apprehension. He cannot be prosecuted unless the Court before which he has deposed, or a superior Court, sanctions a prosecution after such enquiry as may be necessary; and no Court would sanction the prosecution of a witness, unless satisfied that he had deliberately and intentionally made the two contradictory statements, not merely by way of *bond fide* correction of a mistake, but intending in one or other instance to state what he knew to be untrue or did not know to be true. And, further, even when prosecuted, the witness cannot be convicted on an alternative charge for correcting an error; but can be convicted only upon the Court being satisfied that in one or other of the instances charged the accused did *intentionally* give false evidence. The essence of the offence is the *intention*, and that may exist where the contradiction is in various stages of a single

¹ 6 W. R., Cr., 65; B. L. R., F. B., 521.

² 21 W. R., Cr., 72; 13 B. L. R. 324.

deposition, as well as where it is manifested in two distinct proceedings. I come, therefore, to the conclusion that the law permits the charge upon which the petitioner has been convicted, and I see no particular hardship in that state of the law to a person who wilfully gives false evidence.

I would discharge this rule, and would order the petitioner to undergo the sentence passed upon him.

NORRIS, J.—The petitioner in this case was examined as a witness on behalf of the defendants at the hearing of the suits, which were tried together by the Second Subordinate Judge of Dacca. The petitioner's examination-in-chief and cross-examination took place on the 12th September 1883; the cross-examination was not concluded until a late hour, and the re-examination was postponed until the following day. In his cross-examination the petitioner admitted that certain entries in certain account-books, which were shown to him, were in his handwriting; and that a letter, in which he admitted that he had been guilty of embezzlement, was also in his handwriting; in his re-examination he contradicted his previous statements with regard to the entries and the letter, and positively denied that any or either of them were in his handwriting. Sanction having been obtained from the Judge for the institution of a prosecution against the petitioner, he was brought before the Officiating Joint-Magistrate of Dacca, who, after taking evidence, framed the following charge: "I hereby charge you, Khajieh Habibullah, as follows: That you, on or about the 12th day of September 1883, at Dacca, in a stage of a judicial proceeding, *viz.*, in the trial of suits Nos. 88 and 93 of 1882 in the Court of the Second Subordinate Judge, being a witness cited by the defendants in those, the jointly-tried, suits, on solemn affirmation stated, 'Exhibit IX. is in my handwriting, and the signature is mine,' and on the 13th day of September, in the same judicial proceeding, stated, 'Exhibit IX. is not in my handwriting,' and whereas one of those statements you either knew or believed to be false, or did not believe to be true, you thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of this Court, and I hereby direct that you be tried by this Court on this said charge." The Magistrate also framed a second charge with reference to the petitioner's statements regarding the entries in the account-books. The Joint-Magistrate convicted the petitioner, and sentenced him to two years' rigorous imprisonment, one year on each charge. The petitioner appealed to the Sessions Judge, who confirmed the conviction; he then applied to us, in the exercise of our revisional powers, to send for the record with a view of quashing the Magistrate's order, on the ground that an alternative charge of committing an offence under s. 193 of the Indian Penal Code was bad where such charge was based upon alleged contradictory statements made in the same deposition.

We granted a rule to show cause why the conviction should not be set aside. On the argument of the rule, the Advocate-General appeared to show cause; Mr. Pugh and Mr. Gasper supported the rule. I regret that after the best consideration I have been able to bestow upon the case, I find myself unable to agree with my brother Tottenham in the conclusion at which he has arrived.

I am of opinion that the rule should be made absolute. The Advocate-General urged that the point was concluded by authority, and he referred us to two cases, *Reg. v. Mussamat Zumeerun* and *Reg. v. Mahomed Humayoon Shah*. These were both Full Bench decisions; the first was a decision upon the provisions of the Code of Criminal Procedure of 1861 with regard to alternative charges, the second was a decision upon the provisions of the Code of 1872 with reference to such charges.

I. L. R., Cal. 71.

1884.
HABIBULLAH
v.
QUEEN-
EMPRESS,
10 Cal. 937.

1884.
 HABIBULLAH
 v.
 QUEEN-
 EMPRESS,
 10 Cal. 937.

I am undoubtedly bound by these decisions, unless I can distinguish the facts upon which those decisions were based from the facts of this case. I trust, however, that I shall not be considered presumptuous, if I respectfully say that I share in the doubts expressed by Norman and Campbell, JJ., in the first case, and that the judgment of Jackson, J., in the second case, and the reasoning by which he arrived at his conclusion, commend themselves to my judgment. There appears to me, however, to be an essential distinction between the cases above cited and this case. In both the cited cases the alleged contradictory statements were made in two separate depositions taken on two distinct occasions. In *Reg. v. Mussamul Zumeerun* the first statement was made before a Magistrate on the 14th October 1865, and the second statement before a Sessions Judge on the 18th December 1865.

In the case of *Reg. v. Humayoon Shah*, the charge against the prisoner was "that he did, on or about the 23rd January 1873, at Alipore, in the course of the trial of Tulsi Dass Dutt and Mahomed Latif on a charge of cheating, state in evidence before Moulvi Abdul Latif, Deputy Magistrate of Alipore, that, &c., &c., and that he did, on or about the 13th February 1873, in the course of the trial of I. R. Belilias, Tulsi Dass Dutt, and Mahomed Latif in the same case of cheating, state in evidence before Moulvi Abdul Latif, Deputy Magistrate of Alipore, that," &c., &c.

Now, it is plain that, though it is called "the same case of cheating," it could not have been, strictly speaking, "the same case." The case on the 23rd January was a case against two persons only, Tulsi Dass Dutt and Mahomed Latif; the case on the 13th February was one against three persons, I. R. Belilias, Tulsi Dass Dutt, and Mahomed Latif. I. R. Belilias had clearly been added as a defendant between 23rd January and 13th February; the prisoner's evidence against the two defendants on 23rd January could not have been used against the added defendant on 13th February without his having been re-sworn. There would thus be two depositions on two distinct occasions on two different charges.

In this case, though a night elapsed between the cross-examination and the re-examination of the petitioner, the alleged contradictory statements were made in one and the same deposition, on the hearing of one case.

I think it would be a very dangerous thing to extend the principle of the Full Bench cases to such a case as this; it would render it unsafe for a witness to correct the deposition. I am of opinion, upon the ground of the distinction I have pointed out, that the Full Bench cases are not in point, and that the rule should be made absolute.

The Judges having disagreed, the case was referred to Mr. Justice Wilson, and re-argued before him.

The same counsel appeared as at the previous hearing, with the exception of Mr. Pugh—Mr. M. P. Gasper arguing the case in support of the rule.

The following judgment was delivered by

WILSON, J.—This case has been referred to me in consequence of a difference of opinion between Tottenham and Norris, JJ.

The accused has been charged with, and convicted of, offences under s. 193 of the Penal Code. Each charge followed the form given in Sch. V., XXVIII., II. (4) to the Code of Criminal Procedure, and charged him with having, in the course of a judicial proceeding, made, as a witness, two contradictory statements, one or other of which he knew to be false, or did not believe

to be true. The conviction is in accordance with the charge, without any express finding which of two contradictory statements was false.

Mr. *Gasper*, who appeared for the accused, raised these points. First he argued that, under the present law, a charge and conviction of this nature is in no case good. The validity of such charges has twice come before Full Benches of this Court.

In *The Queen v. Mussamut Zumeerun*, such a charge seems to have been regarded as an alternative charge of perjury committed either on the one occasion or on the other, and to have been held good on that ground under the Procedure Code then in force. If the matter be viewed in that light, it would be very difficult to reconcile such a charge with s. 452 of the Code of 1872, or with s. 233 of the present Code, which requires that each offence shall be the subject of a separate charge, except in the particular cases (of which this is not one) in which alternative charges are expressly allowed.

But in the subsequent Full Bench case of *The Queen v. Mahomed Humayoon Shah*, Couch, C.J., with whom Kemp, J., concurred, expressly lays down that such a charge is not a charge of two offences in the alternative, but of one offence. And I think the judgments of Morris, J., with whom Birch, J., concurred, and of Ainslie, J., embody the same view. The other two Judges, who made up the majority of the Court, did not give their reasons. I think I am bound to accept this view of the law, though, if it were not framed by authority, it is not a view that I should myself have taken.

If this be so, s. 233. does not affect the matter. And the form of charge given in the schedule, which is sanctioned by s. 554, and has been followed in this case, is legitimate, and may be followed by a corresponding conviction. I think, therefore, that Mr. *Gasper's* first contention fails.

Secondly, he argued that a charge and conviction in the present form can only properly be used in a case in which it is impossible to find, upon the evidence obtainable, which of the two inconsistent statements is true; and for this he cited *The Queen v. Bedoo Noshyo*. As a guide to the discretion of Courts in framing charges, and in dealing with them, I think what is there said is of great importance. But it cannot affect, and was not, I think, intended to affect, the law applicable to the matter.

Thirdly, Mr. *Gasper* argued that the rule which has been laid down does not apply in a case where, as here, the two inconsistent statements have been made in the course of the same deposition. It is, no doubt, very important that a witness honestly desiring to correct an error in his evidence should not be deterred from doing so by the risk of a criminal charge. And charges arising out of alleged inconsistent statements in a deposition may well require, and I think they so require, to be watched with special care. But I can see no sufficient distinction in principle between such contradiction in one deposition and in two. If it is an offence under s. 193 to make two contradictory statements, one or other of which must be false, and to do so with a guilty intention, on two distinct occasions, I think it must be equally an offence to make them on one occasion.

I therefore agree with the view of Tottenham, J., upon the matter referred to me.

WILSON, J. (TOTTENHAM, J., concurring).—The rule must be discharged, but the period during which the rigorous portion of the sentence was suspended will count as part of the original sentence.

Rule discharged, and conviction affirmed.

1884.

HABIBULLAH
v.
QUEEN-
EMPRESS,
10 Cal. 937.

APPELLATE CRIMINAL.

*Before Mr. Justice Prinsep and Mr. Justice Macpherson.*QUEEN-EMPRESS *v.* BEPIN BISWAS AND OTHERS.¹

1884.

June 26.

10 Cal. 970.

Trial by Jury—Jurisdiction of Judge—Evidence of Approver—Corroboration—Confession of one of several prisoners.

It is open to a Judge in charging the jury to express his opinion as to the effect of a certain portion of the evidence ; but he should always be careful to add that it is for the jury to form their own opinion.

Exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence such as is ordinarily required to make it safe to convict a particular prisoner.

Confessions of prisoners are not, as against their fellow-prisoners who were not present when the confessions were made, such corroborative evidence of the statement of an approver as would justify the conviction of the other prisoners thereon.

Confessions of two of several accused persons made in the absence of the others are of no weight as against the latter.

Such confessions, as well as the statements of approvers, are always regarded as tainted ; because, from the position occupied by the persons making them, they are not entitled to the same weight on the evidence of ordinary witnesses.

An accused person is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficient *prima facie* to convict him of the offence.

In this case eleven persons, namely, Bepin Biswas, Kunju Mundle, Dukee Ghose, Bidesi Ghose, Dukee Dye, Nadi Ghose, Tincouri, Ram Mundle, Sham Ghose, Gopi Ghose, and Sanyasi Ghose, were tried for dacoity before a Sessions Judge and a jury. One of the persons originally accused before the Magistrate turned approver, and two of the abovenamed persons, namely, Bepin Biswas and Kunju Mundle, made confessions before the Magistrate, which they afterwards retracted and denied. The verdict of the jury was as follows :—

“ We are unanimously of opinion that Bepin Biswas, Kunju Mundle, Dukee Ghose, and Nadi Ghose, are guilty of dacoity under s. 395 of the Indian Penal Code. We would acquit the others, namely, Tincourie, Ram Mundle, Sham Ghose, Gopi Ghose, and Sanyasi Ghose. We find that Bepin and Kunju did voluntarily make the confessions imputed to them.”

The prisoners appealed to the High Court.

The judgment of the High Court (PRINSEP and MACPHERSON, JJ.) was as follows :—

“ The six appellants have been convicted of dacoity in a trial held by jury. The evidence against them consisted of the evidence of an approver and of certain witnesses who said that they recognized the appellants at the dacoity. It is also in evidence that some “ *mdls.*,” part of the stolen property, were found in the house of Dukee Dye, one of the appellants ; and two others, Bepin and Kunju, made confessions before the Magistrate, which they have since retracted and denied. In laying before the jury the evidence of the witnesses who speak to having recognized the prisoners, the Judge has very properly pointed out that, when the offence was reported to the police, no one was

¹ Criminal Appeal, No. 321 of 1884, from the judgment of *J. M. Kirkwood, Esq.*, Sessions Judge of Moorshedabad, dated 17th of May 1884.

mentioned as having committed the dacoity, which would be extremely unlikely if any of the villagers had recognized any of the dacoits. He has also mentioned the fact that these witnesses admit that they had previously no acquaintance with those they profess to have recognized in the confusion of the dacoity, and that the night was dark. The Judge has summed up this evidence in the following words :—

“To such identification as this I am unable to attach any weight. It may, possibly, be explained to some extent by a theory that these witnesses, who that night saw these persons, carried away a general impression of their appearance, without being certain as to who they were, found on the arrest of the prisoners that they resembled those impressions, and they were in reality men they had known before.

“At the same time, it appears to me highly probable that the pursuers did get hold of some idea of the men they were pursuing, and that it is in no way improbable that the identifications, at least as regards the men not known to them by name before, were made to the best of their ability, and with every wish to be accurate.”

This was not a correct way of placing the evidence before the jury for their consideration. It was certainly open to the Judge to express his own opinion regarding it, and he did do so when he stated that he was “unable to attach any weight to it.” He should, however, have been careful to add that it was for the jury to form their own opinion on this evidence. But his subsequent remarks were certainly calculated to place this evidence before the jury in a manner very prejudicial to the prisoners, inasmuch as it would tend to make the jury altogether lose sight of the much more important considerations already mentioned, *viz.*, that the night was dark, and that none of the dacoits were named in the early stage of the police-investigation.

But the Judge's charge to the jury is open to much stronger objection in other respects. The evidence of the witnesses who profess to have recognized the appellants is clearly not the principal evidence in the case, on which the Judge himself, and, as far as we can determine from the character of the charge to the jury, the jury must have relied, with the exception of that relating to the finding of the “*malis*” in the house of Dukee Dye ; that evidence consists of the evidence of an approver, and we have also the two statements or confessions made by Bepin and Kunju before the Magistrate. The Judge has thus directed the jury in this respect : “It is not illegal for you to convict on the unsupported testimony of an accomplice if you fully believe it.”

“But, ordinarily, before convicting on such testimony, you should see if that testimony has received strong corroboration. In my opinion, it would not be safe to convict on the statement made in this Court by Heera Lall (the approver), unless that statement receives strong corroboration. Now, it is a corroboration of Heera Lall's statement made before you yesterday, that on two previous dates (the 5th and 2nd April) he made statements in full detail of the events of that night. These statements, in all important particulars, agree one with the other ; the only discrepancies are one or two very slight ones as to the parts one or two of the accused played during the plundering of the house, and this may well be, when one considers that the operators were not standing still, but in constant movement and activity. It is important, however, for you to notice that on each of these three occasions he gives the same version.” The Judge then proceeds to mention the points of correspondence ; but we do not find that he drew attention to the discrepancies to which he has also generally alluded.

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QUEEN-
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The mere repetition of the same statement of facts without contradiction or material discrepancy is, no doubt, recognized by s. 157 of the Evidence Act, as some corroboration of the truthfulness of that statement; but the Judge has lost sight of the fact that, from the position occupied by an approver-witness, his evidence is necessarily regarded with very great suspicion as being tainted, and that, although he may, on the main facts connected with the commission of the offence, be truthful and reliable, it is when he comes to implicate any particular person that his evidence should be accepted with the greatest caution. Nothing is easier for a man than to narrate events with accuracy, and yet more so, when coming to describe the acts of a particular person, to change his personality so as to exculpate a guilty friend, and to implicate an innocent person or an enemy.

It is for this reason that the rule stated in the case of *The Queen v. Nawab Jan*¹ has always been accepted. In that case, Macpherson, J., pointed out that "there was no corroboration such as adds to the approver's evidence against Nawab Jan, because there is no evidence, apart from that of the accomplice, which identifies the prisoner with the commission of the offence with which he is charged; nothing which distinctly goes to prove that he was in any way connected with the commission of the principal offences. Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the "accomplices say is true." He would also refer the Judge to the cases of the *Queen v. Baikanthanath Banerjee*² and *Queen v. Mohesh Biswas*,³ as well as to *Reg. v. Malapabin Kapana*.⁴ In the last case the Bombay High Court refused to accept, as evidence corroborative of that of the approver, statements made by him on different occasions to his parents shortly after the murder, pointing out that his statement, whether made at "the trial, or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not improve by repetition." It is not necessary for us to consider whether the rule should be extended as far as to exclude a statement made before arrest; but we have no doubt at all that the exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence such as we ordinarily require to make it safe to convict any particular prisoner.

The Judge has further misdirected the jury in telling them to regard as evidence in corroboration of the approver the statements made by the prisoners, Bepin and Kunju, when examined by the Magistrate. Such statements are no legal corroboration of the tainted evidence of the approver. See *Reg. v. Malapabin Kapana*,⁴ *Queen v. Budhu Nanku*,⁵ *Queen v. Jaffer Ali*.⁶ Statements so made are certainly of no higher value than that of an approver. It should also be remembered that a prisoner under trial would have the advantage of cross-examining an approver, whereas the statement of a fellow-prisoner, which would be as much tainted as that of an approver, would be subject to no such test. See *Queen v. Naga*.⁷ In the case now before us, we would further point out that the fact, that the statements made by Bepin and Kunju before the Magistrate were made in the absence of the other prisoners whom it is intended

¹ 8 W. R. Cr. 19 (26).² 3 B. L. R. 3 (F. B.).³ 19 W. R. Cr. 16.⁴ 11 Bom. H. C. R. 196.⁵ 1 L. R., 1 Bom. 475.⁶ 19 W. R. Cr. 57.⁷ 23 W. R. Cr. 24.

to implicate thereby, should alone have induced the Sessions Judge to caution the jury against attaching any weight to them at all, except as against those who made them,

Next, the Sessions Judge should not have told the jury that, "in the absence of anything whatever to show enmity, or why the other prisoners should have been falsely named by the approver and the two confessing prisoners, there is sufficient material on which to convict them legally, but that, at the same time, it is desirable that, if possible, the jury should have independent evidence of the identity of the accused."

In thus directing the jury, the Judge has put the evidence of the approver and the statements of the two prisoners before the Magistrate on the same footing as the evidence given by any ordinary witness. He has altogether overlooked the fact that one invariable practice is to regard such statements as tainted, because, from the position occupied by the persons making them, they are not entitled to the same weight as the evidence of an independent witness.

We next find that the Sessions Judge has commented on the fact that one of the appellants was absent from home on the night of the dacoity, and that he has adduced no evidence to contradict this, or to show that he was "innocently engaged." This is an observation that should not have been made, and cannot but have seriously prejudiced the prisoner Bidesi, for his own absence from home would be no legal corroboration of the evidence of the approver, unless there was *prima facie* sufficient legal evidence to convict him of the offence, he would not be bound to account for his movements.

We have, therefore, no hesitation in holding that the Sessions Judge has misdirected the jury in such a manner as to demand a new trial. Having regard to the special terms of the verdict of the jury convicting Bepin and Kunju, we should ordinarily have affirmed their convictions, but we find ourselves unable to hold that they too have not been seriously prejudiced by the Judge's charge. For instance, the Sessions Judge told the jury: "As regards Kunju and Bepin, I may say that the evidence I have discussed is in any case ample for their conviction." Again: "But Bepin likewise has not been mentioned by any of the villagers, yet the evidence can leave no doubt of his guilt." It is true that the Sessions Judge at the close of his charge said: "If you feel yourselves able to rely implicitly on the statements made by Kunju and Bepin, you should convict them, notwithstanding the absence of further corroboration;" but it is impossible to say how far the observations previously made, and just quoted, did not have such effect on the minds of the jury as to determine their verdict independently of all other considerations.

Under such circumstances, we think that they also should be re-tried.

New trial ordered.

ORIGINAL CRIMINAL.

Before Mr. Justice Field.

QUEEN-EMPRESS v. MATHEWS.

Incriminating statement by Prisoner to Police-officer—Evidence of Police-constable.

A policeman, on being cross-examined, stated that, when he arrested the prisoner, the prisoner said to him, "Some Chinamen, at the time of the occurrence, came out with hatchets;" in re-examination, the policeman so far altered the words stated to have been

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10 Cal. 970.

1884.

July 21.

10 Cal. 1022.

1884.

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EMPRESS

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MATHEWS,
10. Cal. 1032.

used by the prisoner as to substitute for the words *at the time of the occurrence*, the words *at the time*; and on being asked if the prisoner had explained "what time," answered he said at the time I struck the deceased.

Counsel for the prisoner interposed and objected to the evidence. The Standing Counsel contended that he was entitled to clear up a matter which had been left in doubt by the cross-examination.

Held that the evidence could not be given.

ONE Mathews had been committed to the Sessions by the Presidency Magistrate of Calcutta, charged with murder. At the trial, a police-officer was examined for the prosecution, and, in the course of cross-examination, gave the following answer to Mr. *Gasper*, who appeared for the defence.

A.—The prisoner, when I arrested him, said: "Some Chinamen at the time of the occurrence came out with hatchets."

Re-examined by the Standing Counsel (Mr. *Phillips*).

Q.—Did the accused use the word "occurrence"?

A.—He said "at the time."

Q.—Did the accused explain "what time"?

A.—He said "at the time I struck the deceased——."

Mr. *Gasper*.—I object to this.

[FIELD, J.—The evidence cannot be given. I must instruct the jury to put out of their minds anything the present witness, being a policeman, may say implicating the prisoner by quoting words alleged to have been used by the prisoner himself.]

The Standing Counsel (Mr. *Phillips*).—Your Lordship will hear me on the point. I am entitled to obtain an answer to the question I have asked, even if the reply should bring out any statement, or part of a statement, made by the accused implicating himself to the witness. The Court will remember that my question is directed to clear up a matter left in doubt by the cross-examination, not an independent enquiry started by the prosecution. The witness used an ambiguous expression "the time." I am entitled to fix the precise meaning he attached to these words. For instance, if the accused had said to the police-officer, "I did not kill the deceased with a knife, but shot him with a pistol; and the cross-examining counsel extracted from the witness the statement that the accused had used the words, "I did not kill the deceased," surely the prosecution, in re-examination, is entitled to get from the witness the whole statement made by the accused on the occasion.

[FIELD, J.—I don't think you would be entitled to have the words *in extenso*. You might, perhaps, get the witness to say the accused had qualified that statement, but you could not have the exact words he used if they amounted to an incriminating statement. The law is imperative on the point.]

Mr. *Gasper*.—As the witness has already given us a part of the statement made by the accused, I prefer the whole statement being given to the jury, as the whole statement shows that he did not strike the deceased with a knife.

[FIELD, J.—I am afraid I cannot permit that; the law is imperative in excluding what comes from an accused person in custody of the police, if it incriminates him.]

ORIGINAL CRIMINAL.

Before Mr. Justice Field.

THE QUEEN-EMPRESS *v.* GREES CHUNDER BANERJEE.

1884.

July 28, 29, 30.

10 Cal. 1024.

Evidence—Absence of entry in a book irrelevant—Act I. of 1872, s. 34—Reply, Prosecutor's right of—Criminal Procedure Code (Act X. of 1882), ss. 289, 292.

Though, under s. 34 of the Evidence Act, the actual entries in books of account regularly kept in the course of business are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter.

The fact that the accused has, during the cross-examination of the witnesses for the prosecution, used certain documents, and that such documents have been put in as evidence on his behalf, does not entitle the prosecutor to the right of reply, if, when asked upon the close of the case for the prosecution whether he means to adduce evidence, the accused says that he does not.

THIS was a private prosecution at the instance of one Mohendro Nath Holder, an Attorney of the High Court, the charges consisting of forgery, using as genuine a forged document, and giving false evidence.

The charges were brought in respect of a promissory note and certain letters, purporting to be in the handwriting of the complainant, which had been used by the accused as genuine in a certain suit in the Calcutta Court of Small Causes.

Mr. O. C. Mullick and Mr. Deva for the prosecution.

Mr. M. P. Gasper, Mr. Trevelyan, and Mr. Roy, for the defence.

During the examination-in-chief of the complainant, he said, referring to a book of account before him :—

"This is my cash-book. It is written up by me. It is kept in the ordinary course of business. I am in the habit of entering in this book all sums received by me, and all sums paid away by me. I did not receive from the accused the sum of Rs. 500 on the 26th day of October, or on any other day."

Mr. Mullick (to witness).—"Look at your book and say whether or not it contains any entry of a receipt by you of Rs. 500 from the prisoner on the 26th day of October 1880, or on any other day;" and he tendered the book as evidence to show that no such entries existed.

Mr. Gasper objected to the admissibility of the book itself for the purpose for which it was sought to be used. He relied on s. 34 of the Evidence Act, and contended that, though that section made an entry in a book of account relevant, it did not also make the *absence* of an entry equally relevant. The value of such evidence is absolutely *nil*.

Mr. Mullick pressed the question.

[FIELD, J.—It is, no doubt, fair of the prosecution to produce the book to give the prisoner an opportunity of seeing if the entry is there, but I think the book itself is not relevant to disprove the alleged transaction by the absence of any entry concerning it.]

During the progress of the trial, Mr. Gasper put certain documents into the hand of the witness for the prosecution, and, having proved them by cross-examination, tendered them in evidence, and had them marked as exhibits on behalf of the prisoner, at the same time intimating that he would contend that, by so doing, he did not give the counsel for the prosecution the right of replying upon his case in the event of no witnesses for the defence being called.

I. L. R., Cal. 72.

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When the case for the prosecution had closed, Mr. *Gasper* had stated that he did not intend to call any witnesses.

Mr. *Mullick* contended that, under s. 292, coupled with s. 289 of the Criminal Procedure Code, he was entitled to a reply, in consequence of the documents above referred to having been put in. He argued that it was impossible for the prosecution to predicate what use the defence intended to make of the documents which had been put in.

Mr. *Gasper* was not called upon.

[FIELD, J.—You knew, when summing up your whole case, that they had been used for a certain purpose in cross-examination, and you had an opportunity of observing upon them. The Criminal Procedure Code being a penal statute, the principle to be applied in construing those sections is that the construction most favourable to the prisoner must be adopted. In this view, I hold that, under s. 292, the prosecution is not entitled to a reply.]

CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Norris.

1884.

July 22.

10 Cal. 1026.

QUEEN-EMPRESS v. AUTAL MUCHI.¹

Evidence—Criminal Procedure Code (Act X. of 1882), s. 510—Report of "Additional Chemical Examiner."

A document, purporting to be a report under the hand of an "Additional Chemical Examiner" upon a matter or thing submitted to him for analysis and report, cannot be received in evidence under s. 510 of Act X. of 1882.

THIS was a reference under s. 438 of the Code of Criminal Procedure.

One Autal Muchi was charged by a Deputy Magistrate, under ss. 428—511 of the Penal Code, for an attempt at cattle-poisoning.

At the trial the evidence against him was that he was seen by the villagers to offer bamboo leaves to some cattle; that the villagers, suspecting him, searched him, and found upon him a small packet, containing some white powder. It was then proved that the packet found upon him was made over to the Civil Surgeon of the station for transmission to a Chemical Examiner in Calcutta; there was, however, no evidence to connect the packet produced in Court with the packet stated to have been made over to the Civil Surgeon; and the report, which purported to give the analysis of the packet produced, was signed by a person, styling himself "Additional Chemical Examiner."

The Deputy Magistrate found the prisoner guilty, and fined him two rupees.

The District Magistrate, after calling upon the Deputy Magistrate for an explanation, referred the case to the High Court.

No one appeared on the reference.

The opinion of the Court (TOTTENHAM and NORRIS, JJ.) was as follows:—

The conviction in this case must be set aside, and the fine, if realized, refunded. There is no evidence on the record to show that the packet received by the Chemical Examiner in Calcutta was the packet taken from the prisoner;

¹ Criminal Reference, No. 101 of 1884, from an order passed by the Deputy Magistrate of Burdwan, *Moulvi Ikram Russoul*, dated 12th June 1884.

the packet is traced into the hands of the Civil Surgeon, and no further. We are at a loss to understand why the Civil Surgeon was not called ; but, even if the identity of the packet had been established, we think the certificate produced, and put in at the trial, was not admissible in evidence. S. 510 of the Code of Criminal Procedure enacts that a document, purporting to be a report under the hand of the "Chemical Examiner or Assistant Chemical Examiner," may be used as evidence in any inquiry ; the certificate in this case is signed by a person styling himself "Additional Chemical Examiner," and is of no more value as evidence than a piece of waste paper.

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10 Cal. 1026.

Serious miscarriage of justice may result from the production of certificates such as the one under discussion ; the Local Government may, perhaps, move the Government of India to amend s. 510 by the insertion of the words "and Additional Chemical Examiner" therein.

Conviction set aside.

CRIMINAL REVISION.

Before Mr. Justice Tottenham and Mr. Justice Norris.

JEEBUNKISTO ROY AND ANOTHER (PETITIONERS) v. SHIB
CHUNDER DAS (OPPOSITE PARTY).¹

1884.
July 31.

Discharge of accused—Further enquiry, Powers to direct—Criminal Procedure Code (Act X. of 1882), ss. 253, 437. 10 Cal. 1027.

An accused having been discharged after a full enquiry before a competent Court is entitled to the benefit of such discharge, unless some further evidence is disclosed. Consequently, an order made by a District Judge, directing a further enquiry to be held under s. 437 of the Criminal Procedure Code, in a case where a Magistrate had discharged the accused under s. 253, was not warranted by law, when there had been a full enquiry by a competent Court, and when no further evidence was disclosed, such order being based merely upon the ground that, in the opinion of the District Judge, the evidence recorded was sufficient for the conviction of the accused.

This was an application to set aside an order of a District Judge, directing a further enquiry, under s. 437 of the Criminal Procedure Code, into a case which had been heard by a Deputy Magistrate, and which had resulted in the discharge of the accused. The case was one of trespass and unlawful cutting and taking of certain crops, the right to possession of which was disputed. The Deputy Magistrate, disbelieving the evidence on behalf of the prosecution, dismissed the case, and discharged the accused under s. 253 of the Criminal Procedure Code.

The prosecutor then applied to the District Judge, who came to the conclusion that a *prima facie* case had been made out against the accused, and that they should have been called upon for their defence. He also characterized the Magistrate's order as a long and laboured effort to explain away the force of the evidence for the prosecution, which he considered clearly established their case in the absence of any evidence to rebut it, and he therefore considered that a further enquiry should be held, and under s. 437 directed such to be made.

The accused now applied to the High Court to set aside the latter order.

¹ Criminal Motion, No. 252 of 1884, against the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 30th June 1884.

1884.

JEEBUN-
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DAS,
10 Cal. 1027.

Baboo *Umbica Churn Bose* appeared on behalf of the petitioner.

No one appeared for the opposite party.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) was delivered by

TOTTENHAM, J. (NORRIS, J., concurring).—We think that the order of the Sessions Judge, directing a further enquiry in this case, is not warranted by law. It seems to us that the law allows a further enquiry only where there has not been a full enquiry, and where further evidence is disclosed. The application to the Judge was to the effect that the evidence recorded by the Deputy Magistrate was sufficient for the conviction of the accused, and the accused ought to have been convicted. The Sessions Judge seems to have endorsed the applicant's opinion, and upon that ground ordered the further enquiry. It seems to us that the accused having been discharged after a full enquiry by a competent Court, he is entitled to the benefit of that discharge, unless some further evidence is disclosed.

The order of the Sessions Judge will be set aside, and the proceedings stopped.

Order set aside, and proceedings stopped.

CRIMINAL REVISION.

Before Mr. Justice Miller and Mr. Justice Pigot.

1884.

Aug. 14.

10 Cal. 1029.

THE GOVERNMENT OF BENGAL (THROUGH THE DEPUTY LEGAL REMEMBRANCER)
(PETITIONER) v. PARMESHUR MULICK (OPPOSITE PARTY).¹

Appeal by Local Government—Appeal upon facts from verdict of a jury—Criminal Procedure Code (Act X. of 1882), ss. 417, 418, 423.

Under the provisions of Act X. of 1882, no appeal at the instance of the Local Government lies from an order of acquittal in a case which has been tried by a jury, when the questions involved are purely questions of fact; for such an appeal to lie it must be supported upon a ground which is covered by s. 418.

THIS was an application by the Local Government for the admission of an appeal.

Mr. *Leith* (Deputy Legal Remembrancer), on behalf of the Local Government, stated that the present case was tried by a jury, and that the appeal was based entirely upon questions of fact. The present application was due to the fact that Sessions Judges frequently abstained from availing themselves of the provisions of s. 307 of the Criminal Procedure Code in cases in which the jury had clearly returned an erroneous verdict, under the impression that it was open to the Local Government, if it thought fit, to prefer an appeal. Doubtless, such a course was open to the Local Government under the provisions of Act X. of 1872. And it was for their Lordships to decide whether the Legislature intended to take away that right by the provisions of Act X. of 1882, and whether, as a matter of fact, that had been done.

Mr. *Leith* then proceeded to refer to the sections bearing upon the question.

¹ Criminal Motion, No. 4 of 1884, under s. 417 of the Code of Criminal Procedure, against the order of acquittal made by C. W. Macpherson, Additional Sessions Judge of Howrah, dated March 22nd, 1884.

The judgment of the Court (MITTER and FIGOT, JJ.) was delivered by

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MITTER, J.—This is an application by the Local Government for leave to appeal under s. 417 of the Code of Criminal Procedure against an order of acquittal passed in a trial by jury. The grounds upon which the appeal is sought to be preferred are all questions of fact. It is contended that, under the Code, an appeal under s. 417 would lie upon questions of fact, although the acquittal was had in a trial by jury. We are of opinion that this contention is not valid. S. 417, which provides for the appeal, says: "The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court." S. 418 says: "An appeal may lie upon a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only." Then, s. 423, cl. 4, says: "Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him." These provisions clearly show that an appeal against an order of acquittal in a case which is tried by a jury must be supported upon a ground which is covered by s. 418 of the Code of Criminal Procedure. It is admitted in this case that there is no such ground alleged in the petition of appeal. We therefore reject this application.

Application refused.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Macpherson.

IN THE MATTER OF KHARAK CHAND PAL (PETITIONER) v. TARACK
CHUNDER GUPTA, MUNICIPAL OVERSEER (OPPOSITE PARTY).¹

1884.

Aug. 22.

10 Cal. 1030.

Indian Penal Code (Act XLV. of 1860), s. 188—Beng. Act V. of 1876, s. 256—Disobedience of lawful order—Interest of Magistrate in convicting the prisoner—Disqualification of Judge.

On the 29th of March 1883, the Municipal Commissioners of Commillah at a meeting issued an order under s. 256 of the Bengal Municipal Act of 1876.

The accused was tried and convicted before the District Magistrate under s. 188 of the Indian Penal Code, and fined Rs. 100 for having disobeyed that order.

The Magistrate, who tried and convicted the accused, was present as Chairman of the Municipal Commissioners at the meeting of the 29th of March, when the order was passed, for disobedience of which the accused was tried and convicted.

Held that the conviction was illegal, and must be set aside.

*Sergeant v. Dale*² cited and followed.

THE facts of this case are fully set forth in the judgment of the Court delivered by PRINSEP, J.

Munshi *Serajul Islam* for the petitioner.

No one appeared for the other side.

PRINSEP, J.—The petitioner has been convicted under s. 188 of the Penal Code of having disobeyed an order of the Municipal Commissioners of Commillah under s. 256, Beng. Act V. of 1876, dated the 29th March 1883.

¹ Criminal Revision, No. 196 of 1884, against the order passed by *G. H. Hopkins, Esq.*, District Magistrate of Tipperah, dated the 5th of May 1884.

² L. R., 2 Q. B. D. 558.

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On enquiry we have ascertained that the District Magistrate, who tried and convicted the petitioner, was present as Chairman of the Municipal commissioners at the meeting of the 29th March 1883, when the order was passed, the disobedience of which forms the subject of the present case.

S. 555 of the Code of Criminal Procedure provides that "no Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested." (No permission has been applied for in the present case.) The explanation to s. 555 further declares that "a Magistrate shall not be deemed to be a party, or personally interested, within the meaning of this section, to or in any case, merely because he is a Municipal Commissioner."

That explanation, however, does not, in our opinion, apply to any case in which a Magistrate may have been personally concerned as a Municipal Commissioner in the matter which forms the subject of trial before him. It was rather intended to prevent an objection being raised that, from the mere fact that the Magistrate might happen to be a Municipal Commissioner, he was necessarily disqualified from holding a trial in which some municipal matter was involved. It is a very different matter when, in the present case, we find that the Magistrate is practically one of the prosecutors and the Judge.

An objection has been raised before us, which was probably raised before the District Magistrate, that the order which has been disobeyed was an illegal order; obviously, the District Magistrate, having been a party to that order, was not a proper person to try such an objection. In the present case, we do not find that the order in question was in any way illegal, but this does not affect the propriety of the trial which has taken place. We would refer to the case of *Serjeant v. Dale*.¹ The passage quoted is to be found at pages 566 and 567: "By the common law, a Judge, who has an interest in the result of a suit, is disqualified from acting, except in cases of necessity, where no other Judge has jurisdiction. . . . The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way, he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard, not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security. . . . We are anxious not to be misunderstood in using this language. No right-minded person does, or can, for a moment entertain the thought that the right reverend prelate (or, in the present case, the District Magistrate) who was called upon to act in this case was or could be influenced by any consideration of personal interest in the proceeding. . . . The applicant stands upon his legal right, and calls upon us to give effect to it."

On these grounds we think that the proceedings before the Magistrate must be set aside, and the fine, if paid, refunded.

Conviction set aside.

¹ L. R., 2 Q. B. D. 558.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Pigot.

IN THE MATTER OF NOBIN KRISHNA MOOKERJEE (PETITIONER)
v. RASSICK LALL LAHA (OPPOSITE PARTY).

1884.
 Aug. 18.

Revision on facts—Act X. of 1882, s. 435—Evidence—Registration Act (III. of 1877), s. 82. 10 Cal. 1047.

Under s. 435 of the Criminal Procedure Code, the High Court has power to go into questions of fact; but it will only exercise this power in cases in which it finds that it will be in the interests of justice to do so.

N was charged with having made a false statement before a Sub-Registrar in identifying K, a person who had executed a mortgage-deed in favour of R, and who was a neighbour of his (N's), as being the person to whom R had agreed to advance the money, the consideration of the mortgage. The false statement consisted in his stating to the Sub-Registrar that he "knew K as his neighbour." During the hearing of the case, it was sought to prove a statement made by R to a third party (R having died previous to the institution of the case) to the effect that N had told him certain facts. A memorandum, alleged to be in the handwriting of N, was also tendered and received in evidence without any further proof as to its being in N's handwriting than that it bore a similarity to another piece of paper proved to bear his handwriting.

Held that the statement made by R to the third party was inadmissible and irrelevant, and that the memorandum was wrongly received in evidence.

In this case the accused was charged with having abetted the false personation of one Khirod Chunder Mookerjee before the Sub-Registrar of Sealdah, with having intentionally made a false statement before that officer, in that he identified some unknown person as the said Khirod Chunder Mookerjee, and also with having abetted the offence of cheating.

The facts of the case were shortly as follows: One Bossunto Coomar Mookerjee, a broker, negotiated a loan in September 1881, with one Roma Nath Laha, for the sum of Rs. 5,000, to one Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore, to be secured by a mortgage of the borrower's property.

In pursuance of that arrangement, a draft mortgage was prepared, and given to Bossunto for the purpose of being approved. It was then taken away by him, and afterwards returned, accompanied by a memorandum on a slip of paper, which ran as follows:—

"I approve the draft, only the time is to be extended to one year instead of six months; the schedule of the properties covered by the deed will be sent to-morrow, 25th September 1881. (Sd.) Nobin Krishna Mookerjee, Pleader."

The deed was then engrossed, and on the 27th September an attempt was made to get it registered at the Sealdah Sub-Registrar's Office after Khirod had executed it, but registration was refused, on the ground that there was no proper person present to identify Khirod. Subsequently, on the 10th October 1881, it was registered, Khirod being then identified by the accused, Nobin Krishna.

It subsequently transpired that the Khirod who executed the deed was not the real Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee; and the accused was placed before the Joint-Magistrate of Alipore upon the above charges.

Previous to the institution of the case, Roma Nath Laha died.

During the hearing of the case, the following question was put to one of the witnesses for the prosecution in re-examination: Q.—What did Roma Nath tell you about his interview with Nobin?

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This question was objected to by the pleader who appeared on behalf of the accused, but the objection was overruled by the Magistrate, who remarked that, had the objection been a valid one, he would still have put the question himself.

In reply to the question, the witness detailed a statement made to him by Roma Nath to the effect that the accused had told him (Roma Nath) that after he (the accused) had identified the executant, there was no cause for anxiety for him, and that he (the accused) would be responsible for the money.

In the course of the hearing, the memorandum attached to the draft above referred to was admitted in evidence without any proof of its being in the handwriting of the accused, but merely on the ground of the similarity between the handwriting of the accused and the handwriting appearing on the memorandum.

The remainder of the facts of the case appear sufficiently for the purpose of this report in the judgment of the High Court.

The Joint-Magistrate having convicted the accused, and sentenced him to rigorous imprisonment for one year and a fine, an appeal was preferred to the District Judge. That appeal being dismissed, an application was made to the High Court, under its revisional power, to send for the record in the case, and the Court granted a rule.

The rule now came on to be heard.

Mr. *Evans*, Mr. *Gasper*, and Baboos *Umbica Churn Bose*, *Grish Chunder Chowdry*, *Jogesh Chunder Roy*, and *Dwarkanath Chuckerbutty*, for the petitioner.

Mr. *Allan* and Baboo *Srinath Chunder* for the opposite party.

The judgment of the High Court was delivered by

MITTER, J. (PIGOT, J., concurring).—The petitioner before us was convicted by the Joint-Magistrate of Alipore (1) of having abetted the false personation of one Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore, before the Sub-Registrar of Sealdah; (2) of having intentionally made a false statement before the said officer in identifying some unknown person as the said Khirod Chunder; and (3) of having abetted the offence of cheating by dishonestly inducing one Huridas Bhattacharjee to deliver the sum of Rs. 5,000 to the said unknown person under the belief that he was advancing the said sum of money to Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore. The petitioner was sentenced to one year's rigorous imprisonment and a fine of Rs. 200 in respect of the second of the above-mentioned offences, no sentence being passed for the others. On appeal, the conviction and the sentence have been upheld by the Sessions Judge of the 24-Pergunnahs. The present application has been made under s. 435 of the Code of Criminal Procedure to set aside the conviction and the sentence on various grounds of law and facts. Under s. 435, we generally decline to go into the questions of facts, though we have the power to do so. We exercise this power only in such cases where we find that in the interests of justice it should be exercised. After fully hearing arguments in this case, we were of opinion that the present is a case in which that power should be exercised. Moreover, we find that there are two grave errors of law in the proceedings and the judgment of the lower Court. The first error is that the Joint-Magistrate allowed a statement of a deceased person, namely, Roma Nath Laha, the master of Huridas, to go in as evidence, although objected to. This statement

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was deposed to by Huridas. There is no question that this statement was not relevant. The other error is that the lower Courts have assumed without any evidence that the petitioner as a vakeel had approved the draft of the mortgage-bond which was executed by an unknown person calling himself Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore, in favour of Roma Nath Laha.

These two errors of law being established, we have to determine how far they affected the merits of the decisions of the lower Courts. We cannot decide this question without considering the weight of the remaining evidence. For these reasons, we find it necessary to consider the evidence adduced in this case, in order to judge how far the conclusions of facts arrived at by the lower Courts are correct.

The most essential question of fact in this case was, whether in regard to the execution of the mortgage-bond in favour of Roma Nath Laha, and in respect of its registration, there was false personation of Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore, by an unknown person.

Upon this point, after fully considering the evidence, I find no reason to dissent from the view taken by the Courts below.

I have no reasonable doubt in my mind that the person who executed the mortgage-bond, and who appeared before the Sub-Registrar of Sealdah, and registered it, was not Khirod Chunder Mookerjee, son of Prosono Coomar Mookerjee, of Bhowanipore. I see no ground to disbelieve the evidence of Khirod Chunder Mookerjee, Russicklall Mookerjee, Iswar Chunder Chunder, and Bepinbehary Chowdhry upon this point. Their evidence is strengthened by a comparison of the signature of Khirod Chunder Mookerjee, both in English and in Bengali, with the signatures of the so-called Khirod on the mortgage-bond, and the note of hand executed in favour of the witness, Iswar Chunder. In coming to this conclusion, the circumstance, the absence of any tangible evidence showing that about the time of the said mortgage-bond the real Khirod was in need of borrowing such a large sum of money as Rs. 5,000, has, to a certain extent, weighed with me. The petitioner being a neighbour of Khirod, if the latter had really borrowed the money, he would have been in a position to give some evidence upon the point. Upon the question of false personation, therefore, I think that the lower Courts have come to a correct conclusion.

Then comes the question whether Nobin Chunder knowingly participated in any way in abetting the successful carrying out of the fraudulent scheme by which Roma Nath Laha was defrauded of Rs. 5,000. The conclusion to which the lower Courts have come upon this point is unfavourable to the petitioner. The oral evidence upon this point is, in my opinion, very unsatisfactory. The only documentary evidence which has been put in is also, in my opinion, not entitled to much weight. It is a memorandum of an alleged approval of the mortgage-bond by Nobin Chunder. Its proof rests merely upon a comparison of handwriting. I do not think that the evidence is strong enough to establish its genuineness. Then, again, supposing that it is genuine, there is no evidence to connect it with the particular transaction in question in this case. Putting aside this document, there is only the oral evidence which, as I have already said, is unsatisfactory. Then, balancing this oral evidence against certain circumstances to which I shall presently refer, it seems to me that the reasonable conclusion upon this point is that Nobin Chunder was in no way party to the fraud which was perpetrated upon Roma Nath Laha. It is in evidence

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that, on the 27th September 1881, when the mortgage-bond was executed at the Sealdah Sub-Registrar's Office, Nobin Chunder was not present. Upon the evidence, it seems to me that on that day the document in question would have been registered, and the money paid to the executant if the Sub-Registrar had not objected to the identification of Khirod Chunder as unsatisfactory. Then, again, on the next day, when Iswar Chunder advanced Rs. 1,000 to the personator of Khirod, Nobin Chunder was admittedly not present. These two circumstances almost conclusively show that the petitioner was not a party to the fraudulent device. He is a vakeel, and also a well-to-do person. If he was depraved enough to join in the fraud, it is exceedingly improbable that he should have done so, unless he was assured of a very large share in the spoil; and if he had to receive such a share, it is almost impossible to believe that he should not have been present at the Sub-Registrar's office on the 27th September, and at Roma Nath Laha's *Boytuckhana* on the following day. Then, again, Nobin Chunder is not shown to have received anything more than eight rupees in the whole transaction. His conduct in telling Huridas, who called at his house in April 1882, to fetch the real Khirod Chunder, is inconsistent with a guilty conscience. These circumstances, in my opinion, decidedly outweigh the oral evidence upon this point, which, as I have already said, is of a meagre and unsatisfactory character upon the question of the complicity of Nobin Chunder in the fraud. I therefore come to a different conclusion from that of the lower Courts.

The next question is whether Nobin Chunder, when he identified some unknown person as Khirod Chunder, made a false statement intentionally. Upon the evidence upon the record, I cannot but come to the conclusion that he made that false statement intentionally. It seems to me that, when he stated to the Sub-Registrar that he knew Khirod as his neighbour, he was perfectly aware that that statement was false. But, having regard to his position in life, and to the amount of remuneration he received, I think it is a reasonable conclusion to come to, that, placing full reliance on the representations of Bosunto, Nobin Chunder believed that he was identifying Khirod Chunder, the son of Prosono Coomar.

Upon the conclusions at which I arrive, Nobin Chunder is only guilty under cl. a, s. 82, of intentionally making a false statement before the Sub-Registrar of Sealdah, and is not guilty of the other offences charged against him.

It will be convenient here to notice a point which was a good deal discussed before us. It was contended that the conviction under s. 82 of the Registration Act cannot be sustained, because the prosecution for the said offence was not commenced with the permission of the Sub-Registrar of Sealdah. But we find that, on the 22nd April 1884, the Sub-Registrar of Sealdah gave permission for the prosecution of Nobin Chunder under s. 82 of the Registration Act. It is true that that permission was given when a complaint against Nobin Chunder was pending in the Joint-Magistrate's Court, but that complaint had nothing to do with any offence under s. 82 of the Registration Act. The Joint-Magistrate, in investigating that complaint, examined the witnesses for the prosecution in the month of April 1884. On that evidence, on the 23rd May 1884, the Joint-Magistrate, for the first time, framed the charges under s. 82 of the Registration Act against Nobin Chunder. The prosecution for the offence under cl. a, s. 82 of the Registration Act, was, in my opinion, commenced on the date when the charges were framed. That being so, the objection as to the want of permission falls to the ground.

The only question that remains to be considered is that of punishment. Having regard to the facts, which, in my opinion, have been established against Nobin Chunder, and to his position of life, I think the interests of justice would be fully met if we pass the sentence of rigorous imprisonment for one month and a fine of two hundred rupees. The conviction under cl. a, s. 82, will stand, and the conviction of the other offences mentioned in the charge will be set aside. The sentence will be modified as stated above. If Nobin Chunder has undergone imprisonment under the sentence of the lower Court for any period, he will have to complete the time of imprisonment to which we sentence him.

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Conviction upheld.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

QUEEN-EMPRESS v. RAM SAHAI LALL AND ANOTHER.¹

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Aug. 21.
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Witnesses, Duty of the prosecution to produce.

Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses in Court on the part of the prosecution that they had been examined by the Committing Magistrate against the express wish of the police-officer in charge of the prosecution, held that that was not a valid ground for the non-production of the witnesses in the Sessions Court.

In conducting a case for the prosecution, all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined.

THE two accused in this case were charged with causing grievous hurt to one Gandaury Kahar, and with culpable homicide. One Pokhan, the brother of Gandaury, laid the charge against the accused at the thanna; and, in giving certain details of what had taken place, stated that he had received the information from Jitan Singh, Chita Singh, and Tiloke, who were to be his witnesses. At the preliminary inquiry, the Sub-Inspector, Mohamed Baker, who had the conduct of the prosecution, objected to the examination of Jitan Singh, Chita Singh, and Tiloke, on behalf of the Crown, as they had been discovered to be hostile witnesses. Nevertheless, the Deputy Magistrate insisted upon their examination, and recorded their evidence. The accused were committed to the Sessions Court, where the three witnesses were not produced, and the Judge expressed his opinion that the prosecution was not bound, under the circumstances, to ensure their attendance. The accused were convicted, and they appealed to the High Court.

Mr. Allen and Baboo *Rajendra Nath Bose* for the appellants.

Baboo *Ram Churn Mitter* for the Crown.

The Court (FIELD and NORRIS, JJ.) delivered the following judgments:—

FIELD, J.—We have heard the evidence in this case, and have considered the arguments addressed to us by the learned Counsel who appeared on behalf of the appellant; and we think that the proper course to take will be to set aside the conviction, and direct a new trial of the prisoner, Ram Sahai Lall; and for this reason, Pokhan, the brother of the deceased, Gandaury, gave the first information to the police-station. Pokhan was not speaking from his own personal knowledge in giving an account of the transaction which resulted in

¹ Criminal Appeal, No. 441 of 1884, against the order and sentence passed by *W. Verrier, Esq.*, Sessions Judge of Monghyr, dated the 3rd July 1884.

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the death of Gandrauri, but he did give certain details, and he stated that he had received these details from three persons, Tiloke, Jitan, and Chita, and he proceeded to add that these three persons were his witnesses. These three persons were examined by the Deputy Magistrate, and their evidence did not support the case for the prosecution. It would appear, and it is so stated in the judgment of the learned Sessions Judge, that the police-officer who had charge of the case did not wish these persons to be examined, and that the Deputy Magistrate, notwithstanding this expressed wish, proceeded to examine them, and this is given by the Sessions Judge as a good reason for not calling these witnesses in the Court of Session, or tendering them for cross-examination in that Court. Now, it must be understood, and it has recently been pointed out in more than one judgment of this Court, that, in conducting a case for the prosecution, all the persons who are alleged or are known to have knowledge of the facts ought to be brought before the Court and examined. No doubt, it may happen that certain witnesses will conceal facts which they know, or alter their account of what they have seen. Nevertheless, these witnesses should be before the Court, and the Judge and the assessors, or the jury, if the case is tried by a jury, should have an opportunity of forming their own judgment as to their credibility or otherwise. This course was not followed in the present case; and we think that the learned Counsel has rightly pressed upon us that the prisoner has been prejudiced in his defence in consequence. On this ground, we set aside the conviction, and direct that the prisoner be re-tried.

NORRIS, J.—I am of the same opinion. I would only add that I think the learned Sessions Judge has, subject to this omission, tried this case with remarkable ability, and I trust that, when the case goes back to him, he will look upon it as an entirely new case, and not allow his mind to be at all prejudiced by the fact that the case had been previously tried.

Re-trial directed.

ORIGINAL CRIMINAL JURISDICTION.

QUEEN-EMPRESS v. SHIB CHUNDER MITTER.¹

1884.

17th Sep. 13.

10 Cal. 1079.

Misdirection—S. 26 of the Charter of 1865—Charge, Misunderstanding of.

Mere misunderstanding on the part of bystanders in Court, or Counsel engaged in a case, of expressions used by a Judge in charging a jury (where it appears that the expressions used by the Judge were such as ought to have been understood by any reasonable man, having regard to what was proved in the case, and what was said to the jury afterwards), will not constitute misdirection.

THIS was a rule obtained under the provisions of s. 26 of the Charter, calling upon the law-officers of the Crown to show cause why the prisoner, Shib Chunder Mitter, should not be acquitted, or why there should not be a new trial, on the ground that the learned Judge, Mr. Justice Field, who tried him, misdirected the jury on a point of law.

The facts were: The prisoner, who was a cash-keeper in the firm of Ramsay, Wakefield & Co., was tried, at the Criminal Sessions of the High Court, on the 17th July 1884, before Mr. Justice Field, and a common jury, upon certain charges of forgery, using as genuine a forged document, and criminal breach of trust as a servant with respect to the payment by him of certain small sums of money to a post-office peon; it being alleged that certain vouchers for the

¹ Rule, under s. 26 of the Charter, on a finding and sentence passed by *Field, J.*, dated 17th July 1884.

same were altered into larger amounts by the prisoner, and credit taken by him for such larger amounts. The said vouchers were for the sums of 8 annas, 4 annas, and 8 annas, which sums were apparently altered into Rs. 2-8, Rs. 3-4, and Rs. 2-8, respectively. The principal question at the trial was, as to who made the alteration—the prisoner or the post-office peon.

It appeared from the evidence given at the trial that the usual course of business with regard to the vouchers for parcels delivered by the post-office to the firm was as follows :—

The parcel and a yellow ticket would be presented by the post-office peon to the European assistant of the firm, who would sign the yellow ticket, and take over the parcel, leaving the yellow ticket with the post-office peon as a receipt for the parcel; that a white ticket was then made out by the European assistant, on which was stated the amount to be paid for the parcel, and it was then the duty of the post-office peon to take this white ticket to the prisoner, the cashier of the firm, and obtain the money.

The charge against the prisoner was with regard to the forging, &c., of these white tickets or vouchers.

The evidence further showed that there was a book in which the post-office peon himself entered the parcels to be delivered, and the amounts to be received for the same; and as regards this book, the sums entered for the parcels in question were 8 annas, 4 annas, and 8 annas, the peon having stated as regards the entry: "I enter the book myself, and I never alter the entries; nor were they (the entries in question) altered when in my hands. I enter the amounts in my book." He further stated that he did, in this case, take the white tickets direct to the cashier, and received the amounts entered in his book. As regards this latter point, Mr. Davis, the European assistant, who made out the white tickets, said that he did not watch the peon to see if he went straight to the cashier with the tickets.

It was also proved that the peon had a sufficient knowledge of the English characters and figures to enable him to make the alteration, had he the opportunity to do so.

The defence set up at the trial was that the post-office peon might have been guilty of the offence; that there was no evidence, except that of the peon himself, to show that the peon went direct to the cashier with the white tickets; and that it was very possible that he might, after having received the white tickets from the European assistant, have left the shop, and made the alterations. The prisoner was found guilty, and was sentenced to three years' rigorous imprisonment.

The petition on which the rule *nisi* was obtained stated that the exception taken to the charge of the learned Judge was that the jury was left no option but to convict, having regard to the way that the Judge directed the jury, *vis.*, by saying: "There is no evidence that the peon could make the English 2's and 3's," and that, upon the prisoner's Counsel drawing the attention of the learned Judge to the peon's own evidence, and of his book, and to the evidence of Mr. Davis that the peon knew the English character and figures, the learned Judge replied: "I know that, still I maintain that there is no evidence that the peon could make the figures 2 and 3 in the vouchers, and could write English," or words to that effect.

At the hearing, Mr. *Allen* appeared in support of the rule, and Mr. *Phillips* (the Standing Counsel) for the Crown.

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Mr. Allen supported the rule on the affidavits of seven persons, five of whom composed in part the jury, but did not seek to use the affidavits of the jurymen, further than as the evidence of persons who heard what was said by the learned Judge, and to supplement any defect that there might be in Counsels' notes of the trial; and he stated that he did not seek to use them in order to show that the jury had been influenced in the conclusion they had come to. There were also further affidavits of the attorney for the defence and his clerk. On these materials, it was contended that, when it was the contention of the defence that the motive, ability, and opportunity of the prisoner and the peon to commit the forgeries were the same, the opinion expressed by the learned Judge on that most vital point in the case could not have failed to affect the verdict of the jury.

[Mr. Phillips.—The note taken by the Counsel for the Crown as to this point is, "no evidence that the peon was able to alter the figures in vouchers, to write there 2's and 3's in the vouchers."]

[FIELD, J.—What I said was, that "there was no evidence that the figures on the back of the vouchers were in the peon's handwriting."]

I never contended that there was evidence that the peon altered the figures on the back of the vouchers. My point was, that it was for the prosecution to prove that the prisoner was the man who did so, and I said that they had not proved it, because the motive in the case of both persons must be said to be equal, and the ability equal, and, under the circumstances, the opportunity equal.

[GARTH, C.J.—What you fail to show to me is that the Judge conveyed, or intended to convey, to the jury that the man could not write English. What I understand him to have said was, that there was no evidence that the man could have made those alterations.]

[FIELD, J.—That was what I intended to convey to the jury.]

I understood your Lordship to say that there was no evidence that he had the manual capacity to do it—knowledge of the English language to do it.

[FIELD, J.—How could I have said that Mr. Allen? What I said was, that there was no evidence that the dāk-peon did alter the figures; then you interrupted me, and said that a comparison of handwriting would show that the altered figures were more like the peon's handwriting than the prisoner's. I said, "You have given no evidence to show that the figures are in the peon's handwriting. The books are there, and the jury can look at them." The jury did not look at them.]

[GARTH, C.J.—It is not because the jury misunderstood what the learned Judge said, that there is a misdirection; what do you say we ought to do?]

I say the Court should order a new trial. On the question of fact, there are seven affidavits which all point that the meaning of the words used by the learned Judge was, *ability to write the figures*; the affidavit of the other side does not deny this.

[FIELD, J.—If there was such a misunderstanding, I should at once state that I should wish a new trial to be had.]

Mr. Phillips (for the Crown).—I don't think the Court has power to order a new trial, see the case of the *Queen v. Hurribole Chunder Ghose*.¹

There is nothing in this proceeding which comes within s. 26 of the Charter. The Advocate-General has not certified that there is an error in point of law,

¹ I. L. R., 1 Cal. 207.

but he says that the matter ought to be further considered. There was no point of law decided by Mr. Justice Field which this Court can interfere with; the Judge told the jury that the peon could make the figures on the voucher—what is the point of law there? I dispute the fact that a pure point of law has been decided; it can never have been intended that the evidence in the case should be laid before the Advocate-General; he can only deal with points, such as want of jurisdiction, or illegality of the sentence. As to the misdirection, I take it the statement of the learned Judge is conclusive on the point; the question is between the Judge and by-standers, and the Judge's statements must be taken to be correct. See *Reg. v. Pestanji Densha*; ¹*Queen v. Aaron Mellor*.²

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The case of the *Queen v. Hurribole Chunder Ghose*³ is of the same description as the present; it is a question of withdrawing evidence from the jury. On page 217⁴ it is laid down that the Court has no power to order a new trial, and no power to send the case back to the original Court.

The misdirection imputed is absurd on the face of it, for the Judge, having started with the radical incapacity of the one to do it, then is said to have gone on to discover which of them had the best opportunity to do it.

If, notwithstanding this, the Court should think that there was a misdirection, then I submit your Lordships should review the case, and see what alteration in the sentence should be made. The sentence could not be diminished, and, therefore, altering the sentence must be an acquittal, for the power given to the Court in these cases is only "to deal with the sentence." The affidavits of the other side do not show that the whole charge was misleading, but only go to the effect of a particular expression used. Misunderstandings are no good ground for a new trial; for, if they were, any person friendly to the prisoner could come forward and say that he misunderstood the Judge, and obtain thus a new trial.

The following were the judgments of the Court.

GARTH, C.J. (PRINSEP, J., concurring), after stating the facts, continued:—

The prisoner, in his petition, in which he partly founded his application for a rule, alleged that the learned Judge, in his charge to the jury, directed them that there was no evidence before them that the peon could make the English 2's and 3's; and that, thereupon, Mr. Allen, prisoner's Counsel, immediately drew the attention of the learned Judge to the peon's own evidence, and of his dāk-book, and to the evidence of Mr. Davis, that the peon knew the English characters and figures; the learned Judge replied: "I know that; still I maintain that there is no evidence that the peon could make the figures 2 and 3 in the vouchers, and could write English figures," or words to that effect; and the petition further stated that the learned Judge, throughout his charge to the jury, said nothing to alter or modify the effect of his own directions. The statements in the petition were verified, not only by the prisoner himself, but also substantially by the prisoner's attorney, and his attorney's clerk, and by five of the jurymen. Having regard to the circumstances under which the charge was made, and to the obvious and acknowledged fact that the forgery of the figures must have been the work of the prisoner or the peon, the alleged misdirection, if it was one, there is no doubt, had relation to a material part of the case; and we have done our best to ascertain, from the notes of Counsel, and of the learned Judge himself, what was really said at the time of the alleged misdirection.

¹ 10 Bom. H. C. 75.² 27 L. J. (M. C.) 121 (131).³ 1 L. R., 1 Cal. 207.⁴ See p. 7 of this Handbook.

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We are bound, of course, in a case of alleged misdirection, to give all due weight to the statement of the learned Judge himself as to what he really said to the jury; and it was very remarkable how very little difference there was in the notes of Counsel on one side, and the statement of the learned Judge. The learned Judge stated that what he told the jury was, that there was no proof that the postal peon did make the alterations in the vouchers, and that he meant to convey to the jury, not that the prisoner *could* not write the figures, because it was clearly proved that the peon did know English, but that he intended to convey to the jury that there was no evidence that the peon did, as a matter of fact, make, or, by leaving the shop, have an opportunity of making, the alteration in the vouchers; that it was not shown that the peon had left the shop for an instant, or that he had access to pen and ink, or any opportunity of making the alterations in the vouchers. When we look at Mr. Allen's own note of the Judge's charge and alleged misdirection, we found these words: "Field, J., charges jury that no evidence that peon able to alter figures in vouchers, to write these 2's and 3's in the vouchers. Allen draws Judge's attention to evidence of peon and postman's book." Then, further on: "Court says no evidence that peon wrote these figures;" then Mr. Phillips' note is much to the same effect, and later on, in his charge to the jury, the Judge told them that the postman's book was on the table, and that, if they thought fit, they had an opportunity of comparing the writing in that book with that on the altered vouchers, and that, if they thought those altered vouchers resembled the writing in the book, they might give the prisoner the benefit of the comparison. In the first place, we have to consider what really was said by the learned Judge, and, in the next place, what any reasonable man, having regard to what had been proved, and what was said to the jury afterwards, should have understood from the Judge's charge. It is plain, we think, from Mr. Allen's own note, that, when the Judge told the jury that there was no evidence, he did not mean to tell them that the prisoner could not write the figures 2 and 3, because it not only appeared in the Judge's own notes that he could, and also in the postman's book written in English by the peon himself, but Mr. Allen called the learned Judge's attention to that fact, when the Judge, without doubting, or denying it, said: "I know that; but still, I maintain, there is no evidence," &c.; and he afterwards left the book to the jury to draw any inference from it in favour of the prisoner they might think proper, and did not withdraw from their considerations what Mr. Allen contended was evidence of the peon's manual capability of writing the altered figures. It seems, therefore, that what the learned Judge told the jury, and meant to point out to them, was, first, that there was no evidence that the peon did, as a matter of fact, make the alterations; and, secondly, that there was no evidence that he could have made, that is, have had an opportunity or facility for making, the alterations; and we think that no reasonable man ought to have construed his words in other than that sense. That being so, we consider that there was no misdirection; and, as in the case it is not shown that in his charge to the jury the learned Judge committed any error of law, we consequently discharge the rule.

FIELD, J.—I concur in the above judgment. I desire merely to add that I had wished to put before the jury, first, that there was no evidence to show that the dāk-peon had, as a matter of fact, made the alterations; and, secondly, that there was no evidence that he had an opportunity of making them. I understood Mr. Allen, who defended the prisoner earnestly and with much ability, to press upon me that the dāk-peon's book was evidence that the dāk-peon did, as a matter of fact, make the alterations in the tickets or pay-orders. In that I dissented from him. It had been brought out in the dāk-peon's evi-

dence, and in Mr. Allen's address to the jury, that the dāk-peon could write English, and was manually capable of making the figures. I had thought there could be no possible doubt upon this point; but in the course of the conversation that followed, when Mr. Allen drew my attention to the book, I think it possible that he and I were speaking of the peon's ability to make the alterations in different senses—he having in his mind the manual ability of the peon to write the figures; I having in my mind his ability, depending upon opportunity or facility; and it was with reference to this last ability that I pointed out to the jury that there was no evidence that the peon had left the shop; while, if there was such evidence, the jury would be bound to give it their careful consideration. On the whole, I see no reason to believe that I said to the jury anything that could reasonably have been misunderstood; I may observe, in conclusion, that I entertain no doubt that the verdict of the jury was correct.

1884.
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 EMPRESS
 v.
 SHIB
 CHUNDER
 MITTER,
 10 Cal. 1079.

Rule discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

GHURBIN BIND (APPELLANT) v. QUEEN-EMPRESS (RESPONDENT).¹

1884.
 Sep. 19.
 10 Cal. 1097.

Deposition where accused has absconded—Criminal Procedure Code (Act X. of 1882), s. 512—Record of evidence in absence of accused.

Where an accused person has absconded, and it is intended to record evidence against him in his absence, it is requisite, under s. 512 of the Code of Criminal Procedure, that the fact of the absconding of the accused should be alleged, tried, and established, before the deposition is recorded.

THE prisoner Ghurbin Bind was charged with dacoity under s. 395 of the Penal Code. It appeared that, in August 1880, a gang of Binds, to the number of 12 or 13, proceeded in a boat up the river, and committed a dacoity in the village of Ghatnagar, in the district of Dinajpur. Property to the amount of Rs. 300 was carried off by force; but, owing to a dispute about the division of the spoil, one of the gang, named Jogeshur Bind, informed the police, upon which information some seven of the dacoits were arrested and committed to the Sessions Court; and on the evidence of Jogeshur Bind, who was one of the dacoits, and had turned Queen's evidence, the prisoners were convicted and sentenced at the November Session of Maldah, 1880.

Five of the gang absconded; their names and descriptive rolls were duly published in the *Police Gazette* of the 24th September 1880, and amongst the names so mentioned was that of Ghurbin Bind. No trace of any of those who had absconded was obtained until 1884, when Ghurbin Bind was arrested in the village of Gosainpore. Subsequently to the trial held in 1880, and previous to the arrest of Ghurbin, Jogeshur Bind died.

Ghurbin was committed to the Sessions Court in July 1884, and at the trial it was proved that he had absconded from his own village at about the time of the dacoity in 1880, and had never returned there; that he went by another name at the village in which he had taken up his abode, and at which he was arrested; that his personal appearance corresponded minutely with the descriptive roll published in the *Police Gazette* of the 24th September 1880. The deposition of Jogeshur Bind, taken before the committing Magistrate in

¹ Criminal Appeal, No. 506 of 1884, against the sentence passed by F. F. Handley, Esq., Sessions Judge of Maldah, dated the 14th of July 1884.

1884.

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EMPRESS,

10 Cal. 1097.

1880 (the records of the Sessions trial held in 1880 not being forthcoming), was tendered and admitted by the Sessions Judge as evidence against the prisoner. This deposition expressly stated that Ghurbin was present at the dacoity. As regards the admissibility of this deposition, the Sessions Judge made the following remarks:—

"The deposition of Jogeshur Bind, the dacoit who was offered a pardon, and turned Queen's evidence, and who is now deceased, is put in under s. 32, cl. 3, and s. 80 of the Evidence Act, and s. 512 of the Criminal Procedure Code. This deposition was made before the committing Magistrate, as the record of the trial before the Sessions Court was not forthcoming. It was recorded by Deputy Magistrate Kasi Kinker Sen in Bengali. It is also evidence under s. 33 of the Evidence Act. It is true the prisoner was not present when the evidence was recorded, and had not the power of cross-examining, but that was his own fault for absconding. If he had appeared and stood his trial, he would have had the right and opportunity of cross-examining the witness Jogeshur Bind, as his fellow-prisoner had, and did, in the former trial; and, under s. 512 of the Criminal Procedure Code, such a deposition is expressly exempted from the ordinary procedure of s. 33 in the case of an absconding prisoner. The (A) form, exhibit D, in the analogous trial to this (No. 7), in the trial of which charge this deposition was recorded, contains the name of this prisoner as an absconder; and the evidence in this case corroborates the fact that this prisoner, Ghurbin, was an absconder. It would obviously be difficult when accused persons absconded, and were not arrested for 20 years, say, to get the evidence of living witnesses. Taking, then, Jogeshur Bind's evidence, which the prisoner and his counsel admit was made against this prisoner, it is found that he expressly mentions this Ghurbin as taking part in that dacoity."

Upon the evidence of Jogeshur, and on the other evidence mentioned, the Sessions Judge, concurring with the assessors, found Ghurbin guilty, and sentenced him to five years' rigorous imprisonment.

The prisoner appealed to the High Court.

No one appeared for either side at the hearing.

Judgment of the Court was delivered by

MACPHERSON, J.—The prisoner Ghurbin Bind has been convicted on a charge of dacoity, and sentenced to rigorous imprisonment for five years. The dacoity was committed in August 1880. Several persons were shortly afterwards charged with being concerned in it, and were tried and convicted; but the prisoner, who is said to have absconded, has only recently been arrested. The only proof against the prisoner is the deposition of one Jogeshur Bind, who was made an approver-witness in the original trial, and who is now dead, coupled with some evidence as to his absence from the village at the time of the dacoity, and as to his absconding therefrom afterwards. The Judge considers that Jogeshur's deposition is evidence against the prisoner under s. 33 of the Evidence Act, and also under s. 512 of the Criminal Procedure Code. It is clearly not admissible under the former Act, as it was not recorded in the presence of the prisoner; and it would only be admissible under the latter if the provisions of s. 512 were complied with. This section requires, we consider, that the absconding should be alleged, tried, and established, before the deposition is recorded. In point of fact, the deposition does not appear to have been recorded under that section at all; it was recorded in the ordinary course of proceedings against other persons, and is, therefore, inadmissible against the prisoner.

Even assuming that it is admissible, there is, we think, an absence of any sufficient corroborative evidence. Proof of his absconding is not sufficient. He belonged to a suspected class of persons, and when several of that class were implicated in the case, it is quite possible that he thought it advisable to leave the village. The evidence shows that he has been living honestly ever since. The conviction must be set aside, and the prisoner released.

Appeal allowed.

1884.
GHURBIN
BAND
v.
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EMPRESS,
10 Cal. 1097.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

ABBILAKH SINGH (PETITIONER) v. KHUB LALL (OPPOSITE PARTY).¹

Sanction to prosecute—Criminal Procedure Code (Act X. of 1882), s. 195, cl. c, para. 2—Notice, when necessary, prior to sanction.

1884.
Aug. 19.
10 Cal. 1100.

A sanction to prosecute, when applied for subsequently to the termination of the proceedings in the course of which the offence is alleged to have been committed, ought not to be granted, unless the person against whom the sanction is applied for had had notice of the application, and an opportunity of being heard.

This was an application for sanction to prosecute made under s. 195 of the Code of Criminal Procedure. One Abbilakh Singh laid a complaint against the servants of Mr. Wilson, of the Poopree factory, in the district of Durbhangah, for assault and forcible entry upon his land. The defence set up before the Deputy Magistrate was, that the father of Abbilakh had, by a written *istifa*, or deed of relinquishment, given up the land or jote in respect of which the complaint had been made. Thereupon, Abbilakh presented an application at the Collectorate, to the effect that the deed alleged to have been filed at the Collectorate by his father, and produced by the factory people, was a fabricated document. That application, together with the complaint, was disposed of by the Deputy Magistrate, who convicted the accused (the servants of the factory), and pronounced the *istifa* to be a forgery. On appeal, the Judge, on the 27th November 1883, discharged the accused, on the ground that the *istifa* was a genuine document. On the 14th February 1884, an application was made by Khub Lall, one of the aforesaid servants of the factory, for sanction to prosecute Abbilakh, on account of his petition at the Collectorate, wherein he imputed forgery to the factory servants. On the 16th February 1884, the Magistrate, without serving any notice on Abbilakh, awarded his "sanction to prosecute." Against that order, Abbilakh presented a petition to the High Court.

Moulvi *Serajul Islam* for petitioner.

Mr. C. Gregory for the opposite party.

The judgment of the Court (FIELD and NORRIS, JJ.) was delivered by

FIELD, J.—This is an application under para. 4, cl. c, s. 195 of the Code of Criminal Procedure, for the revocation of a sanction given for the prosecution of the petitioner, dated 16th February 1884. The sanction is in the following words: "Sanction to prosecute is awarded." We think that this sanction must be revoked on two grounds: The second paragraph of cl. c, s. 195, provides that the sanction "shall, so far as practicable, specify the Court or other

¹ Revision Case, No. 268 of 1884, against the order passed by J. C. Price, Esq., Officiating Magistrate of Durbhangah, dated the 16th of February 1884, awarding sanction to prosecute the petitioner.

1884.

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v.

KHUB LALL,
10 Cal. 1100.

place in which, and the occasion on which, the offence was committed." The sanction which forms the subject of this application does not comply with these provisions of the law.

The second ground upon which we think this sanction ought to be revoked is this: The sanction was not given immediately upon the termination of the proceedings in which the question of the genuineness of the *istifa*, or notice of relinquishment, was raised. It was given when those proceedings had terminated, and by an order of a subsequent date, which virtually re-opened the matter. We think that, when a sanction is applied for under circumstances of this nature, that is, after the termination of the proceedings, in the course of which the offence is alleged to have been committed, the person against whom the sanction is applied for ought to have notice, and have an opportunity of being heard, and that the proceedings ought not to be re-opened in this manner to his prejudice without giving him an opportunity of appearing and being heard. Under these circumstances, we revoke the sanction so far as regards the charge under s. 211. We understand that in this same record there is a charge against the petitioner under s. 500 of the Penal Code. That is an offence for the prosecution of which a sanction is not required, and therefore, so far as regards that offence, we make no order.

Sanction revoked.

VOLUME XI.

CRIMINAL REFERENCE.

*Before Mr. Justice Wilson and Mr. Justice Macpherson.*BASARUDDIN BHUIAH (COMPLAINANT) *v.* BAHAR ALI (OPPOSITE PARTY).¹*Right of way used by the Public—Public right of way—Criminal Procedure Code (Act X. of 1882), ss. 133, 134, 135, 136, 137.*

1884.

Oct. 11.

11 Cal. 8.

The powers embodied in ss. 133, 134, 135, 136, 137 of the Criminal Procedure Code, with regard to the obstruction of public ways, are not intended to be exercised where there is a *bond fide* dispute as to the existence of the public right. Where there is such a dispute, the Court should pass no order under those sections until the public right has been established by proper legal proceedings, civil or criminal.

THIS was a reference made by the Sessions Judge of Dacca, to the High Court, under s. 438 of the Criminal Procedure Code,

It appeared that one Sheikh Basaruddin presented a petition to the Deputy Magistrate of Munshigunge, complaining that Bahar Ali and others had obstructed a public thoroughfare; the Deputy Magistrate ordered an enquiry to be held by a resident of the neighbourhood, and on his report passed the following order: "Notice to issue to the persons complained against under s. 133 of the Criminal Procedure Code to remove the obstruction, or show cause within seven days."

In accordance with this order, two persons, Bahar Ali and Karim, appeared to show cause; and the Deputy Magistrate, after recording the evidence, found that, about a year previous to the complaint, Bahar Ali had raised an objection to the village-cattle crossing the *khal* at his *ghat*; that, in consequence of the objection, the zemindary amlah had come to the *ghat*, and had given the villagers a new *ghat*, *vis.*, that of Karim; that Karim had now obstructed his *ghat*, so that the complainant and his fellow-villagers were unable to take their cattle across the *khal*, either at the *ghat* of Bahar Ali or that of Karim. He further found that the *ghat* of Bahar Ali was a public thoroughfare until a year ago; but that the disuse of a public thoroughfare for a year only would not deprive the complainant and his fellow-villagers of the right of using it; and he came to the conclusion that the obstruction made by Bahar Ali was illegal.

The order recorded by the Deputy Magistrate, after coming to the above conclusion on the facts, was: "The order against Karim is cancelled. I make the order against Bahar Ali absolute under s. 137 of the Procedure Code."

The Sessions Judge was of opinion that this order was bad in law, because a road through the land of a private person, given up a year ago in pursuance of an arrangement made by common consent of the villagers, could not be said to be a public thoroughfare, and that, therefore, the Deputy Magistrate had no jurisdiction. He further was of opinion that the limit of time specified in s. 147 should have been applied; and that the Deputy Magistrate should have referred the parties to the Civil Court. He therefore referred the case to the High Court.

¹ Criminal Reference, No. 144 of 1884, made under s. 438 of the Code of Criminal Procedure, by *W. H. Page, Esq.*, Officiating Sessions Judge of Dacca, dated the 8th of September 1884, against the order of the Deputy Magistrate of Munshigunge, dated the 1st of August 1884.

1884.

No one appeared on the reference.

BASARUDDIN

The order of the Court was delivered by

BHUIAH

v.

BAHAR ALI,

11 Cal. 8.

WILSON, J.—We think the order of the Deputy Magistrate cannot be supported. It has been more than once held by this Court that the powers now embodied in ss. 133 to 137, with regard to the obstruction of public ways, are not to be exercised where there is a *bond fide* dispute as to the existence of the public right. In the present case, it is plain that the right of way is really in dispute, and that its existence is at least open to doubt. No order, therefore, can be made under the sections referred to, until the public right has been established by proper legal proceedings, civil or criminal.

Order reversed.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

1884.

LEIU TU AND SIX OTHERS (PETITIONERS) v. QUEEN-EMPRESS.¹

Oct. 18.

Misdirection of Fury—Fury trial—Burmah Courts' Act of 1875, s. 80—Reference to High Court.

11 Cal. 10.

Three persons, who were attacked and wounded in an affray, informed the police on the same day that the persons who had attacked them were A, B, and C. Eighteen days afterwards the same complainants gave to the Magistrate inquiring into the case the names of four other persons, who, they said, with the three persons first accused, formed the attacking party. The seven accused were tried jointly for the offence before the Additional Recorder of Rangoon and a jury. In his charge to the jury the Additional Recorder omitted to call their attention to the fact that four out of the seven accused had not been mentioned by the prosecutors until after eighteen days had passed over. The prisoners were convicted.

Held that the Additional Recorder misdirected the jury; that under the circumstances the misdirection prejudiced the four persons last accused; and that the verdict must be set aside as far as they were concerned.

THIS was a reference to the High Court under s. 80 of the Burmah Courts' Act of 1875. The facts of the case are stated in the judgment of the Court. The point referred was as follows:—

Whether or not, in this particular case, the learned Additional Recorder misdirected the jury, so far as appellants Nos. 4 to 7 inclusive are concerned, in that he did not point out to the jury the omission on the part of the complainants to charge the appellants with having assaulted them until eighteen days after the assault took place; and if there has been a misdirection, whether or not such misdirection should be held to have so prejudiced these appellants as to justify this Court in setting aside the verdict of the jury so far as they are concerned.

Mr. *W. Jackson* for the appellants.

The judgment of the Court was delivered by

WILSON, J.—The case in which this reference has been made arose in this way: It appears that, on the evening of the 6th of April, the three complainants went into a house in Rangoon occupied by certain actresses; that

¹ Criminal Reference, No. 2 of 1884, made under s. 80 of the Burmah Courts' Act, by the Special Court of British Burmah, consisting of the Judges, *W. E. Ward, Esq.*, and *R. S. T. McEwen, Esq.*, dated September 15th, 1884, against the order of the Additional Recorder of Rangoon.

the persons said to be the seven accused came in afterwards ; that a quarrel arose, in which injuries were inflicted (it is alleged by the seven accused persons, or some of them) upon the complainants ; that on the evening of the occurrence, or immediately after it, the complainants who had gone to the *thannah* pointed out two of the accused persons, who had also gone there, as amongst the persons who had assaulted them, and, on the same evening, they mentioned the name of the third, but at that time they said nothing about the appellants whose case is now before us—the accused persons 4, 5, 6, and 7. The complainants were the same evening taken to the hospital, where the police-officials followed them, and made endeavours to obtain from them the names or identification of any other persons amongst their assailants, in addition to the two who had been identified, and the one who had been named ; but the police-officials failed to obtain any further information then. Eighteen days after the occurrence, and about four days after some of the complainants had come from the hospital, a petition was presented, not through the police, but to the Magistrate who was then investigating the case, in which the four appellants, accused Nos. 4, 5, 6, and 7, were said to have been amongst the assailants. All the seven persons were accordingly committed for trial. The case came on for trial before the Additional Recorder of Rangoon, and all the seven accused were convicted. On appeal to the special Court, objections were taken to the summing up of the Additional Recorder to the jury ; and the two members of the special Court, *viz.*, the Judicial Commissioner and the Additional Recorder, having differed in opinion, this reference has been made. The point referred is this : Whether or not in this special case the learned Additional Recorder misdirected the jury in so far as the appellants Nos. 4 to 7 inclusive are concerned.

Now, in explaining his summing up and its bearing upon the case, the learned Additional Recorder says this : "The seven accused were identified by the various witnesses as well as by the complainants, and the share taken by each man was spoken to. So complete was the evidence of this identification that the appellants' Advocate made a strong point of it in their favour, and pointed out to the jury that the witnesses should not be believed because of the very completeness of their evidence." It is thus clear that, in the view of the learned Additional Recorder, the evidence of identification against the whole seven accused persons, including the appellants, was of an exceptionally clear, specific, and strong kind. If that was so, it appears to us that it was of the very first importance to point out to the jury that, as to four of these people, the story originally told to the police did not touch them at all ; but that all this exceptionally clear story was heard of, for the first time, eighteen days after the occurrence. That seems to us to be not a small circumstance which the Judge might fairly pass by, or assume that the jury would give full weight to. It was a matter of so much moment that, in an ordinary appeal from a conviction by a Judge with assessors, it would probably be sufficient to upset the conviction. Then, there is another aspect of the case, *viz.*, that the attention of the jury was not drawn to the material difference that existed in the evidence as against the two sets of accused persons. So far as we can see from the statement of the Additional Recorder, he left to the jury the case against all the seven accused men as if there was substantially the same case against them all. We think that there was a very great difference between the two cases. The charge against the first three accused persons was made immediately after the occurrence ; the charge against the other four was made for the first time eighteen days afterwards. We think that the omission to call the attention of the jury to this vital matter was a defect so serious as to amount to misdirection within the meaning of that word as construed in the cases cited

1884.

LEIU TU

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EMPRESS,
11 Cal. 10.

1884.

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v.

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11 Cal. 10.

by the Judicial Commissioner and the Additional Recorder. We further think that, under the circumstances of the case, these four persons were prejudiced by the mode in which the matter was left to the jury. Indeed, it could not be otherwise. We are of opinion, therefore, that the point referred to this Court must be answered in this way; that the learned Additional Recorder did misdirect the jury in the manner indicated in the reference; and that this misdirection did so prejudice the appellants 4, 5, 6, and 7, as to justify the special Court in setting aside the verdict of the jury so far as regards these four prisoners.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

1884.

Oct. 24.

11 Cal. 13.

QUEEN-EMPRESS *v.* ISHWAR CHANDRA SUR (ACCUSED).¹

Criminal Procedure Code (Act X. of 1882), ss. 109, 110, 112—Security for good behaviour.

Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence, and that he should be clearly informed of the accusation which he has to meet.

ONE Ishwar Chandra Sur was reported to the Magistrate of Dacca as being "a notorious bad character;" the Magistrate ordered the arrest of Ishwar, and on his appearance took the evidence against him, informing the accused that the order would, if passed, "be under s. 110 of the Code, for one year," and called upon him to show cause why he should not give security and bail for his good behaviour. After recording the answer of the accused, the Magistrate passed the following order: "He will furnish Rs. 50 *muchulka*, and Rs. 50 surety for six months, under s. 109 of the Criminal Procedure Code, and in default to be rigorously imprisoned for that period, or until he furnish security." There was, however, a note written on the order in the Magistrate's own handwriting to this effect: "Under s. 110 for a year."

The Officiating Sessions Judge considered that the order was bad in law, for the following reasons, *viz.*, (1) because no order was recorded in writing by the Magistrate, as directed by s. 112 of the Code; (2) because it was not clear under what section, or for what term, bail and security were demanded from him; and (3) because the accused had not been given an opportunity of entering upon his defence, or of stating whether he would call witnesses. On those grounds, the Sessions Judge, after forwarding to the High Court, the Magistrate's explanation, recommended that the order should be set aside.

The opinion of the Court was delivered by

MACPHERSON, J.—We think the Sessions Judge is right, and that the order must be set aside. The record does not show, and the Magistrate, in his explanation, does not say, that the accused had an opportunity of entering upon his defence, or of citing witnesses.

It is, moreover, by no means clear that the accused knew whether the accusation which he had to meet was one under s. 109 or s. 110 of the Criminal Procedure Code.

Order set aside.

¹ Criminal Reference, No. 160 of 1884, made under s. 438, by W. H. Page, Esq., Officiating Sessions Judge of Dacca, dated 10th October 1884, against the order of F. Wyer, Esq., District Magistrate of Dacca, dated the 27th August 1884.

CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

IN THE MATTER OF HARI MOHUN THAKUR AND ANOTHER (PETITIONERS)
v. KISSEN SUNDARI AND ANOTHER (OPPOSITE PARTIES).¹

1884.
 Oct. 9.

11 Cal. 52.

Burden of proof—Easement—Act X. of 1882, s. 147.

The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land; the burden of proof would, therefore, lie upon the party alleging such rights.

THIS was a proceeding under s. 147 of the Criminal Procedure Code. The parties were zemindars of Chunderpore and Amkhuria, respectively, in the district of Bhagulpore. The dispute arose owing to the Amkhuria zemindars having used the water of a certain reservoir by cutting the spur of an old *bund*. It was admitted that the *hathu* or spur in question lay wholly within the village of Amkhuria. The Court of first instance (the Deputy Magistrate) held that, as there was no reliable evidence to show that the Amkhuria party had, on any previous season during several years prior to the dispute, used the water of the reservoir by cutting through the spur, they should refrain from doing so now. The Amkhuria party applied to the High Court to have that order set aside. It was contended on behalf of the petitioners that, inasmuch as the ditch in dispute lay admittedly within their zemindari, the Deputy Magistrate ought to have called upon the opposite party to abstain from interfering with the cutting of the *bund*, and that the provisions of s. 147 were wholly inapplicable to the case.

Mr. Jackson and Baboo Gonesh Chunder Chunder for the petitioners.

Mr. M. M. Ghose, Mr. O. C. Mullick, and Baboo Charu Charun Mitter, for the opposite party.

The judgment of the Court (WILSON and MACPHERSON, JJ.) was delivered by

WILSON, J.—It appears to us that the order of the Deputy Magistrate in this case cannot be sustained. The controversy was between the proprietors of two neighbouring properties. In the proceedings before the Deputy Magistrate, the parties of the first part were the proprietors, or persons connected with the proprietors, of village Chunderpore. The parties on the other side were the proprietors, or people connected with the proprietors, of village Amkhuria. Now, it appears that there is a reservoir of some considerable size, which stands mainly within the limits of Chunderpore, but partly within the limits of Amkhuria, and partly within the precincts of another property, belonging to persons different both from the first and second party. The reservoir is secured by a *bund* running along its north side, with a spur at the western end, and a spur at the eastern end, both running southerly; the western spur and the adjacent portion of the reservoir being within the limits of Amkhuria. It appears that in the present year the Amkhuria people set about cutting a passage or ditch through the western spur in order to draw the water of the reservoir to their village, Amkhuria, and this was objected to by the Chunderpore people, and there being information that a breach of the peace was imminent, proceedings were taken under s. 147. Now, it is necessary, in order to appreciate these proceedings, to see exactly the position in which the

¹ Criminal Revision, No. 352 of 1884, against the order of Baboo Ram Narain Banerji, Deputy Magistrate of Bhagulpore, dated the 15th September 1884.

1884.
HARI MOHUN
THAKUR
v.
KISSEN
SUNDARI,
11 Cal. 52.

parties stand. The Amkhuria people stand simply upon their ordinary proprietary right as owners of the lands of Amkhuria. They claim a right which, *prima facie*, all proprietors are entitled to exercise, *viz.*, to cut a *bund* on their own land, and use the water standing on their own land. On the other hand, the Chunderpore people claim a right, which they may very well have, but which it lay upon them to establish, *viz.*, to restrain the Amkhuria people from exercising ordinary proprietary rights over their own land. That is a right of the nature of an easement different from ordinary rights of owners of land. And, in order to entitle them to ask for an order under s. 147, the Chunderpore people had to satisfy the Magistrate that the alleged right existed; that is to say, that the Chunderpore people had the right of restraining the Amkhuria people from doing as they would on their own land. The Deputy Magistrate, before whom the matter came, appears to us to have misunderstood the question which he had to deal with. He assumes that the question before him was not as to the easement alleged by the Chunderpore people, but the right of the Amkhuria people to cut their own *bund* and draw water standing on their own land. The finding which he arrives at is this: "The Court finds that the second party did not exercise any right in drawing water from the Banhara *bund* by cutting its western path for several years, and that they took no water from it by opening *kunwas* during the season next preceding such institution; and therefore the Court directs that they must not do so now, and that the western bottom be not cut till they obtain the decision of a competent Civil Court adjudging them to be entitled to do such thing." The Deputy Magistrate appears to us to have wholly misunderstood the question before him. He threw the burden on the wrong side, and his findings are insufficient to support the order that he has made. It is not necessary for us to say anything about the view taken by the Deputy Magistrate of the proviso to s. 147. Whether that proviso really has any application to a case of this kind is a question of considerable difficulty, and one as to which we are not disposed to express any opinion at present. It is sufficient to say that in our judgment the order made by the Deputy Magistrate is not supported by any finding which he has arrived at, and that this order must, therefore, be set aside. Any costs that may have been paid under the orders of the Court will be refunded.

Order set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

1884.
Sep. 18.
11 Cal. 77.

IN THE MATTER OF CHANDRA SEKHAR RAI (PETITIONER).¹

Security-bond—Code of Criminal Procedure (Act X. of 1882), s. 514.

As there is no provision in the Criminal Procedure Code authorizing a police-officer to take a surety-bond for the production of any person before the police, such a bond is *ab initio* void; and a Magistrate has no power to alter it, and impose fresh obligations thereunder.

THIS was a reference to the High Court by the Judge of Dacca in respect of an order of a Magistrate, purporting to have been passed under s. 514 of the Criminal Procedure Code. The facts are briefly these: On a certain date, the inspector of police sent a report to the Magistrate of Dacca that one Chandra Sekhar Rai had given a bond to him for the production of twelve persons,

¹ Criminal Reference, No. 142 of 1884, made under s. 438 of the Code of Criminal Procedure, by *W. H. Page, Esq.*, Officiating Sessions Judge of Dacca, dated 8th September 1884, against the order of *H. F. Wyer, Esq.*, Magistrate of Dacca, dated 18th August 1884.

1884.

 IN THE
 MATTER OF
 CHANDRA
 SEKHAR RAI,
 11 Cal. 77.

and had failed to produce them when required, and had, therefore, rendered himself liable to the penalty mentioned in the bond. In pursuance of a notice, Chandra Sekhar appeared before the Magistrate, who, on the 12th August, passed the following order: "I find that the accused were ordered *to be present*; but whether before the police, or before the Magistrate, is not stated. No security could be taken for the production of the persons before the police, but only before the Magistrate. I therefore direct that Chandra Sekhar Rai produce the twelve men before me within ten days." This order was served upon Chandra Sekhar on the 12th August. Thereupon, Chandra Sekhar presented a petition to the Magistrate, denying execution of the bond; the Magistrate, however, on the 18th August, declared the bond forfeited, and directed the attachment and sale of the petitioner's moveable property.

The High Court (WILSON and MACPHERSON, JJ.) passed the following order:—

MACPHERSON, J.—The Magistrate's order, directing the attachment and sale of the moveable property of the petitioner on forfeiture of the surety-bond executed by him for Rs. 2,400, is illegal, and must be set aside. There is no provision in the Criminal Procedure Code, authorizing a police-officer to take security for the production of any person before the police. If the bond was in this respect bad, the Magistrate had no power to alter it, and to impose on the petitioner a fresh obligation.

Assuming, however, that the conditions of the bond could be legally enforced, there has been a total disregard of the provisions of s. 514 of the Code. The bond was taken by a police-officer; and that section requires that, on its being proved to the satisfaction of the Court that the bond has been forfeited, the Court shall record the grounds of such proof, and call upon the person bound by it to show cause why the penalty should not be paid. In the present case, the petitioner denied the execution of the bond, and cited as his witnesses the police-officer, to whom it was said to have been given, and other police-officers. These were witnesses whose attendance he could not enforce without the assistance of the Magistrate; and it is difficult to see how the Magistrate could, on the mere report of a police-officer, whose conduct in the matter was directly challenged, be satisfied that the bond had been executed.

A Magistrate acting under s. 514 must proceed on legal evidence; and the penalty can only be enforced on proof that the bond was duly executed and forfeited. The denial of execution by the petitioner made it incumbent on the Magistrate to take evidence as to the fact of execution.

The Magistrate's proceedings are in other respects illegal. If the notice to produce the accused persons within ten days was only served upon the petitioner on the 12th August, there was no breach on the 18th, when the Magistrate summarily ordered that the amount should be realized by attachment and sale of his moveable property.

Order set aside.

CRIMINAL REFERENCE.

*Before Mr. Justice Wilson and Mr. Justice Macpherson.*QUEEN-EMPRESS *v.* ATAR ALI (ACCUSED).¹

1884.

Nov. 3.

11 Cal. 79.

False charge—Compoundable offence—Discharge of accused charged under s. 211, Indian Penal Code, upon plea of original charge having been compounded—Act XLV. of 1860 (Indian Penal Code), ss. 211, 342, 347—Act X. of 1882 (Criminal Procedure Code), s. 345.

The fact that an offence alleged to have been committed has been compounded is no conclusive answer to a charge made against the prosecutor under s. 211 of the Penal Code.

A laid a charge against M for wrongful confinement. The police reported the case as a false one; and A not appearing to prove his complaint, the District Magistrate ordered him to be prosecuted under s. 211 of the Penal Code, and made over the case to a Deputy Magistrate. Upon the hearing of such charge, A pleaded that he had compounded the original charge laid by him against M, and that, therefore, the charge against him, under s. 211, could not lie. The Deputy Magistrate, without hearing any evidence, dismissed the case.

Held that the course so taken was illegal, as such plea was no conclusive answer to a charge under s. 211.

THE facts which gave rise to this reference were as follows :—

On the 29th June, one Atar Ali gave information to the police of Char-siddhi that his father was being wrongfully confined by Minut Ali, with a view to extort a kabooliat from him. The police reported the case as false; and as the complainant failed to appear and prove his complaint, the District Magistrate ordered his prosecution under s. 211 of the Penal Code on the 23rd August, and made over the case for trial to the Deputy Magistrate, who was a First-class Magistrate. On the 26th August, the latter fixed the 9th September for hearing, and issued a summons against Atar Ali under s. 211 of the Penal Code. On the 9th September, the case was adjourned till the 10th September. On the 10th September, Atar Ali filed a petition, submitting that the charge under s. 211 could not proceed, as he had compounded the original charge under s. 342 of the Penal Code. The Deputy Magistrate accordingly dismissed the case without passing any orders about the accused. Upon being called upon for an explanation by the District Magistrate, he gave the following as his reasons for the course adopted: "In this case, the complainant, in the original charge, was called on to come and prosecute. He did not do so, on the ground that he had compounded with the accused. Now, s. 345 of the Code of Criminal Procedure does not prevent a case under s. 342, being compounded out of Court. Hence, if a complainant on that charge does not appear to prosecute, a charge under s. 211 would not lie against him, especially on the motion of the police."

The District Magistrate accordingly now referred the case to the High Court, with a covering letter which contained the following :—

"It appears to me the order of the Deputy Magistrate is quite illegal. A charge under s. 211 of the Penal Code cannot be compounded. An accused, summoned under s. 211 of the Penal Code, cannot be discharged without taking evidence for the prosecution. The complaint before the police amounted to an offence under s. 347 of the Penal Code, and was described by them as such,

¹ Criminal Reference, No. 159 of 1884, by *Baboo A. Borooah*, Officiating Magistrate of Noakhali, dated the 6th October 1884, against the order made by *H. W. Barber, Esq.*, Deputy Magistrate of Noakhali, dated the 10th September 1884.

and such an offence is not compoundable under s. 345 of the Criminal Procedure Code. There is no law that a false charge of wrongful confinement cannot be enquired into, if the complainant fails to prove his complaint.

"Questions again and again come before us, (1) whether the right of compounding allowed by s. 345 of the Criminal Procedure Code can be exercised at any time the complainant chooses, *e.g.*, after the charge is framed, or after the witnesses for the prosecution are examined, or only up to the initial stage of the prosecution, *viz.*, when the accused appears, or is brought before the Magistrate; and (2) whether a prosecution, under s. 211, Indian Penal Code, can be frustrated by the alleged exercise of this right, *i.e.*, whether the original complainant, when ordered to prove his complaint preliminary to a trial under s. 211, Indian Penal Code, can get off by simply alleging that he had compounded the case.

"As these two points are connected with this reference, I solicit the honourable Judges will be pleased to clear our doubt by a decisive ruling."

No one appeared on the reference for either party.

The opinion of the High Court (WILSON and MACPHERSON, JJ.) was delivered by

WILSON, J.—We agree with the District Magistrate in thinking that the order of the Deputy Magistrate is illegal, on the ground that the compounding of the original charge was not a conclusive answer to the charge under s. 211. The order will be set aside, and the case will proceed before such Magistrate as the District Magistrate may direct.

The other point, raised by the District Magistrate, we think it unnecessary to deal with upon this reference.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

CHUNDER NATH GHOSE (PETITIONER) *v.* NUNDOLLOL CHATTERJI
(OPPOSITE PARTY).¹

*Penal Code, ss. 497, 498—Marriage insufficiently proved—Discharge of accused—
Re-trial ordered—Wife ordered to be examined on re-trial.*

In an enquiry into a case of alleged adultery, and enticing away a married woman for illicit purposes, the complainant refused to examine his wife as to the marriage, the Deputy Magistrate declined to frame a charge, and discharged the accused.

The Sessions Judge directed a re-trial to be held by another Deputy Magistrate, and ordered that the evidence of the wife should be taken as to the marriage.

Held that the Sessions Judge, in ordering a re-trial, had not exercised a proper discretion, he having admitted that the prosecution had failed to prove the marriage, and it not being alleged that any evidence was tendered by the prosecution, and not taken by the Deputy Magistrate.

THIS was a motion made to the High Court under Ch. XXXII. of the Criminal Procedure Code.

It appeared that one Nundololl Chatterji accused Narain Mytee with having committed adultery with his (the complainant's) wife, and with having enticed her away for illicit purposes.

¹ Criminal Revision, No. 377 of 1884, against the order of *H. Beveridge, Esq.*, Officiating Sessions Judge of 24-Pergunnahs, dated 20th of September 1884, setting aside the order of Nawab Abdul Latif, Khan Bahadur, Deputy Magistrate of Sealdah, dated 1st August 1884.

1884.

QUEEN-
EMPRESS

v.

ATAR ALI,

11 Cal. 79.

1884.

Nov. 12.

11 Cal. 81.

1884.

CHUNDER
NATH GHOSE

v.

NUNDOLLOL
CHATTERJI,
11 Cal. 81.

The complainant cited several witnesses (amongst whom was his wife); but although she was in attendance at the Court, refused (when called upon to do so by the Deputy Magistrate) to examine her. Evidence was attempted to be given of the marriage, but was insufficient.

The Deputy Magistrate held that the evidence on behalf of the prosecution was insufficient to justify the framing of a charge; and he accordingly dismissed the case, and directed that the accused should be discharged.

Nundololl Chatterji thereupon applied to the Court of the Sessions Judge under s. 435 of the Code of Criminal Procedure, on the ground that the evidence was sufficient to justify a conviction.

The Sessions Judge sent for the record, and passed the following order :—

“I do not think that the Deputy Magistrate's judgment in this case is satisfactory. It is extremely short, and no reasons are given for disbelieving the evidence for the prosecution. It cannot be doubted that the woman left the house where she and her husband were residing, or that she did so at about the time mentioned by the witnesses. She may not be of good character, but still she could hardly effect her departure alone, and if the accused helped her to go away, they are guilty under s. 498.

“It is objected that the marriage has not been properly proved. This is true; but apparently this was, because the husband and the barber witness were not properly examined. The marriage took place some twenty years ago, and so it is not a matter very susceptible of strict proof. This is a point on which the woman herself might be examined. Her deposition should certainly have been taken. It seems to me that the accused have been improperly discharged, and I therefore direct that the case be further enquired into. As the evidence was once taken by Nawab Abdul Latif, and he has disbelieved it without assigning any reasons for his disbelief, I think it will be better that the case be re-tried by some other Magistrate. The woman should be sent for and examined, and proof should be taken of the marriage.”

The accused thereupon moved the High Court to have the order of the Sessions Judge set aside, on the following grounds :

(1) That the complainant had attempted, but had failed, to prove his marriage with the woman said to have been enticed away, and that, therefore, the Sessions Judge was wrong in directing the alleged wife to be sent for, and examined as to the marriage, inasmuch as she was cited as a witness by the prosecution, and attended Court each day of the enquiry, but was not examined by the complainant, the latter having distinctly stated to the Deputy Magistrate that he declined to examine her.

(2) That the Sessions Judge was wrong in ordering a new trial, and in ordering the new trial to be held by an officer other than the Deputy Magistrate who had held the enquiry.

Baboo *Aushulosh Dhur* and Baboo *Sham Lall Mitter* for the petitioner.

Baboo *Kali Charan Banerjee* for the opposite party.

The order of the Court (PRINSEP and O'KINEALY, JJ.) was as follows :—

This is a case of adultery, and enticing away a married woman with criminal intent, under ss. 497 and 498 of the Penal Code. After hearing the entire evidence for the prosecution, the Magistrate discharged the accused, on the ground that the evidence was not sufficient to justify the framing of a charge. The Sessions Judge, however, on an application made to him, has,

under s. 437 of the Code of Criminal Procedure, directed a further enquiry to be held. The Sessions Judge at the same time admits that the prosecution has failed to prove the fact of marriage on which this case depends. It is not alleged that any evidence was tendered by the prosecution, and not taken by the Magistrate. But the Sessions Judge seems to think that the wife, whom the complainant (the husband) refused to call as a witness, should have been examined by the Court; and on the supposition that, if the case be re-tried, a different complexion might be put on it, he has thought proper to order a re-trial by another Magistrate.

1884.

CHUNDER
NATH GHOSE

v.

NUNDOLOLL
CHATTERJI,
11 Cal. 81.

In dealing with this matter, we think we should consider whether we should have granted such an application if it had been made to us. We have no doubt that it would not have been regarded by us favourably, and that we should certainly not have re-opened the case. We cannot, therefore, but find that in ordering a further enquiry, or rather a re-trial, the Judge has not exercised a proper discretion. The order is therefore set aside.

Order set aside.

CRIMINAL REFERENCE.

*Before Mr. Justice Mitter and Mr. Justice Norris.*UMA CHURN MUNDLE AND OTHERS (COMPLAINANTS) v. JOSHEIN
SHEIKH AND OTHERS (DEFENDANTS).¹

1884.

Dec. 5.

*Criminal Procedure Code (Act X. of 1882), ss. 133, 138, 139—Jury
illegally constituted—Furor refusing to act.*

11 Cal. 84.

One out of five jurors appointed under s. 138 of Act X. of 1882 declined to act on the jury. Two out of the remainder of the jury were in favour of a temporary order under s. 133 being maintained, whilst the other two were against its being so maintained. The Deputy Magistrate declined to pass any order under s. 139 of the Code of Criminal Procedure, as a majority of the jurors did not find the temporary order to be reasonable and proper; and he therefore struck off the case.

Held that the course taken by the Deputy Magistrate was irregular, and *ordered* that a fresh jury be summoned, and the case enquired into anew.

THIS case was referred to the High Court under s. 438 of Act X. of 1882.

It appeared that one Joshein Sheikh had closed up a public thoroughfare by placing a fence across it; and, on the complaint of one Uma Churn Mundle, the Deputy Magistrate of Howrah issued an order under s. 133 of the Code of Criminal Procedure, calling upon Joshein Sheikh to remove the obstruction, or to appear before him to show cause why the order should not be set aside.

The parties appeared, and eventually a jury consisting of five persons was appointed under s. 138 of the Code of Criminal Procedure. One of these five jurors appointed did not act on the jury, and of the remainder two were in favour of the Deputy Magistrate's order being maintained, and two were against it.

The Deputy Magistrate thereupon passed the following order: "Of the five jurors appointed, one has not acted at all; two report in favour of the order; two against it. As a majority of the jurors do not find the order to be reasonable and proper, no further steps can, under s. 139, be taken. Case struck off." The

¹ Criminal Reference, No. 185 of 1884, made by *W. H. Grimley, Esq.*, Magistrate of Howrah, dated the 28th November 1884, against the order of *Baboo Bunkim Chunder Chatterji*, Deputy Magistrate of Howrah, dated the 14th of October 1884.

1884.

UMA CHURN

MUNDLE

v.

JOSHEIN

SHEIKH,

11 Cal. 84.

District Magistrate, at the instance of the complainant, considered that this order was illegal, because (1) the jury were not legally constituted; inasmuch as it consisted of four persons only; and (2) because the proper course for the Deputy Magistrate to have taken was to have appointed another juror in the place of the one who did not act. The Deputy Magistrate, on being called upon for his explanation, did not consider it necessary to offer any explanation in support of the course he had taken, inasmuch as he was of opinion that the case could be revived without any reference to the High Court; and he further considered that ss. 438, 439 of the Code of Criminal Procedure did not apply to a case in which there was no sentence to be revised.

No one appeared for either party on the reference.

The order of the Court (MITTER and NORRIS, JJ.) was as follows:—

We think that the course taken by the Deputy Magistrate was irregular. He must summon a fresh jury, and commence the enquiry afresh.

Order set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Norris.

QUEEN-EMPRESS v. JACQUIET.¹

1884.

Dec. 8.

11 Cal. 85.

Verdict in accordance with charge—Verdict disagreed with by Judge—Reference under s. 307, Act X. of 1882.

The Court will not interfere with the finding of a jury, unless their verdict is shown to be manifestly erroneous.

A prisoner was charged under ss. 302 and 304 of the Penal Code, and the Judge at the trial added a further charge under s. 325. The Judge in his charge to the jury directed them that, in the event of their finding the charges under ss. 302 and 304 unsustainable, they might find the prisoner guilty under s. 325.

The jury unanimously acquitted the prisoner under the charge framed under s. 302, and a majority of them acquitted him under the charge framed under s. 304; but a majority of them found him guilty under the charge framed under s. 325.

The Judge disagreed with their finding as regarded the charge framed under s. 304, and referred the case to the High Court under s. 307 of the Criminal Procedure Code.

The High Court refused to interfere with the verdict, on the ground that the verdict could not be said to be manifestly erroneous, the Judge having heard the evidence, and having expressed his opinion to the jury that they might find the prisoner guilty under s. 325.

ONE Thomas Jacquet, a guard in the service of the East Indian Railway Company, was committed to the Court of the Sessions Judge of Burdwan, charged under ss. 302, 304 of the Penal Code with having caused the death of his wife.

The Sessions Judge on his own motion added a further charge under s. 325 of the Penal Code, in order to meet the somewhat doubtful testimony of the medical officer given in the Court below as to the exact cause of the death of the prisoner's wife.

The evidence given at the Sessions Court was to the effect that, on the 2nd October, Jacquet was taken home drunk and incapable at about 11 A.M.,

¹ Criminal Reference, No. 23 of 1884, made by S. H. C. Taylor, Esq., Sessions Judge of Burdwan, dated 20th November 1884.

and that at that time Mrs. Jacquet was lying on her bed; and it appeared that the prisoner at 1 P.M. sent his servant with his children out of the house, and was then left alone in the house with his wife. At 6 P.M. the prisoner was again seen, and was then said to have been able to stand, and talk. Between the hours of 1 and 6 P.M. Mrs. Jacquet was murdered. The medical evidence was, however, a little uncertain as to the exact cause of death itself, though it clearly showed that the wife had been brutally treated.

1884.
 QUEEN-
 EMPRESS
 v.
 JACQUET,
 11 Cal. 85.

The Sessions Judge charged the jury as follows :—

“ There is hardly a point in this case either for or against the prisoner that has not been fully discussed before you by counsel on both sides; and it has been clearly shown to you that the main question which calls for your most careful consideration is whether the prisoner intended to commit any offence, and, if so, what was the offence he intended to and did commit. I need hardly say that there cannot be a shadow of a doubt that the prisoner did take the life of his wife, for it would be simply preposterous to hold that the injuries which Mrs. Jacquet received were either self-inflicted, or the result of accident. Some person must have caused them, and as the prisoner was admittedly alone with his wife that day, none but he could have killed her. I may furthermore observe that no attempt whatever has been made to shift the act on to any one else's shoulders, while the whole argument of prisoner's counsel has been directed solely to endeavouring to bring the case under s. 325 of the Penal Code. Looking at the several charges, you will see that intention or knowledge forms an essential element therein. If, after considering all the facts disclosed, you are of opinion that the prisoner really did intend to take his wife's life under any of the conditions enumerated under s. 300 of the Penal Code, you must find him guilty of a most atrocious murder. If, however, the circumstances disclosed lead you to think that his case falls short of murder, there is the charge under s. 304 of the Penal Code against the prisoner; and if for any good reason you hold that s. 304 of the Penal Code will not apply to his case, there is the third (and alternative) charge under s. 325, under which it would be very difficult not to bring his case, if the other charges fail. You have been rightly told that intoxication cannot be pleaded as an excuse for the commission of an offence; but where intention or knowledge are facts which bear directly upon the guilt or innocence of a person charged with so serious an offence as the prisoner is, it has always been the practice of our Courts to consider such plea when determining such question of knowledge or intention. And here it seems to me that it is all the more necessary to take that plea into consideration, inasmuch as we are left considerably in the dark as to much that took place from the hour of 1 P.M. to the time Mrs. Jacquet's dead body was seen by the prisoner's neighbours. You have the fact that the prisoner was helplessly drunk on the morning of the day the deceased lost her life, and also that his wife was tipsy. You have been told that there was a bottle of brandy which, though nearly full in the morning, was found nearly empty in the evening. None but these two persons apparently had access to this bottle, and it may be assumed, I think, that either one or both drank of its contents some time during the day. On the other hand, you have been told that at a later hour in the day the prisoner had sufficiently recovered to know, at all events, what he was about; and I think it would be hard to hold that after 1 P.M. of that day the prisoner was incapable from drink of knowing what he was about. Up to this stage in the case nothing of a complicated nature presents itself. From this point, however, we have difficulties to contend with, and here, too, your best consideration to all the surrounding circumstances must be given.

I. L. R., Cal. 76.

1884.

QUEEN-
EMPRESS

v.

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11 Cal. 85.

There are two points especially to which I would draw your attention, as it appears to me that a correct appreciation thereof will go far to help you to a right determination on the question of intention or knowledge. It has been urged, in the first place, that in sending his servant away with his children the prisoner must have premeditated murder; and, secondly, that, in changing his clothes and concealing them, he was merely carrying out a preconceived plot. As to the second assertion it is not quite correct, for the prisoner did not conceal his blood-stained clothes, but put them with his other soiled linen in the dirty clothes basket, and he did not change his clothes till he went to the station to despatch two telegrams to his relations announcing the death of his wife. This he did publicly when his neighbours were viewing the corpse, and after he had been in his blood-stained clothes to call Mr. Rome to see his wife. So far, then, from there being any concealment, the man acted in a most open and public manner. Indeed, if you look to his whole conduct, it savours rather of a man partially stunned by the consequences of his own desperate acts, than of one who had preconceived a deliberate murder, and afterwards tried to conceal the fact. If you agree with me in this, will you be prepared to hold that the sending away his servant with his two children, at a time when he was evidently still under the influence of his morning's libations, must show that he had planned a murder? I confess I cannot think so. You must consider whether or not you think so. But, apart from all this, there is another very important circumstance which you have to consider in connection with this question of intention. You have heard that the prisoner, though sometimes the worse for liquor, was generally a well-conducted inoffensive man, devoted to his wife, and against whom the most that only one witness could say was that he had at times slapped his wife. There is absolutely not an iota of evidence to show, or lead to the inference, that anything whatever had occurred between husband and wife on the day the latter lost her life, that was calculated to make the prisoner even annoyed or displeased with his wife. Such being the case, are you prepared to say that the prisoner intended to take the life of his wife? If, while caring for his wife, and having no cause for complaint against her, the man unprovoked committed a deliberate murder, I do not see how one could avoid looking on the act as that of an insane person. But the prisoner is not insane, and we must form some other and reasonable opinion on the case. In so doing, however, we are left absolutely to conjecture. For hours during the day in question husband and wife were alone—not an eye to see, not an ear to hear, what passed between them. We know only the result—and if you agree with me in thinking it highly improbable that murder could have been contemplated by any sane person under the circumstances, we are forced to the conclusion that something must have taken place between the two which actuated the prisoner to the deed—and it seems to me that there is nothing more probable than that both (being probably still under the influence of their morning's drinking) had words, and that in the course of a quarrel the prisoner, unable to control himself, made what must have been a savage attack on his wife. If there were evidence to show what was the provocation, if any was given, it could be without much difficulty seen whether it was of that grave and sudden nature as would under the law reduce the offence from murder to culpable homicide not amounting to murder. But there is no such evidence, and we have to do the best we can to fill up the gap. Where a doubt exists, the prisoner is entitled to the benefit thereof; and here an intention to commit murder as defined under s. 300 of the Penal Code seems to me to be left unproved. If you are doubtful on the point, you must give the prisoner the benefit of such doubt. As to the charge under s. 304, I am bound to tell you that the facts,

if credited, certainly establish that charge, for the prisoner was not so drunk that he did not know what he was about, and the attack was so savage, and the wounds inflicted so severe, that he must have known what the consequences were likely to be. As to the charge under s. 325, I need hardly tell you that it is a very minor one, and was added in order to meet the doubtful testimony of the medical officer as to the cause of death when he was deposing in the Court below. If for any good reasons you can say that the case does not come under either s. 302 or 304, and you hold that a minor offence was committed, there is ample evidence to show that grievous hurt was voluntarily caused. Your best attention is solicited to all the facts disclosed in this case."

The jury unanimously found the prisoner not guilty under the charge framed under s. 302; and in the proportion of three to two found him not guilty under the charge framed under s. 304; but in the proportion of three to two found him guilty under the charge framed under s. 325.

The Sessions Judge, however, disagreed with the verdict of the jury as to their finding on the charge under s. 304 of the Penal Code; and as, in his opinion, the sentence which he was capable of passing under s. 325 was wholly inadequate to the offence committed, he referred the case to the High Court for orders under s. 307 of the Code of Criminal Procedure.

On the case coming up before the High Court—

The *Officiating Deputy Legal Remembrancer* (Mr. *Leith*) appeared for the Crown.

Babu Khetter Mohun Gangooli for the prisoner.

The following order was passed by the Court (MITTER and NORRIS, JJ.):—

NORRIS, J.—This case has been referred to us by the Sessions Judge of Burdwan under the provisions of s. 307 of the Code of Criminal Procedure. The facts are briefly these: The prisoner was committed for trial under ss. 302 and 304 of the Penal Code. At the trial the Sessions Judge of his own motion added a charge under s. 325 of the Penal Code. Evidence was adduced in support of all three charges; and at the close of the case for the prosecution and the speeches for the prosecution and defence, the Judge proceeded to charge the jury. He began his charge by telling the jury that the counsel for the defence had endeavoured to bring the case within s. 325, in other words, had endeavoured to save his client's life. The Judge then goes on to point out to the jury what evidence there is in favour of the charge under s. 302, and what evidence there is against it. Similarly the Judge points out what evidence there is for and against the charge under s. 304. Then the Judge goes on to say: "As to the charge under s. 325, I need hardly tell you that it is a very minor one, and was added in order to meet the doubtful testimony of the medical officer as to the cause of death when he was deposing in the Court below. If for any good reasons you can say that the case does not come under either s. 302 or s. 304, and you hold that a minor offence was committed, there is ample evidence to show that grievous hurt was voluntarily caused." Now, if the Judge in the Court below was of opinion, as he appears to be according to his letter of reference, that this case resolved itself simply into the question whether the prisoner was guilty of murder or of culpable homicide not amounting to murder, instead of directing the jury, as he has done, that they might convict under s. 325, he should have struck out the charge under this section, even if the prisoner had been originally charged thereunder. He should have said: "Gentlemen, there was a charge under s. 325, I have taken it upon myself to strike out that

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charge, as the crime of the prisoner cannot possibly be brought under that section." Instead of doing that, the learned Judge invites the jury, if they fail to find a verdict either under s. 302 or 304, to return a verdict under s. 325. This being the way that he has charged the jury, it is unreasonable for the Judge to complain of the verdict that the jury have returned, and throw upon us the responsibility of dealing with the case under s. 307 of the Code of Criminal Procedure. We decline to interfere with the verdict of the jury. We convict the prisoner of the offence charged under s. 325, and sentence him to be rigorously imprisoned for seven years.

MITTER, J.—I concur. It is clear upon the authority of decided cases that this Court will not interfere unless the verdict of the jury be found to be manifestly erroneous. In his charge to the jury the Sessions Judge directed that, in the event they found the other charges unsustainable, they might find the accused person guilty under s. 325, if that offence, in their opinion, has been established upon the evidence. The Sessions Judge heard the evidence, and after recording it, he expressed his opinion in his charge to the jury that they might upon that evidence find the accused person guilty under s. 325. That being so, I am not prepared to say, upon the bare perusal of the recorded evidence, that the verdict of the jury is manifestly erroneous.

Verdict affirmed.

CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

RAJNARAIN KOONWAR (PETITIONER) v. LALA TAMOLI RAUT (OPPOSITE PARTY).¹

1884.

Nov. 6.

11 Cal. 91.

Joinder of charges—Summons and Warrant-cases—Criminal Procedure Code, ss. 247 and 253.

In the investigation of a complaint, which forms the subject of two distinct charges arising out of the same transaction, one of which is a summons, and the other a warrant-case, the procedure should be that prescribed for warrant-cases.

THIS case arose out of a dispute in regard to a certain field. It was alleged that, in the course of the dispute, one Lala Tamoli had been severely assaulted, and his crops taken away. The charge laid was one of theft, as well as of voluntarily causing hurt. The Deputy Magistrate, seeing that the complainant (Lala Tamoli) did not appear on the day fixed for the trial, passed an order under s. 247 of the Criminal Procedure Code, the effect of which was to acquit the accused. An appeal, it would seem, was preferred to the District Magistrate, who, after expressing his dissatisfaction with the mode in which the matter had been disposed of, ordered a new trial by another Deputy Magistrate. The accused, thereupon, applied, under the revisional sections of the Code, to the High Court, where, among other things, it was contended that the District Magistrate had no power to order a new trial in a case wherein an order of acquittal had already been passed.

Baboo Gopi Nath Chatterjee for the petitioner.

Baboo Amarendra Nath Chatterjee for the opposite party.

The judgment of the Court (WILSON and MACPHERSON, JJ.) was delivered by

¹ Criminal Revision, No. 366 of 1884, against the order of J. C. Price, Esq., Officiating Magistrate of Durbhangah, dated the 17th October 1884, setting aside the order of Baboo Gomhar Ali, Deputy Magistrate of Durbhangah, dated the 30th June 1884.

WILSON, J.—In this case two charges were made against the accused persons arising out of exactly the same state of facts and under the same circumstances. The one was a charge of voluntarily causing hurt, which would be a summons-case; and the other a charge of theft, which would be a warrant-case. But inasmuch as the two charges were based upon exactly the same evidence and the same circumstances, and no order was made for a separate trial, it is plain that the mode of trial under which the Deputy Magistrate ought to have proceeded was that applicable to the greater of the two charges, that is, the case ought to have been tried as a warrant-case. But what happened was this: The complainant being absent on a day to which the hearing of the case was adjourned, the Deputy Magistrate made an order, purporting to be an order under s. 247. An order under this section is, of course, an order of acquittal. What he ought to have done was to have made the order under s. 253, not for acquittal, but for discharge. Now, one or other of two things must be the case. Either the Deputy Magistrate intended to take the proper procedure, and make an order under s. 253, although he mentioned s. 247. If that be so, then, perhaps, the order ought to be treated as one under s. 253; but in this case the order of the District Magistrate would be clearly right; or, on the other hand, the Deputy Magistrate did not intend to act under s. 253, but to proceed, as he says, under s. 247, and in that case he made an order which was clearly illegal. It may be that the District Magistrate had no authority to set aside that illegal order, but we have that authority; and the matter having been brought before us, we think it would be right to make the order which we have power to make, although, perhaps, the District Magistrate had not. That being so, it would be an idle form to interfere with the order made by the District Magistrate.

1884.

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11 Cal. 91.*Re-trial allowed.*

APPELLATE CRIMINAL.

*Before Mr. Justice Mitter and Mr. Justice Norris.*BEHARI MAHTON (APPELLANT) v. QUEEN-EMPRESS (RESPONDENT).¹

1884.

Dec. 16.

Charge—Accused entitled to know exact nature of charge made against him—Criminal Procedure Code (Act X. of 1882), s. 221.

11 Cal. 106.

An accused is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company.

In this case, the accused Behari Mahton was committed to the Sessions Court at Patna charged as follows:—

“(1.) That he, on or about the 14th day of January 1884, being a member of an unlawful assembly, and using violence in pursuance of its common object, committed the offence of rioting, and thereby committed an offence punishable under s. 147 of the Penal Code.”

“(2.) That, in pursuance of the common object of the unlawful assembly of which he was a member, certain other members of the assembly committed the offence of murder of Bhagut Goala, and that he was therefore, under s. 149 of the Penal Code, guilty of that offence.”

¹ Criminal Appeal, No. 680 of 1884, against the order and sentence of *T. D. Beighton, Esq.*, Sessions Judge of Patna, dated the 10th of July 1884.

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11 Cal. 106.

The Sessions Judge added to the last charge the words "and thereby committed an offence punishable under ss. 302, 149 of the Indian Penal Code, and within the cognizance of the Court of Session;" he also further added two other charges, *viz.*—

"(3.) That you, Behari Mahton, on or about the 14th January 1884, at Kurhara, in pursuance of the common object of the unlawful assembly of which you were a member—such common object being to resist the theft of crops by violence—certain other members of the said assembly (names unknown) committed the offence of culpable homicide of Bhagut Goala, an offence which you knew likely to be committed in pursuance of the common object; and you are, therefore, under s. 149 of the Indian Penal Code, guilty of the aforesaid offence, and thereby committed an offence punishable under ss. 304, 149 of the Indian Penal Code, and within the cognizance of this Court."

"(4.) That you, Behari Mahton, on or about the 14th January 1884, at Kurhara, in pursuance of the common object of the unlawful assembly, of which you were a member—such common object being to resist the theft of crops by violence—certain other members of the said assembly (names unknown) committed the offence of grievous hurt, which you knew likely to be committed in pursuance of the common object; and you are, therefore, under s. 325 of the Indian Penal Code, guilty of the aforesaid offence, and thereby committed an offence, punishable under ss. 325 and 149 of the Indian Penal Code, within the cognizance of this Court."

The Judge, in charging the jury, omitted to direct the jury to consider what, if any, was the common object of the assembly before the assault was committed; he further omitted to point out that, if the assault was committed in the absence of the accused, they ought to be satisfied that it was committed in pursuance of a common object, which would make the assembly unlawful within the meaning of s. 149 of the Penal Code.

The jury acquitted Behari of the offences under the first and third charges, but found him guilty under the last (having returned no verdict under the second charge).

The prisoner was sentenced to 18 months' rigorous imprisonment.

The prisoner appealed to the High Court.

No one appeared at the hearing.

The judgment of the Court (MITTER and NORRIS, JJ.), after setting out the two first charges *in extenso*, ran as follows:—

We are of opinion that the two first charges are not sufficiently explicit, and that they should have contained such particulars of the manner in which the alleged offence was committed as would have been sufficient to give the accused notice of the matter with which he was charged.

The foundation of both charges lay in the fact that the accused was alleged to have been a member of an unlawful assembly. An "unlawful assembly" is defined by s. 141 of the Indian Penal Code, and the alleged common object of the assembly ought to have been set out in the charges. An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him. Unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate an accused person for acts not committed by himself, but by others with whom he was in company.

The Sessions Judge appears to have recognised the insufficiency of these charges, for he framed the new charges (Nos. 3 and 4) [here followed *in extenso* charges 3 and 4 as set out above].

The jury unanimously acquitted the accused on the first charge, and on the first amended charge (1 and 3). As far as we can gather from the record, which is almost illegible, and which we have almost been constrained to return to be fair copied, they have returned no verdict on the second charge; nor does the Sessions Judge appear to have directed their attention to that charge in his summing up. We are, however, satisfied that, even if the second charge had been properly framed, there was no evidence upon which the accused could have been convicted of murder. The jury, however, convicted the accused on the second amended charge (charge No. 4).

We have now to consider whether, looking at the form of the charge, and considering the Judge's summing up, the conviction can be supported, for we can only set it aside upon some error in law.

We are of opinion that the charge as framed discloses no offence.

The common object of the unlawful assembly, as laid in the charge, was "to resist the theft of crops by violence." There is no punctuation in the charge as set out in the record, but we imagine that what was meant to be charged as the common object was "the resisting, by violence, the theft of crops."

Now, it is clear that, under s. 96 of the Indian Penal Code, the accused was justified in using violence for the protection of his own crops, or those of any other persons, provided that, in the exercise of such right, he did not inflict more harm than it was necessary to inflict for the purpose of such protection.

The charge to have disclosed an offence should have alleged the common object to have been "to unlawfully resist by violence the theft of crops," or, still better, "to defend certain immoveable property, to wit, growing crops, against the offence of theft, and, in such defence, to inflict more harm than was necessary for the purpose of such defence."

The case for the prosecution was that unnecessary violence had been used by members of the assembly other than the accused, for which he became responsible by virtue of s. 149 of the Indian Penal Code; this should have been distinctly alleged. We have carefully perused the Judge's summing up, and it appears to us to be deficient in this respect, in that he has not directed the jury to consider what, if any, was the common object of the assembly before the assault was committed; nor has he told them that, if the assault was committed in the absence of the accused, they must be satisfied that it was committed in pursuance of a common object which would make the assembly "unlawful" within the meaning of s. 149 of the Indian Penal Code. We are, therefore, constrained to set aside the conviction. Under the circumstances, we think no good result would follow from our directing a new trial, and we accordingly direct that the accused be discharged from custody.

Appeal allowed.

1884.

BEHARI
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11 Cal. 106.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Norris.

1885.

Jan. 7.

11 Cal. 160.

INA SHEIKH (APPELLANT) *v.* QUEEN-EMPRESS (RESPONDENT).¹*Penal Code (Act XLV. of 1860), s. 411—Receiver of stolen property—Presumptions as to possession of property after theft—Possession of stolen property.*

A common brass drinking cup was stolen in October 1883, and was discovered in the possession of the accused in September 1884; held, in a case in which the accused was tried for receiving stolen property, that his possession of the stolen property, coupled with the fact that he had failed to give an account as to how he became possessed of the property, would, under ordinary circumstances, raise a *probable presumption* of his guilt, but where, as in this case, such possession was not a recent possession, but one eleven months subsequent to the act of theft, the presumption against him was so slight that, taken by itself, he ought not to be called upon to explain how his possession was acquired.

The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen.

Rex v. Adam,² *Rex v. Cooper*,³ *Rex v. Partridge*,⁴ followed.

ONE Ina Sheikh was charged before the Sessions Judge of Mymensingh under s. 457 of the Penal Code with house-breaking by night in order to commit theft.

It appeared that the house of the complainant was broken into on the night of the 10th October 1883, when a brass drinking cup was stolen therefrom. There was nothing proved at the trial to connect the prisoner with the offence of house-breaking; but the complainant and one Guru Churn, the investigating police-officer, both gave evidence to the effect that the prisoner, at the time of the investigation into the case, held in September 1884, produced the drinking cup from some jungle near his house. The cup was identified as the property of the complainant. The prisoner called no evidence save as to character, but made a statement in which he said that the cup was his own property, denying that it had been secreted in the jungle, and said that the police had found his little boy playing with the cup in the jungle, and had taken it from him and put forward the charge.

The assessors considered that the prisoner should be convicted under s. 411 of the Penal Code, observing that he had not been able to give any proof of his assertion that the property was his.

The Judge closed his judgment with the following words :—

"This is one of three cases in which the prisoner has been convicted in the present Session, he would therefore appear to be an habitual offender. The conviction is had under s. 411 of the Penal Code, which seems more appropriate than s. 457, as there is nothing to connect the prisoner directly with the actual house-breaking, and nearly a year has elapsed between the theft and the finding of the property in his possession."

"The Court, concurring with the assessors, finds that Ina Sheikh is guilty under s. 411 of the Penal Code of the offence of dishonestly receiving stolen property, knowing or having reason to believe the same to be stolen property, and directs that Ina Sheikh be rigorously imprisoned for two years."

¹ Criminal Appeal, No. 667 of 1884, against the order of sentence made by J. F. Stevens, Esq., Sessions Judge of Mymensingh, dated the 7th of November 1884.

² 3 C. & P. 600.

³ 3 C. & R. 318.

⁴ 7 C. & P. 551.

The prisoner appealed to the High Court.

No one appeared for either party.

Judgment of the Court (MITTER and NORRIS, JJ.) was as follows :—

In this case the prisoner has been convicted under s. 411 of the Indian Penal Code of dishonestly receiving a brass drinking cup.

The evidence upon the record clearly establishes that the complainant's house was broken into in October 1883, and the cup, which is abundantly identified as the complainant's property, stolen therefrom.

There is no evidence to connect the prisoner with the actual house-breaking ; and the question we have to consider is whether there is sufficient evidence to warrant a conviction under s. 411 of the Indian Penal Code.

The cup was stolen in October 1883, and was not discovered until the 4th September 1884, when, as the prosecution allege, it was produced by the prisoner to the police from under a *rangi* tree in the jungle. At the trial the prisoner denied that the cup was secreted in the jungle. He alleged that his little boy was playing with it in the jungle ; that the police picked it up, and falsely stated that it was secreted. The prisoner also alleged that the cup was his own property.

It would appear from the opinion of the assessors that it was because the prisoner failed to substantiate his assertion that the cup was his own property that they convicted him ; their opinion as recorded is as follows : " Both assessors consider that the accused should be convicted under s. 411, Indian Penal Code, observing that he has not been able to give any proof that the property is his."

We are of opinion that, independently of the evidence as to the alleged concealment of the cup, to which we shall refer presently, there was no such case made out against the prisoner as to call upon him to account for its possession.

No doubt, the possession of stolen property *immediately* after it has been stolen affords a strong presumption that the person in whose possession it is is either the actual thief, or a receiver with a guilty knowledge ; and this presumption is, of course, strengthened, if the person in whose possession the stolen property is fails to give a satisfactory account of the manner in which he acquired such possession, or gives a false account, or gives accounts which are contradictory, or if the property is secreted. But the possession of stolen property, even if accompanied by a failure to give an account as to how such possession was acquired, or by a false account, or by accounts which are contradictory, or by a concealment of the property, would raise, not a violent or strong presumption, but a probable presumption merely.

But this is not a case of very recent possession, or of possession some time afterwards, but of possession 11 months after the theft, and such possession, by itself, affords but a slight presumption against the accused, so slight that, taken by itself, he ought not to have been called upon to explain how his possession was acquired.

In the case of *Rex. v. ———*¹ Bayley, J., said : " The rule of law is that, if stolen property be found *recently* after its loss in the possession of a person, he must give an account of the manner in which he became possessed of it, otherwise the presumption attaches that he is the thief ; but I think that,

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INA SRIKIH

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¹ 2 C. & P. 459.

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after so long a period as 16 months has elapsed, it would not be reasonable to call upon a prisoner to account for the manner in which property supposed to be stolen came into his possession."

In *Rex. v. Adams*¹ Parke, J., observed that possession of stolen property three months after it was lost was not such recent possession as to put the prisoner upon shewing how he came by it, unless there was evidence of something more than the mere fact of the property, being in his possession at that distance of time after the loss of it.

In *Reg. v. Cooper*² Maule, J., said: "Where a man is found in possession of a horse six or seven months after it is lost, and there is no other evidence against him but that possession, he ought not to be called to account for it."

In *Rex. v. Partridge*³ Patteson, J., pointed out that the question of what is or is not such a recent possession of stolen property as to require the person in whose possession it is to give an account of how such possession was acquired, was to be considered with reference to the nature of the articles stolen, adding, "if they are such as to pass from hand to hand readily, two months would be a long time."

The stolen article in this case was not of an unique or unusual character, but such as is possessed in every native household, and would pass readily from hand to hand.

Upon the authority of these cases, we are of opinion that the mere fact of the prisoner's possession of the cup 11 months after it was stolen was not such a recent possession as to put him to proof of how such possession was acquired.

But, no doubt, there was other evidence besides that of possession to be considered, and if we felt that we could credit the evidence of the concealment of the cup, we should hesitate to interfere with this conviction; but we are not prepared to accept this evidence, and consequently we set aside the conviction.

Conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Field and Mr. Justice Beverley.

1885.
Mar. 3.

RAMANUND MAHTON (COMPLAINANT) *v.* KOYLASH MAHTON
(ACCUSED).⁴

11 Cal. 236. *District Magistrate's Office—Deputy Magistrate placed in charge of current duties of District Magistrate's Office—Jurisdiction—Criminal Procedure Code (Act X. of 1882), s. 437—Penal Code (Act XLV. of 1860), ss. 379, 417—Summary trial—Splitting of charges for purpose of jurisdiction.*

A Deputy Magistrate, placed in charge of the current duties of the District Magistrate's Office, is not thereby vested with jurisdiction under s. 437 of the Code of Criminal Procedure.

Where an accused is charged with offences, one of which is triable summarily, and the other not so triable, it is not open to a Magistrate to discard the latter charge, and to proceed to try the case summarily.

¹ 3 C. & R. 318.

² 3 C. & P. 600.

³ 3 C. & P. 551.

⁴ Criminal Reference, No. 29 of 1885, made under s. 438, by H. W. Gordon, Esq., Sessions Judge of Sarun, dated the 11th of February 1885.

ONE Ramanund Mahton preferred to the Magistrate of Sarun a complaint against one Koylash Mahton under ss. 379 and 417 of the Penal Code. The Magistrate referred the case to a Bench of Magistrates. The Bench recorded the complainant's evidence, and referred the case to the police for enquiry and report. On the receipt of the police-report, the President of the Bench passed the following order (presumably under s. 203 of the Criminal Procedure Code): "There is neither theft nor cheating. I refer the plaintiff to the Civil Court for enforcing payment of the consideration-money. Case struck off."

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 11 Cal. 236.

The complainant then applied for a re-hearing of his case; and the President of the Bench of Magistrates (who was then in charge of the District Magistrate's office), in his capacity of Deputy Magistrate in charge of the District Magistrate's office, ordered the case to be restored to the file.

The Bench (the Deputy Magistrate presiding) thereupon tried the case summarily under s. 379 of the Penal Code, and convicted the accused, sentencing him to a fine of Rs. 50, or, in default, to one month's rigorous imprisonment.

The prisoner moved the Sessions Judge to refer the case to the High Court on the following grounds: (1) that the Deputy Magistrate had no jurisdiction to order the re-hearing of a complaint which he had already dismissed under s. 203 of the Criminal Procedure Code; the mere fact of his being in charge of the District Magistrate's office not giving him any power to pass such an order; and (2) that the District Magistrate having referred the case to the Bench for disposal under ss. 379 and 417 of the Penal Code, it was not open to the Bench, in order to give itself summary jurisdiction, to reject one part of the complaint under s. 417, which was not triable summarily, and to accept the other part of the complaint under s. 379, which was triable summarily.

The Sessions Judge, being of opinion that, on the grounds above set out, the proceedings of the Bench of Magistrates should be set aside, referred the case to the High Court.

No one appeared for either party on the reference.

The order of the Court (FIELD and BEVERLEY, JJ.) was as follows:—

For the reasons set out by the Sessions Judge, we reverse the conviction of Koylash Mahton, and direct that the fine, if realized, be refunded.

A Deputy Magistrate, placed in charge of the current duties of the District Magistrate's office, is not thereby vested with jurisdiction under s. 437 of the Code of Criminal Procedure.

Conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

QUEEN-EMPRESS v. JUGGERNATH (ACCUSED).¹

Stamp Act (I. of 1879), s. 3, cl. 17, and art. 52, Sch. I.—Receipt—Acknowledgment.

An entry made by a creditor in the khatta-book of the debtor, and signed by him for the payment of a sum of money in discharge of a debt, is a "receipt" within the meaning of s. 3, cl. 17, of the Stamp Act, and as such must be stamped under art. 52, Sch. I. of that Act.

1885.
 Feb. 24.
 11 Cal. 267.

¹ Criminal Reference, No. 1 of 1885, by B. L. Gupta, Esq., Presidency Magistrate, Calcutta, dated the 8th of January 1885.

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11 Cal. 267.

THIS was a reference from the Presidency Magistrate of Calcutta under s. 432 of the Criminal Procedure Code, and the question referred was as to whether an entry in a khatta-book, proved to have been signed by the accused, was a receipt within the meaning of cl. 17, s. 3 of the Stamp Act (Act I. of 1879), and as such required a one-anna stamp under art. 52, Sch. I. of that Act.

The Magistrate, in his letter referring the case, stated as follows :—

"Independent evidence has been given to show that the amount paid was in satisfaction of a debt, and the entry also refers expressly to the transaction out of which the debt arose. The amount in figures, and the name of the accused, are shown to have been written by the accused at the time he received the payment; and it is admitted that no separate receipt of any sort was taken from the accused, or from the firm on whose behalf he received the money.

I have seen the rulings in the cases of *Brojender Coomar v. Bromomoye Chowdhurani*¹ and *Binja Ram v. Rajmohun Roy*,² but no general principle is deducible therefrom; and the decision in each case must depend on the nature of the particular entry, and of the evidence adduced."

The prosecution was one of several of a like nature instituted by the Collector of Calcutta to test the question as to whether such entries did not require to be stamped.

The entry was contained in the debtor's books, and was as follows :—

No. 99.

Year 1291.

Date 7th Assar.

Debit side.

									Rs. A. P.
Debited to Sebaram Megraj ...	...	...	...	...	...	...	...	...	405 4 0
Through Juggernath, on account of 13th Bysack, Government note	...	...	...	...	...	...	...	...	500 0 0
P/45-23466, 1 piece	...	...	...	...	...	...	...	...	94 12 0
Deduct, returned ...	...	...	...	...	...	...	...	...	405 4 0

And it was proved by the evidence that it referred to a previous entry detailing the transaction which was the purchase of a bale of cloth, and that the sum of Rs. 500 was paid to Juggernath, the gomastah of the firm, who retained the sum of Rs. 405-4, the amount due, and returned the balance Rs. 94-12, and that Juggernath made the entry and signed it.

It was also proved by the evidence that it was not the practice to take separate receipts, but that the person who received the money made an entry of the above nature in the books, and signed it.

The Advocate-General (Mr. *Phillips*) appeared for the Crown.

Mr. *Salé* and Mr. *Chick* for Juggernath, the accused.

Mr. *Phillips*.—The document amounts to an acknowledgment of the payment of money, and therefore is *prima facie* a receipt, and the only receipts exempted from duty are those covered by Sch. II., cl. 15. Sub-cl. *b* of that clause exempts receipts for any payment of money without consideration; but

¹ I. L. R., 4 Cal. 885.

² I. L. R., 8 Cal. 282.

that is not the case here, for there can be no question that there was consideration for the payment of this sum. The entry is also signed, and such signature shows the actual receipt by the person so signing the amount.

Mr. Sale.—The form and nature of the document sought to be chargeable with stamp-duty must be looked at as well as the intention of the parties executing it. For example, entries in an ordinary cash-book of receipt of money could surely never be intended to be regarded as receipts. (See *In the matter of Act XVIII. of 1869 and the Uncovenanted Service Bank*; ¹ *Brojender Coomar v. Bromomoye Chowdhurani*; ² *Binja Ram v. Raj Mohun Roy*; ³ *Brojo Gobind Shaha v. Goluck Chunder Shaha*.⁴)

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Such entries as this on either side of the account are not intended to operate as acknowledgments of money received, or as acknowledgments of debts. They are made solely for the information of the owner of the book in which they appear, and for the purposes of his business. The fact that the entry is made by the person receiving the money, and not by the owner of the book, is immaterial, because, otherwise, it might equally be said that the entry, if made in the presence of the creditor, and acquiesced in by him, would be sufficient to make it chargeable with stamp-duty under the section. If the entry in question is liable to be stamped, then the corresponding entry on the other side of the account would also have to be stamped as an acknowledgment of debt. Thus, each entry in the book would require to be stamped, as well as the corresponding entries of payment in the creditor's books. If this view of the law be the correct one, it would be impossible to keep *khattas*, or native books of account, and the system of account-keeping in the bazar would be completely upset, and serious inconvenience would be occasioned.

Mr. Phillips (in reply).—Mr. Sale's contention amounts to this, that the question to be considered is not whether the document falls within the section, but whether it was the intention of the parties that it should fall within it. This can scarcely be the correct way of looking at it. Again, he says, that, to be liable to stamp-duty, the document must have been executed with the same intention as is ordinarily understood by the act of "granting a receipt," and that great inconvenience would be caused by holding that this entry requires to be stamped. But the Legislature have defined the term "receipt" (see s. 3, cl. 17), and the word used is "acknowledged," and not "admitted." An admission may be to any one, and thus an entry by a man in his own book would not come within this section. Giving a receipt is merely giving an acknowledgment of payment made under cl. 1, Sch. I.; acknowledgment in books must be stamped. The cases of *In the matter of Act XVIII. of 1869 and the Uncovenanted Service Bank*,¹ and *Brojender Coomar v. Bromomoye Chowdhurani*,² were under the Old Stamp Act, and the words in that Act were different.

The opinion of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

TOTTENHAM, J.—It appears to me that Exhibit B, which was submitted to us by the Presidency Magistrate with his letter of the 8th January last, does come within the meaning of cl. 17, s. 3 of the Stamp Act (I. of 1879). The signature of Juggernath, and the amount, Rs. 405-4, in his handwriting, form, in my opinion, a writing, whereby the debt was acknowledged to have been paid off. I think so, because of the place in which this writing appears, namely, against the entry in the debtor's book where the debtor recorded payment

¹ I. L. R., 4 Cal. 829.

² I. L. R., 4 Cal. 885.

³ I. L. R., 8 Cal. 282.

⁴ I. L. R., 9 Cal. 127.

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of his debt. It is true that we must look to the intention of the parties as to what this writing by Juggernath was intended to import, and upon the evidence I have no doubt that the intention was that what Juggernath wrote should operate as a receipt. I think, therefore, that this writing falls within this definition of a receipt in cl. 17, s. 3 of the Stamp Act,

GHOSE, J.—I am of the same opinion. It seems to me that the entry in Exhibit B, coupled with the writing and signature of Juggernath, the *gomastah* of the firm of Megraj, amounts to a receipt within the meaning of cl. 17, s. 3 of the Stamp Act.

Mr. Sale, on behalf of Juggernath, contended that in this case the question was one of intention, namely, whether the parties intended that the entry and signature in question should operate as a receipt. I accept this contention as perfectly sound, and it seems to me that in every case of the kind it should always be a question of intention. On turning to the evidence of Grish Chunder Ghose, the owner of the shop, from which the debt in question was due, and reading Exhibit B by the light of that evidence, it appears to me to be clear that the intention of the parties was that the entry and the signature to it of Juggernath should have the same effect as a receipt.

Mr. Sale also called our attention to several rulings of this Court. Those decisions, I observe, were passed under the Stamp Act of 1869. The present Stamp Act of 1879 is more comprehensive so far as the definition of a receipt is concerned; and it appears that, in the cases in which those decisions were passed, the true question was whether the particular document which was tendered in evidence was admissible in law by reason of no stamp having been used. The question here is a different one; and, on examining the observations made by the learned Judges in those cases, it would appear that, if any principle of law is deducible from them as applicable to this case, it is a principle rather in favour of the view taken by the Crown than opposed to it.

CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

MAKHAN LAL SAHA (PETITIONER) v. MAKHAN CHORA SAHA
 (OPPOSITE PARTY).¹

1885.
 Feb. 19.
 11 Cal. 271.

Public Nuisance—Obstruction—Enquiry under s. 133, Criminal Procedure Code (Act X. of 1882)—Previous orders when no bar to such enquiry—Criminal Procedure Code (Act X. of 1882), s. 133.

An application was made under s. 133 of the Criminal Procedure Code (Act X. of 1882) for the removal of an obstruction in a public thoroughfare; but after a personal local inspection by the Magistrate, and without any evidence being taken, the parties were referred to a civil suit, and the order was refused, the Magistrate holding that the way was not a public way.

A civil suit was then filed, and during its pendency, a second application was made under s. 133 of Act X. of 1882 with a like object, which was refused on the ground that the civil suit was pending, and that there was no likelihood of a breach of the peace.

The civil suit resulted in the way being held to be a public thoroughfare.

A third application was then made under s. 133 to have the obstruction removed, but the Magistrate held that, in face of the two previous orders, he could not interfere.

¹ Criminal Revision, No. 13 of 1885, against the order of Baboo Radha Madhub Bose, Deputy Magistrate of Cutwa, dated the 18th of November 1884.

Held that the order of the Magistrate was wrong, upon the ground that he was bound to make such enquiry; and as there never had been any enquiry into the matter, the first decision being no decision at all, but a mere dictum of the Magistrate upon a personal local investigation without hearing evidence, and thus not on judicial enquiry; and the second decision being based merely upon the pendency of the civil suit, and the previous improper order, and that neither of these orders operated, therefore, as a bar to the Magistrate enquiring into the matter of the present complaint.

THIS case arose out of an application made under s. 133 of the Criminal Procedure Code (Act X. of 1882) for the removal of an obstruction in the shape of a *pucca* building in a public road. It was the third application that had been made with the same object.

The first application was made at a time when the building was in course of erection in 1881, but the Sub-divisional Magistrate, before whom it was made, after holding a local examination, but without taking any evidence, on the 17th July 1881 refused to interfere, and referred the parties to the Civil Court. Thereupon, a civil suit was instituted for the removal of the obstruction upon the footing of the pathway being a private one, but that suit, which was ultimately taken up on second appeal to the High Court, was unsuccessful, and the defendant's plea that the pathway in question was a public one was substantiated.

Pending the hearing of the second appeal, a second application was made under s. 133 for the removal of the obstruction; but the Deputy Magistrate, by an order on the 8th September 1883, refused to interfere, upon the ground that there was no likelihood of a breach of the peace; and that the question as to whether the path was a public or private one was still pending before the High Court. Against this order, the applicant moved the High Court, but without success, as the Court refused to interfere till the appeal then pending was decided.

The appeal was heard on the 6th June 1884, and resulted in a decision that the pathway was a public one.

The present application was then made, and an order was issued calling upon the opposite party to show cause why the obstruction should not be removed. The opposite party appeared and filed a written statement, questioning the right of the Magistrate to entertain the matter in the face of the two previous orders passed by officers holding concurrent jurisdiction with himself, and also on the ground that there was no likelihood of a breach of the peace, and that the proceeding was, therefore, not justified in law. The Magistrate overruled the said objection, holding that a likelihood of a breach of the peace was not a necessary condition precedent to action being taken under s. 133, but upheld the other objection, and refused to pass any order in the matter.

Against that decision, the petitioner now applied to the High Court under its revisional powers.

Baboo *Ashutosh Dhur* and Baboo *Ambica Churn Banerjee* for the petitioner.

Baboo *Ambica Charan Bose* for the opposite party.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

TOTTENHAM, J.—It appears to me that the Deputy Magistrate was mistaken in supposing that he was precluded from taking up this case by reason of the decisions of his predecessors. The question was whether the obstruc-

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tion complained of had been erected in a public way. On the first occasion when an application was made to the Magistrate, it seems that no enquiry was instituted, that is, no judicial enquiry; but the Magistrate simply inspected the place, and, upon that inspection, determined that the way was not a public way, and therefore refused to interfere. Thereupon, the complainant went to the Civil Court, and attempted to show that the way was a private one, and that he was specially hindered by the obstruction. In the Civil Court he failed upon the ground that it was a public way, and that he had not made out a case sufficient to entitle him to relief in the Civil Court.

In the meantime, while the decision of the Civil Court was under appeal, the complainant applied again to the Magistrate upon the strength of the finding of the Civil Court that the way was a public one. The Magistrate then declined to interfere, not absolutely, but upon the ground that the civil suit was still pending, as well as upon the ground that his predecessor had already held that the way was not a public one. Upon the civil proceedings being terminated by the decision of a second appeal to this Court, the petitioner again applied to the present Magistrate. The Magistrate now thinks that, notwithstanding the decision of the Civil Court, he is precluded from interfering, because his predecessor thought that way was not a public one. Thus, it appears that the petitioner is defeated in the Criminal Court, because the way is not a public one; and in the Civil Court, because it is a public way. We think that the Magistrate is bound to make an enquiry, notwithstanding the decisions of his predecessors. The last of these two decisions was upon the ground, partly that there were civil proceedings still pending, and partly that there had already been a decision by the Magistrate. The first decision of the Magistrate, strictly speaking, was not a decision at all, but simply a dictum on inspection of the place. It is impossible for any Magistrate, without taking evidence, to say whether a road is a public thoroughfare or not.

Under the circumstances, we think that the rule must be made absolute, and the Magistrate directed to come to a decision whether or not the way is a public one, and, if so, whether the obstruction raised should be removed. The matter of the removal of the obstruction is one entirely in his own discretion.

GHOSH, J.—I am of the same opinion. It appears to me that neither on the first, nor on the second, occasion did the two previous Deputy Magistrates hold any judicial enquiry in the matter of the complaint made before them in accordance with the provisions of s. 133 of the Criminal Procedure Code. That being the case, neither the first nor the second order operates as a bar to the Deputy Magistrate enquiring into the complaint upon the present occasion.

Order set aside.

APPELLATE CRIMINAL.

*Before Mr. Justice Tottenham and Mr. Justice Ghose.*LOKE NATH SARKAR AND ANOTHER (APPELLANTS) v. QUEEN-
EMPRESS (RESPONDENT).¹1885.
March 6.

Practice—Conviction of rioting and causing hurt by dangerous weapons—Cumulative sentences—Distinct offences—Separate charges—Penal Code (Act XLV. of 1860), ss. 71, 148, 149, 324—Act X. of 1882 (Criminal Procedure Code), ss. 35, 235—Act X. of 1872 (Criminal Procedure Code), ss. 314, 454—Act VIII. of 1882, s. 4.

11 Cal. 349.

The offences of rioting armed with a deadly weapon, and voluntarily causing hurt with a dangerous weapon to two persons, are distinct offences; and a person charged with such offences can be convicted and sentenced in respect of the rioting, and of the hurt caused to each of the persons injured.

A and B were charged with rioting armed with deadly weapons, under s. 148 of the Penal Code; and they were also charged under s. 324, coupled with s. 149, with causing hurt by a dangerous weapon to X; and B was further charged, under s. 324, with causing a like hurt to Y; A being also charged under s. 324, coupled with s. 149, in respect of the hurt caused by B to Y. A and B were convicted on all charges, and separate sentences, to take effect in succession, were awarded in respect of each offence charged. The offences under s. 324 were committed during the riot.

Held that the several acts with regard to which the prisoners were charged did not fall within the provisions of s. 71 of the Indian Penal Code, inasmuch as it was not found that the causing of the hurt was the force or violence which alone constituted the rioting, and that consequently, under s. 235 of the Criminal Procedure Code, the several sentences passed were strictly legal.

THIS appeal arose out of a trial in which the two accused, Loke Nath Sarkar and Sachani Sheikh, were charged with having taken part in a riot, being armed with deadly weapons. The charges upon which the prisoners were tried were as follows: Both were charged under s. 148 of the Indian Penal Code, and also under s. 324, read with s. 149, in respect of an injury said to have been caused by one Kangali Singh, one of the rioters, who, however, was not before the Court, to one Joydhur. The prisoner, Sachani, was further charged under s. 324, and the prisoner, Loke Nath, under the same section read with s. 149, in respect of an injury alleged to have been caused by the former to another person, named Kamala Kant Poddar.

The riot, in consequence of which these charges were brought, arose from a number of men, amounting in all to some 40 or 60 persons, armed with *lalties* and spears, and one man with a sword, amongst which number were the accused, proceeding to a field belonging to one Nasiruddin, with a number of cattle, and setting the cattle to eat up the rice-crop standing on the ground. Upon being remonstrated with by Nasiruddin and some of his people, the riot occurred, during which the injuries forming the subject of some of the charges were inflicted.

The Sessions Judge, agreeing with the assessors, convicted the accused on all the charges, and proceeded to pass the following sentences, *viz.* :—

Under s. 148, Loke Nath Sarkar to two years' rigorous imprisonment;

Under s. 148, Sachani Sheikh, to 1½ years' rigorous imprisonment;

¹ Criminal Appeal, No. 22 of 1885, against the order of J. F. Stevens, Esq., Sessions Judge of Mymensingh, dated the 17th November 1884.

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Under s. 324, read with s. 149, Loke Nath to a fine of Rs. 200, and Sachani to a fine of Rs. 50, and in default each to be additionally imprisoned for a period of nine months;

Under s. 324, read with s. 149, Loke Nath Sarkar to $1\frac{1}{2}$ years' rigorous imprisonment in respect of the third charge, to take effect upon the expiry of the sentence passed under the first head of the charge; and

Under s. 324, Sachani Sheikh to $1\frac{1}{2}$ years' rigorous imprisonment, to take effect upon the expiry of the sentence passed under the first head of the charge.

Against these convictions and sentences, the prisoners preferred this appeal, both upon the ground that the evidence did not support the findings of the Court below, and that the sentences were illegal, and ought to be set aside.

Baboo *Ambica Churn Bose* appeared for the appellant.

No one appeared for the Crown.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

We see no reason to differ from the Court below as to the facts found by it. These are, that both the prisoners took part in a riot, being armed with deadly weapons; that, in the prosecution of the common object of the rioters, the prisoner, Sachani Sheikh, caused hurt, with a dangerous weapon, to one Kamala Kant Poddar, and another of the rioters caused hurt, with a dangerous weapon, to one Joydhur.

Upon these facts, both of the prisoners have been convicted under s. 148 of the Penal Code; both have been convicted under s. 324 by the operation of s. 149 in respect of the hurt caused to Joydhur. Loke Nath Sarkar has been further convicted under the same section in respect of the hurt caused to Kamala Kant; and Sachani Sheikh has been further convicted, under s. 324, only in respect of the latter hurt caused by himself.

Separate sentences have been passed upon the prisoners in respect of each separate conviction. The sentences on Loke Nath Sarkar amount in the aggregate to three-and-a-half years' rigorous imprisonment and a fine of Rs. 200; and the sentences on Sachani Sheikh aggregate to three years' rigorous imprisonment and a fine of Rs. 50; and, in default of payment of the fines, the prisoners are to suffer further imprisonment each for nine months.

Baboo *Ambica Churn Bose*, who appeared for the appellants, contended that the prisoners could not legally be convicted of more than one of the offences, the whole of which formed parts of the same transaction; or that, at any rate, though the several convictions might be legal, the prisoners could not lawfully be sentenced in respect of more than one of them. He relied upon the rulings of this Court in *The Queen v. Durzoola*,¹ *The Queen v. Dina Sheikh*,² *The Queen v. Shahabut Sheikh*,³ and *Empress v. Jubdur Kazi*,⁴ which more or less support his contention.

We have not, however, been able entirely to follow the reasoning of the learned Judges by whom those cases were decided; and we think that, in the present case, it is unnecessary for us to express, either assent to, or dissent

¹ 9 W. R. Cr. 33.

² 10 W. R. Cr. 63.

³ 13 W. R. Cr. 42.

⁴ 1 L. R., 6 Cal. 718.

from, the law laid down by them. The terms of the former Codes of Criminal Procedure, with reference to which those cases were decided, were, perhaps, less clear than the provisions of the Code now in force. By s. 35 of that Code, as well as by s. 314 of the previous Code, it is provided that, when a person is convicted at one trial of two or more distinct offences, the Court may sentence him for such offences to the several punishments prescribed therefor, which such Court is competent to inflict, subject to certain provisions as to maximum, which are not material in the present appeal. Then, s. 235 provides in cl. 1, which seems to apply to the present case, that, if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence ; and, if tried, he must be either acquitted or convicted.

As regards punishments, this section enacts nothing beyond this, that " nothing contained in this section shall affect the Indian Penal Code, s. 71." That section, as amended by Act VIII. of 1882, s. 4. contains the same provisions as to limit of punishment which were embodied in cls. 2 and 3 of s. 454 of the former Code of Criminal Procedure. As the law now stands, therefore, a person, tried and convicted of several offences under s. 235 of the Code of Criminal Procedure, is liable to be punished for each such offence, unless he is protected by s. 71 of the Penal Code. S. 71 then provides (1) that, when anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished for more than one of such offences, unless it be so expressly provided ; (2) that, if a single act falls within two separate definitions of offences, the offender shall not receive a more severe punishment than could be awarded for either of them ; and (3) that, if several acts, of which one or more would by itself constitute an offence, form, when combined, a different offence, the offender must not receive a punishment more severe than that provided for any *one* of such offences.

It seems to us that the present case does not come within the purview of s. 71.

The offences of which the prisoners have been convicted are distinct : (1) rioting armed with deadly weapons ; (2) voluntarily causing hurt with a dangerous weapon to Kamala Kant Poddar ; (3) a similar offence with regard to Joydhur.

The several acts, in support of which the prisoners were charged, do not in combination form any other offence defined by any law with which we are acquainted ; nor do they fulfil any other condition of s. 71 which would protect the accused from more than one punishment, or limit the severity of the sentence passed upon them.

If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding ; for rioting was being committed before the hurts were inflicted on the two men wounded.

We note that the view of the law which we have taken was adopted by the High Court at Allahabad in the recent case of *Queen-Empress v. Dungan Singh*.¹

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It appears to us, therefore, that the convictions and the several sentences passed were strictly legal, and that they cannot be set aside on the grounds put forward by the vakeel for the appellants.

But we think that we may, under the circumstances of the case, mitigate the punishment to some extent. We accordingly reduce the sentences passed under s. 148 to rigorous imprisonment for one year in the case of Loke Nath Sarkar, and to six months in the case of Sachani Sheikh; and that the fines imposed, in respect of the second head of the charge, be reduced to Rs. 100 and to Rs. 30 respectively.

Convictions upheld, and appeals dismissed.

CRIMINAL MOTION.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

1885.

Feb. 24.

AMBLER AND ANOTHER (PETITIONERS) v. PUSHONG AND ANOTHER
(OPPOSITE PARTIES).¹

11 Cal. 365. *Possession, Inquiry as to—Time at which Magistrate is to determine who was in possession—Actual possession—Criminal Procedure Code (Act X. of 1882), s. 145.*

Under s. 145 of the Criminal Procedure Code, the Magistrate has to find which of the parties is in possession of the subject-matter of the dispute at the time when he is inquiring into the matter, which, in the contemplation of the law, is identical with the time of the institution of the proceedings, and not at any time previous thereto, and he has no concern as to how the party then in actual possession obtained possession, but has only to pass an order retaining him in his possession.

THIS case arose out of a dispute between the respective parties as to the right to hold possession, for a particular purpose, of a certain hill, called Bhoika Hill, the property of the Maharaja of Gidour.

The petitioners, Ambler and Stephens, claimed under an unregistered lease for a period of five years from November 1882 to November 1887, and the opposite party, Pushong and Sen, claimed under a lease, dated the 20th September 1884, and registered on the 13th October 1884. Both the leases were of the same nature, and were granted to the respective parties by the Maharaja for the purpose of giving the holders the right to quarry, and remove the stone in and from the hill in question. The facts as proved, and the allegations on either side, so far as are material, were as follows:—

There was no dispute that Ambler had originally entered into possession under his lease, and worked the quarries; but it was alleged, on behalf of the opposite party, that he only worked them for a period of about two months, and then abandoned them. In 1884, Ambler entered into partnership with Stephens and others, and it was alleged that the partnership thus constituted determined to abandon the quarries, but the Magistrate found that Ambler had certainly not determined on that course. The question depended apparently upon whether the Railway Company would or would not run a siding up to the hill to facilitate the removal of the stone when quarried, so as to enable the quarries to be worked at a profit.

¹ Criminal Revision, No. 12 of 1885, against the order of C. R. Marindin, Esq., Joint-Magistrate of Monghyr, dated the 11th December 1884.

The time for the registration of Ambler's lease having expired, the Maharaja re-dated the lease. The Magistrate found, as a fact, that Ambler continued to deliver stone that had been quarried up to August 1884; and Ambler contended that he had never given up possession of the hill. Pushong and Sen contended that they found the hill unoccupied, and commenced working there under the lease on the 22nd September, and continued in undisturbed possession till the 16th October, when they were turned out by Ambler with the aid of the police. It appeared that, on the 15th October, Ambler complained to the police that Pushong and Sen had, on the 14th, forcibly turned out his coolies, and taken their tools; and on the 16th, the police proceeded to the spot, and finding none of Pushong's men there, save two, who at once decamped, Ambler was put in possession. Pushong and Sen in their turn complained that they had been forcibly dispossessed by Ambler and the police on the 16th October. The present proceedings were instituted on the 18th October, and at that time it was not disputed that Ambler was in possession.

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The Magistrate came to the following conclusions, *viz.*, that Ambler was dispossessed on the 22nd September, and that he did not complain till the 14th October; that Pushong and Sen obtained possession on the 22nd September, and held it till the 14th October; and that, on that day, the dispute arose while they were in peaceful possession. He therefore, treating the question as one to the right to possession of the hill, declared that Pushong and Sen were entitled to retain possession until legally evicted.

It appeared that, on the 17th October, Pushong and Sen made the complaint, upon which the proceedings were initiated by the Magistrate on the 18th, and that Ambler lodged a cross-complaint. The Magistrate issued his proceedings under s. 145 of the Criminal Procedure Code "with regard to the right to excavate ballast at a certain hill situated in the district," treating the dispute as regards that right, and not a right to possession of the hill, and he did not specify the hill in question in his initiatory proceedings. In his judgment, however, he treated the dispute all along as to the right to possession of the hill, and, upon the above facts, dismissed the summons against Pushong and Sen, and ordered Ambler to give security to keep the peace for one year, with two sureties to the extent of Rs. 1,500 each.

Against this order Ambler now applied to the High Court under the revisional sections; and in his petition set out the facts, and further stated that, on the 24th October, Pushong and Sen had instituted a civil suit against him with reference to the subject-matter of the dispute.

The order of the Magistrate, on the subject of the present application, was dated the 11th December 1884.

Mr. *M. Ghose*, Mr. *M. P. Gasper*, and Mr. *R. E. Twidale*, for the petitioner.

Mr. *Pugh* and Baboo *Bolye Chand Dutt* for the opposite party.

Mr. *Ghose* for the petitioner.—A right of this nature is not such a right as is within the scope of s. 145, and therefore the Magistrate had no jurisdiction to entertain the matter at all.

If s. 145 does apply, the Magistrate had no business to act as he has done; but all he could do was to find who was in possession at the time when he instituted his proceeding; and if he was bound to go back at all, he was bound to go back to the time before any dispute at all arose, *viz.*, before the 22nd Sep-

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tember, when we were in peaceful possession. See *Pirthiram Chowdhry, Rai Bahadoor*,¹ and *In the matter of the petition of Mohesh Chunder Khan*.²

Further, once the other side having instituted civil proceedings, there was an end to the jurisdiction of the Magistrate under this section; the opposite party, in their plaint in the civil suit, admit that we are in possession, and say that we dispossessed them on the 16th October, and they seek to recover possession, and yet the Magistrate has made an order that they be "retained in possession."

In addition, there is no evidence to support that portion of the order requiring us to give security to keep the peace, and that part is clearly bad.

Mr. *M. P. Gasper* on the same side.—S. 145 has no application to a case where a right of the kind is in dispute—*Bejoy Nath Chatterjee v. The Bengal Coal Company, Limited*;³ as the right is not to possession of the land, but only to quarry stone, i. e., to go there, quarry the stone, and take it away.

Mr. *Pugh (contra)*.—There is no doubt that we were in actual physical possession up to the 16th October, the day on which the dispute arose, and the "possession" mentioned in the section means the possession at the time when the dispute arises. *Pirthiram Chowdhry, Rai Bahadoor*:¹ *Rakhal Dass Singh v. Rajah Sheo Pershad Singh*;⁴ *Bunwari Lall Misser v. Rajah Radha Pershad Singh*;⁵ *In the matter of the Petition of Mohesh Chunder Khan*.⁶ Besides, this is a totally different case to that quoted by Mr. *Gasper, viz., Bejoy Nath Chatterjee v. The Bengal Coal Company*,⁷ in which case there was no possession, at any rate, of more than a very small quantity, and only a right to dig as to the greater part, and the Magistrate had clearly jurisdiction to take it up. The right to quarry stone may be the right in respect of which possession was taken; but, however taken, there was the fact of possession, and the Magistrate treats the case with the assent of both parties as one in which the possession of the hill or quarry is at issue.

If your Lordships adopt the suggestion of Mr. *Ghose*, that the possession referred to is the possession at the date of the Magistrate's initiatory proceeding, you will be adopting a forced construction that will put a premium on lawlessness, and oblige a Magistrate to retain any one in possession who may clearly be a wrong-doer, and have forcibly dispossessed another.

Mr. *Ghose* in reply.—The cases cited on the other side are no authority under the wording of the section in the present Code. Aft XXV. of 1861, s. 318, contained no provision enabling a party wrongfully dispossessed to be restored to possession. The Madras High Court held⁸ that a trespasser's possession could not be considered, but the Calcutta and Bombay High Courts took a different view. It was contended that a possession, obtained by force or fraud, could not be considered; but it was held that it was immaterial how the possession was obtained. That view was also adopted by the Agra High Court. See *Government v. Gholam Mahommed*⁹ (cf. Prinsep, 5th edition to Code of 1872, p. 471). These cases were before the Legislature, and a substantive provision was enacted by Aft X. of 1872 to give a Magistrate power to give relief where they occurred (see Aft X. of 1872, s. 534). That section is now substantially reproduced by s. 522 of the present Code.

¹ 20 W. R. Cr. 51.² 1 L. R., 4 Cal. 417.³ 23 W. R. Cr. 45.⁴ 24 W. R. Cr. 73.⁵ 1 C. L. R. 136.⁶ 1 L. R., 4 Cal. 417.⁷ 23 W. R. Cr. 45.⁸ 6 Mad. H. C. App. xiii.⁹ 1 Agra H. C. Cr. 33.

The decision of Mr. Justice Ainslie in *Mohesh Chunder Khan's* case went too far, and the provision of the present Code overrules it. It evidently overlooked the fact that special provisions had been made by s. 534 of Act X. of 1872 to meet a class of cases in which the Courts were previously powerless to give any redress. In *Pirthiram Chowdhry, Rai Bahadoor*,¹ the Chief Justice was of opinion that, under the old Code, even the Magistrate should find who was in possession at the time of the institution of the proceedings, and the Legislature seems now to have adopted that decision, and also one of a Full Bench of the Madras High Court (unreported, but referred to in *Weir*, 2nd ed., p. 437), for they have inserted the word "then" in the present section. The Madras decision was in 1880, and upon the footing of that case, and the true reading of the present provision of the Code, I contend that the Magistrate must retain the party in possession who is actually in possession at the time of the institution of the proceedings.

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The case of *Bunwari Lall Misser v. Rajah Radha Pershad Singh*² contains remarks of Mr. Justice Ainslie, which have no further application than that particular case; but if you do adopt that view, then you must adopt it as a whole, and go back to the time when another was in undisputed possession.

The order of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

TOTTENHAM, J.—This was a case under s. 145 of the Code of Criminal Procedure; the Magistrate deciding it in favour of the second party, and the first party have moved this Court to set aside the order on various grounds.

In the first place, it was urged that the case did not properly fall under s. 145 at all, the matter in dispute not concerning any tangible immoveable property; and in the next place, it was contended that, if this section did apply, then the first party were entitled upon one of the findings of the Magistrate himself to an order in their favour, the Magistrate having found that the first party were actually in possession at the time when these proceedings were instituted. The Magistrate appears to have decided in favour of the second party, because he considered that they were in possession up to within a few days before this case was instituted, and that the possession of the first party had been wrongfully obtained by force.

It seems to me that the first objection taken by the petitioners cannot be maintained. No doubt, the Magistrate, in his initial proceeding, speaks of the dispute as concerning a right to quarry stone in a certain hill, but what he meant was that a dispute existed concerning the possession of the hill itself. Both parties so understood the matter, and both parties adduced evidence upon that understanding, and the Magistrate's decision is as to possession of the hill itself, which certainly is tangible immoveable property. Were we to set aside the order upon the ground that the Magistrate's proceeding was not sufficient to give him jurisdiction, the only result would be that proceedings would be taken afresh, and then the Magistrate would correctly describe the subject of dispute by the name of the hill of which each party claims possession.

As regards the other objection, that depends upon the construction to be put upon s. 145, as to the period at which the Magistrate is to determine in whose possession the subject of dispute is or was. After setting out what proceedings the Magistrate is to take, the section says: "The Magistrate shall, if possible, decide whether any, and which, of the parties is then in such pos-

¹ 20 W. R. Cr. 51.

² 1 C. L. R. 136.

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session of the said subject." And it further provides that, "if the Magistrate decides that one of the parties is then in such possession of the said subject, he shall issue an order declaring such party to be entitled to retain possession thereof until evicted therefrom in due course of law." The question is, what is meant by the word "then." It has been argued, on the other side, that "is then in such possession" really means was in possession at the time the dispute began, or "was in possession at the time when the Magistrate's attention was called to the dispute." For the petitioners it has been contended that "is then" has its literal meaning, and means the time during which the enquiry is being made, or, at any rate, it cannot be construed as having reference to a period previous to the time when the case was instituted by the Magistrate; and this view, I think, is the correct one. The section expressly prohibits the Magistrate from taking into consideration the merits of the claim of any party to possess the subject of dispute. He has simply to determine which party is *de facto* in possession at the time when he is enquiring into the matter. And I think that the law contemplates that the time of the institution of proceedings, and the time of deciding the case, are practically identical. It does not contemplate any change of possession pending the proceedings. The proceedings are intended to be prompt, and to be concluded without any delay.

In the present case, the Magistrate distinctly finds that, at the time when he instituted his proceedings, that is, on the 18th October last, the first party were in possession, having two or three days before ousted the second party who had been in possession for some three or four weeks. That being so, the Magistrate's simple duty was to maintain the first party in possession, although he might be of opinion that they were in wrongful possession. He had no power in law in these proceedings to oust the party whom he considered in wrongful possession, and maintain in possession the party whom he considered rightfully entitled to possession. That being so, the rule must be made absolute. The order of the Magistrate is set aside, and, in lieu thereof, he is directed to maintain the first party in possession until ousted by due course of law.

Another objection was taken by the petition. The Magistrate required the first party to enter into recognizances to keep the peace under s. 107. We find that there is no evidence to warrant him to make that order. That order, therefore, is also set aside.

GHOSE, J.—I concur in the judgment just delivered by my learned colleague. There seems to me to be a certain amount of conflict of authorities upon the question whether the Magistrate is bound to enquire as to which party was in possession at the time when the dispute arose, or whether he should confine his enquiry to the time when the proceedings were instituted before him. These rulings were either under s. 318, Act XXV. of 1861, or under s. 530 of Act X. of 1872. The latest case upon the point is a Full Bench decision by the Madras High Court, which is to be found in Mr. Weir's edition of the Madras High Court Reports, page 437. This decision was passed in 1880, overruling an earlier decision of the same Court which had taken a contrary view. It held that the Magistrate was to ascertain who at the time of enquiry was in possession; and it was probably this decision, as was contended by Mr. Ghose, that the Legislature had in view when in s. 145 of the law of 1882 they introduced a change of wording. The words I refer to are to be found in the second paragraph of s. 145, namely, "which of the parties is then in such possession." I believe the Legislature, by introducing the word "then,"

intended to remove the doubt which had existed before in this matter; and it seems to me that what the Magistrate is required to do under s. 145 is to enquire which party is in possession at the time of the institution of the proceedings, and not at the time when the dispute arose.

Order set aside.

Subsequently to this order of the High Court, directing the Magistrate to maintain Ambler in possession, an application was made by Ambler to the Magistrate, for the purpose of obtaining possession, and for the withdrawal of the order of the 11th December 1884, under which Pushong and Sen had been retained in possession.

The Magistrate then passed an order to the effect that Ambler should be put in possession. Thereupon Pushong and Sen presented a petition to the Magistrate, in which they urged that Ambler had relinquished possession of his own accord, and that, they having obtained possession, the order of the High Court could not be carried out if it was intended by that order that Ambler should be restored to possession; they also urged that the Court had no power, under the circumstances, to restore a party to possession. The Magistrate, after hearing both sides, directed that his previous order should be stayed, pending a reference to the High Court to ascertain whether the High Court intended that Ambler should be restored to possession, and, if not, what effect should be given to the order. Before this reference reached the High Court, Ambler moved the High Court in the matter, and obtained a rule, calling upon Pushong and Sen to show cause why the order of the High Court, dated the 24th February 1885, should not be carried out by the Magistrate, and why the order of the Magistrate, dated 11th December 1884, should not be withdrawn. Before the hearing of this rule, the reference made by the Magistrate reached the High Court, and the two matters were heard together at the hearing of the rule on the 1st May 1885.

Mr. *Ghose* for Ambler contended that possession given under an illegal order, subsequently set aside, must be ignored; that the true effect of the High Court's order was that the Magistrate should regard Ambler as in possession from the date of his order of the 11th December 1884; that there would be no object in the High Court possessing powers of revision in such cases if orders made by it were to have no effect. [GHOSE, J.—But it is said that you relinquished possession of your own accord.] Mr. *Ghose* contended that there was nothing to support that allegation; and that the Magistrate had stated that the other side were now in possession under his own order; that, until that order had been withdrawn, Ambler was bound to obey it. That in a similar case to this, *viz.*, in the matter of *Chutraput Singh*,¹ the High Court had directed what was practically restoration to possession; it directed the Magistrate, whose order was reversed, to see that the other side was kept in possession; and that, although it was doubtful whether, under the Code of 1861, the High Court possessed this power, yet, since the passing of the Code of 1872, there was no longer room for doubt.

Mr. *Mullick* for Pushong and Sen contended that the Court had no power to restore a person to possession, except under the provisions of s. 522 of the Code.

Mr. *Ghose* was not called upon to reply.

The order of the Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

On the 24th of February last, this Court, on revision, set aside an order of the Joint-Magistrate of Monghyr, under s. 145 of the Criminal Procedure

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¹ 5 C. L. R. 200.

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Code, in a case of disputed possession, between Charles Ambler on the one side, and Pushong and Sen on the other. The present proceedings have arisen out of that order of the 24th of February, which comes before us in a two-fold manner: Ambler, in whose favour the order of this Court was passed, applied to us that the Magistrate of Monghyr may be informed that it was his duty, in carrying out the orders of this Court, to put the petitioner in possession; and the Magistrate directed to withdraw the order by which Pushong and Sen were put into possession. Upon this petition, a rule was issued on the other side to show cause. In the meantime, the Magistrate had by a letter referred to this Court to know whether the High Court intended to restore Ambler to possession, or, if not, what effect was to be given to the High Court's order.

It appears to us that neither the reference, nor the application upon which the present rule was granted, should have been necessary. It is difficult to conceive how any Magistrate could doubt what the meaning of this Court's order was, or what his duties were in respect of that order. The Magistrate, in December last, while deciding the case, found Ambler to be in possession of the subject of dispute, and yet, because he found also that the other side, Pushong and Sen, were in actual possession on the 14th October, that is, a few days before the institution of the case, he declared them entitled to retain possession until legally evicted.

The order of this Court was that the order of the Magistrate was to be set aside, and in lieu thereof, the first party, Ambler, should be maintained in possession till ousted by the due course of law. It seems perfectly clear that the meaning of this order is that the possession of Ambler be declared, and that, at the time when the Magistrate made the order in favour of Pushong and Sen, his order should have been in favour of Ambler. We now direct that the Magistrate formally withdraw the order passed on the 11th of December last in the matter in question, and that, in lieu thereof, take the order of this Court of the 24th February as being the order which should have been passed, and accordingly declare Ambler to be in possession, and entitled to retain possession until ousted by due course of law. This order will govern the reference.

Rule absolute.

APPELLATE CRIMINAL

Before Mr. Justice Field and Mr. Justice Beverley.

1885.

March 25.

11 Cal. 410.

NETAI LUSKAR (APPELLANT) v. QUEEN-EMPRESS (RESPONDENT.)¹

Charge of murder, Statement by the accused in answer to—Penal Code, ss. 302, 300, excep. 1 and explanation—Plea of guilty—Act X. of 1882, ss. 271, 299—Criminal Procedure Code.

An accused person in answer to a charge of murder stated that he had killed his wife, but that he had done so in consequence of his having discovered her in an act of adultery on the previous day. *Held* that such a statement did not amount to a plea of guilty on the charge, and that it was the duty of the Court to try whether the provocation there-in disclosed was sufficiently grave and sudden to reduce the offence.

ONE Netai Luskar was committed to the Sessions Court on a charge of murder, under s. 302 of the Indian Penal Code. After hearing the charge read, the accused made the following statement: "I did kill my wife. I did not kill her willingly. Finding her in the act of adultery, and being wholly unable to restrain myself, I killed her. I intended to kill her; my caste was gone;

¹ Criminal Reference, No. 11 of 1885, and Appeal No. 187 of 1885, against the order of C. B. Garrett, Esq., Additional Sessions Judge of 24-Pergunnahs, dated the 5th of March 1885.

I resolved to kill her, and then commit suicide. I detected her in adultery on Friday. I did not kill her then. On Saturday, I took her into Madun Roy's garden, and then killed her. On Friday, after seeing the adultery, I was in fever, and did not eat. I vowed I would not eat until I had killed her. I told Goberdhone what I intended to do. He advised me to desist. I said I could never desist, because I was disgraced, and it was better to die than submit to such disgrace. I murdered the woman with this *haswa*. I concealed it in a tank, and showed it to the police afterwards. Goberdhone got it out of the water. I am glad I killed my wife. I bathed myself in her blood. I confessed what I have done with pleasure."

Upon this statement, the Judge recorded a plea of guilty on the charge of murder, and sentenced the accused to be hanged. The prisoner appealed to the High Court, and a reference was also made for confirmation of the sentence.

No one appeared for either party.

The judgment of the Court (FIELD and BEVERLEY, JJ.) was delivered by

FIELD, J.—This case has been referred to us under the provisions of s. 374 for confirmation of the sentence of death passed on the accused by the Additional Sessions Judge of the 24-Pergunnahs.

The accused is said to have pleaded guilty, and he has been sentenced (not convicted) by the Judge on that plea. There is no finding on the record.

The accused has also appealed to this Court.

In the Sessions Court, the accused made the following statement as recorded by the Sessions Judge: "I did kill my wife. I did not kill her willingly. Finding her in the act of adultery with another person, and being wholly unable to restrain myself, I killed her. I intended to kill her; my caste was gone. I resolved to kill her, and then commit suicide. I detected her in adultery on Friday. I did not kill her then. On Saturday, I took her into Madun Roy's garden, and there killed her. On Friday, after seeing the adultery, I was in fever, and did not eat. I vowed that I would not eat until I had killed her. I told Goberdhone what I intended to do. He advised me to desist. I said I could never desist, because I was disgraced, and it was better to die than submit to such disgrace. I murdered the woman with this *haswa*. I concealed it in a tank, and showed it to the police afterwards. Goberdhone got it out of the water. I am glad I killed my wife. I bathed myself in her blood. I confessed what I had done with pleasure."

This statement, no doubt, contains an admission that the accused killed his wife; but this admission is coupled with an explanatory statement, which is in effect a plea that he killed her under grave and sudden provocation. We think the whole statement must be taken together; and, being so taken, it certainly is not equivalent to a plea of guilty upon the charge of murder under s. 302 of the Penal Code. The explanation to the first exception in s. 300 of the Indian Penal Code states that the question, "whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact;" and by s. 299 of the Code of Criminal Procedure, "it is the duty of the jury to decide all questions which, according to law, are to be deemed questions of fact." We think, then, that this case should have been tried out, and the verdict of the jury taken on the plea raised by the accused. We accordingly set aside the sentence passed by the Sessions Judge, and direct that the accused, Netai Luskar, be tried on the charges on which he was committed to the Court of Session.

Sentence set aside.

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CRIMINAL REFERENCE.

Before Mr. Justice Field and Mr. Justice Beverley.

1885.

March 24.

PRAMATHA BHUSANA DEB ROY (PETITIONER) *v.* DOORGA CHURN BHATTACHARJI AND OTHERS (OPPOSITE PARTIES).¹

11 Cal. 413. *Dispute as to the right to collect rents—Criminal Procedure Code (Act X. of 1882), s. 145—Tangible immoveable property—Act X. of 1872, s. 530.*

A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Code of Criminal Procedure.

A CERTAIN tenure, known as Taraf Sachani, comprising 28 mouzahs, was sold for arrears of rent on the 1st September 1884, and purchased by the decree-holder, Kumar Pramatha Bhusana Deb, Rai Bahadur of Naldanga. On the 21st December, the Nazir of the Civil Court delivered possession to the auction-purchaser of the village of Dighulgram, one of the 28 mouzahs aforesaid. The Kumar's party thereupon began collecting such rents as they could from the tenants of the village. They, however, were opposed by one Doorga Churn Bhattacharji, who claimed the village as his under-tenure, and alleged that he had been in peaceful possession of it for upwards of thirty years. The Deputy Magistrate of Magoora, being satisfied upon the report of the sub-inspector of police that a dispute likely to cause a breach of the peace existed concerning mouzah Dighulgram, which lay within his jurisdiction, issued an order, calling upon the rival parties to appear and file written statements of their respective claims to the mouzah. Upon a review of all the circumstances of the case, the Deputy Magistrate held that the Bhattacharji's party were in possession of the mouzah, and were entitled to retain possession thereof, until evicted in due course of law. Against that order, the Kumar applied to the High Court, and obtained the rule set out in the judgment of *Field, J.* On the rule coming up for argument, it was contended, on behalf of the petitioner, that the Court below had no jurisdiction, because the dispute related only to the right to collect rents.

Mr. Pugh and *Baboo Rashbehari Ghose* for the petitioner.

The *Advocate-General* (*Mr. G. C. Paul*) and *Bahoo Srinath Doss* for the opposite party.

The order of the Court was as follows :—

FIELD, J. (BEVERLEY, J., concurring).—In this case a rule was granted, in order to have a question decided, which has arisen upon the construction of s. 145 of the Code of Criminal Procedure. The rule is in the following language : " Let a rule issue on the opposite party to show cause why the order of the Deputy Magistrate, so far as regards the land other than the *khamar* land, should not be set aside, on the ground that it is bad in law, because it concerns merely the right to collect rents from tenants, which is not 'tangible immoveable property' within the meaning of s. 145 of the Code of Criminal Procedure." Under the Code which was in force before Act X. of 1882 was passed, there can be no doubt that, according to the decisions of this Court, the right to collect rents from ryots did come within the purview of the corresponding section (530) of the former Code. This was decided in several cases, to two of which we may refer, *Sutherland v. Crowdy*² and *Harak Na-*

¹ Criminal Revision, No. 90 of 1885, against the order of *Baboo Peari Mohun Banerji*, Deputy Magistrate of Magoorah, dated the 23rd of February 1885.

² 18 W. R. Cr. 11 ; 9 B. L. R. 229.

rain Singh v. Luchmi Bux Roy.¹ At the same time it was held that the provisions of s. 530 did not apply when there were tenure-holders intermediate between the zemindar and the ryots. This latter point was decided in *Empress v. Thacoor Dyal Sing*.² The present case is not, however, on all fours with this last case. A different view was taken by the Madras High Court, and what we have to consider on the present occasion is, whether it was the intention of the Legislature to alter the law as settled by the decisions of this Court, and to adopt in preference the view taken by the Madras Court.

In order to determine this point, we must examine the language of s. 530 of the old Code, and compare it with the language of s. 145 of the present Code. The section of the old Code was as follows: "Whenever the Magistrate of the district, &c., is satisfied *that a dispute*, likely to induce a breach of the peace, exists *concerning any land or the boundaries of any land*, or concerning *any houses, water, fisheries, crops, or other produce of land*, within the limits of his jurisdiction, such Magistrate shall record a proceeding, stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by such Magistrate, and to give in a written statement of their respective claims, as respects the fact of *actual possession* of the subject of dispute. Such Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to enquire and decide which party is in *possession* of the subject of dispute."

The language of the present law is as follows: "Whenever a District Magistrate, &c., is satisfied from a police-report or other information that a *dispute* likely to cause a breach of the peace exists *concerning any tangible immoveable property, or the boundaries thereof*, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court, in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the facts of *actual possession* of the subject of dispute. The Magistrate shall then, without reference to the merits of the claims of any such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any, and which, of the parties is then in *such possession* of the said subject."

It has been argued that the introduction of the word "such" before "possession" in the last clause of the section just quoted indicates an intention on the part of the Legislature to alter the law. We are not able to accede to this argument. We think that, both under the old law and under the new law, parties were required to plead as to actual possession, and the decision of the Magistrate was to be upon this same possession. Under the present law, this is clear, because the words "such possession" refer to *actual possession*. Under the old law, it is not so clear, because the word "such" does not come before "possession;" but we think that, inasmuch as the old law required parties to plead as to *actual possession*, it was intended that the decision of the Magistrate should deal with the same possession, that is, actual possession. It is more difficult to deal with the alteration in the language of the Legislature introduced by the term "tangible" before "immoveable property." If the word "tangible" had been introduced before "possession," it would have been clear that the inten-

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¹ 5 C. L. R. 287.² 1. L. R., 3 Cal. 320.

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tion of the Legislature was to alter the law as laid down by the decision in the case of *Sutherland v. Crowdy* and the other similar cases; but the use of the word "tangible," not in connection with "possession," but in connection with the words "immoveable property," does not, in our view, indicate a similar intention. It is, we think, quite explainable, without assuming any intention on the part of the Legislature to alter the law as laid down by the decisions of this Court. Under the old Code, the dispute was a dispute "*concerning any land or the boundaries of any land, or concerning any houses, water, fisheries, crops, or other produce of land.*" Now, this dispute was certainly, so far as regards fisheries, a dispute concerning an incorporeal right, and an incorporeal right is intangible property. The dispute which the present Code speaks of is a dispute concerning *any tangible immoveable property*; the word "fisheries" and other words have been omitted. It is clear that a dispute concerning an incorporeal right would not come within the purview of the section in the present Code. We think, therefore, that the alteration in the language, by the introduction of the word "*tangible*," is explainable by the exclusion from the section of the present Code of words descriptive of incorporeal or intangible right or property. Under the old law it was held that a dispute between rival zemindars as to the right to collect rents was a *dispute concerning land*. We think it impossible to say that a similar dispute is not, within the meaning of the present law, a *dispute concerning tangible immoveable property*. The use of the word "concerning" in the definition seems to make this wide construction possible, and this word is retained in the present Code.

Speaking for myself, I may say that I would gladly have come to a different conclusion, because I think that disputes between zemindars as to the right to collect rents ought not to be brought into the inferior Criminal Courts in this country. But, applying the ordinary rules of construction, I do not see how we can arrive at any other conclusion than that the Legislature has not had the intention of altering the law as settled by the decisions of this Court. The rule must be discharged.

Rule discharged.

CRIMINAL MOTION.

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

1885.

April 14.

KAMRUDDIN DAI AND OTHERS (PETITIONERS) v. SONATUN MANDAL
(OPPOSITE PARTY).¹

11 Cal. 449. *Criminal Procedure Code (Act X. of 1882), ss. 367, 424, 426—Judgment, Contents of.*

A Sessions Judge, after hearing an appeal, gave the following judgment: "It is urged that the evidence is quite untrustworthy, and that the decision should be reversed. The depositions have been gone through, and commented on at considerable length. The Court finds no ground for interference. The appeal is dismissed." Held that this was not a sufficient compliance with ss. 367 and 424 of Act X. of 1882, and that the case should be re-tried.

Four persons, who were said to have been the dependents of one Kali Das Rai, were accused by one Sonatun Mandal, with having, on the 21st November 1884, in company with some 150 others, unlawfully entered into his house, and

¹ Criminal Motion, No. 107 of 1885, against the decision of *J. McLaughlin, Esq.*, Sessions Judge of Jessore, dated the 18th March 1885, affirming the decision of Baboo *Ananda Chunder Sen*, Deputy Magistrate of Narail, dated the 13th February 1885.

with having taken away certain articles therefrom. The reason for the outrage was said to have been the refusal of Sonatun Mandal to give a *kabuliat* in favour of Kali Das Rai.

The accused were tried by the Deputy Magistrate of Narail, and were convicted of rioting under s. 147 of the Penal Code, and sentenced to two months' rigorous imprisonment. The prisoners appealed to the Sessions Judge of Jessore on the following grounds: That the evidence given by the prosecution was unreliable: (1) because nine witnesses were mentioned in the first information as having been eye-witnesses of the alleged occurrence, and only one of these persons had been called to give evidence; (2) because the witnesses who were examined were all of them ryots or dependents of one Chunder Kant Rai, with whom Kali Das Rai was at feud; and (3) because the alleged outrage was said to have been committed in sight of the bazaar, and at a time when people were going to the *hat*, and not one single independent witness was produced by the prosecution; (4) because the complainant alleged that certain articles of property stolen from his house were found by the police in the house of the accused, and no attempt was made to substantiate this statement by producing the articles said to have been stolen; (5) because there was no evidence save that of the complainant, to show that the accused had ever been asked to give a *kabuliat*; and it had been proved that the complainant was not a ryot of Kali Das Rai; and (6) because there had been great delay in giving information to the police of the alleged outrage. The Sessions Judge heard the appeal, and gave the following judgment:—

"It is urged that the evidence is quite untrustworthy, and that the decision should be reversed. The depositions have been gone through, and commented on at considerable length. The Court finds no ground for interference. The appeal is dismissed."

The prisoners applied to the High Court under the revisional sections of the Code, contending that the Sessions Judge had given no decision, in accordance with ss. 367 and 424 of the Code, on any one of the grounds of appeal, and that, for this reason, the judgment should be set aside, and the appeal re-heard.

Mr. *H. Bell* for the petitioners.

The Court granted to the petitioners a rule *nisi*, calling upon Sonatun Mandal to show cause why the judgment of the Sessions Judge should not be set aside, and why he should not be directed to re-hear the appeal.

When granting this rule, the Court, having regard to the fact that the prisoners were on bail up to the decision of the Sessions Judge, and considering that no proper decision had yet been come to by him, released the prisoners on bail, pending the hearing of the rule.

The rule came on for hearing, and, no one appearing to show cause, Mr. *Bell* (with him Baboo Jagut Chunder Banerjee), on behalf of the petitioners, applied that the rule should be made absolute.

The Court (PIGOT and O'KINEALY, JJ.) thereupon set aside the judgment of the Sessions Judge, ordered a re-hearing, and released the prisoners on bail pending such re-hearing.

Rule absolute.

1885.

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CRIMINAL APPELLATE.

*Before Mr. Justice Prinsep and Mr. Justice Pigot.*MEHTER ALI AND OTHERS (APPELLANTS) *v.* QUEEN-EMPRESS
(RESPONDENT).¹

1885.

April 29.

11 Cal. 530.

Enhancement of sentence on appeal—Criminal Procedure Code (Act X. of 1882), ss. 423, 439—Penal Code, s. 330.

A head-constable was convicted under s. 330 of the Penal Code, and, at a trial before a Sessions Judge, sentenced to four months' simple imprisonment. The prisoner appealed. The High Court, in dismissing the appeal, directed, as a Court of Revision, that the sentence passed should be enhanced.

Four persons, *viz.*, Mannu Lall, sub-inspector, Mehter Ali, head-constable, Hussen Buksh, constable, and Ameer Buksh, constable, were charged, under s. 330 of the Penal Code, with having voluntarily caused hurt to certain persons, in order to extort confessions from them, which might lead to the detection of the murderer of one Mussamut Dhuri. The Sessions Judge, differing from both assessors, found that Mannu Lall and Mehter Ali were guilty under s. 330 of the Penal Code, and sentenced Mannu Lall to simple imprisonment for one year, and Mehter Ali to simple imprisonment for four months; he also, concurring with one of the assessors, found that Hussen Buksh and Ameer Buksh were also guilty under s. 330 of the Penal Code, and sentenced them to two years' rigorous imprisonment.

The prisoners appealed to the High Court.

Baboo *Boido Nath Dutt* for Mehter Ali. The other prisoners were unrepresented.

The Officiating Deputy Legal Remembrancer (Mr. *Leith*) for the Crown.

Judgment of the Court was delivered by

PRINSEP, J.—As regards the two constables, the evidence leaves no doubt in our minds with regard to the correctness of the order of the Sessions Judge convicting them, under s. 330 of the Penal Code, of having caused hurt to certain persons accused of murder of Mussamut Dhuri, with the intention of extorting confessions from them.

As regards the other appellant, Mehter Ali, who occupied a somewhat higher position, being a head-constable, it is argued that the evidence on the record does not amount to actual proof that he himself caused any such hurt to any of these persons. In support of this contention, our attention has been drawn to some discrepancies in the evidence on the record, and especially on comparison of the evidence given by the principal witnesses at the trial with statements made at the various preliminary stages of the proceedings. These discrepancies, however, do not affect the general character of the evidence. The evidence is clear that false confessions were obtained from these persons who were arrested by the police on suspicion of having murdered the woman, Dhuri, and that these false confessions were the result of violence toward these persons, openly caused by the two constables, as well as of illegal detention in police-custody beyond the period prescribed by law. The appellant-head-constable was for some days in charge of the police-investigation, and the superior officer of these constables when openly using violence to the prisoners in their custody, and he was throughout in the immediate neighbourhood of the places where

¹ Criminal Appeal, No. 220 of 1885, against the order passed by *J. Pratt, Esq.*, Officiating Sessions Judge of Purneah, dated the 11th March 1885.

this violence was used, and in constant company with the constables. We find ourselves, therefore, unable to come to any conclusion, but that he was not only cognizant of those assaults, but he was an accomplice in them, and in the illegal detention as the means by which he intended to obtain false confessions. We, therefore, think that there are no reasonable grounds for questioning the correctness of the conviction of the head-constable, Mehter Ali.

In sentencing the head-constable to four months' simple imprisonment, it would seem that the Sessions Judge had before him the fact that he had found that there was a superior officer also engaged in the investigation, and in his opinion more culpable than the head-constable. We have not before us the case of the sub-inspector, and we desire to express no opinion regarding it; but even in the view taken by the Sessions Judge, we think that this sentence is altogether inadequate, and therefore, in dismissing the appeal of Mehter Ali, we direct, as a Court of Revision, that, in lieu of the sentence passed by the Sessions Judge, he be sentenced to six months' rigorous imprisonment, calculated from the date of the sentence of the Sessions Court.

The appeals of the two constables are dismissed.

Appeals dismissed.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Field, and Mr. Justice O'Kinealy.

IN THE MATTER OF GOPI NATH (PETITIONER) *v.* KULDIP SINGH AND OTHERS (OPPOSITE PARTIES).¹

Sanction to prosecute—Proceedings under s. 82 of Act III. of 1877—Registration—Act III. of 1877, ss. 82, 83.

It is not necessary that sanction should be given before instituting a charge under s. 82 of the Registration Act.

THIS case arose from certain proceedings taken in connection with a deed, which purported to have been executed by one Gopi Nath and his three sons in favour of Kuldip Singh and his brothers, passing to the vendees the proprietary right of the vendors in a certain mouzah. This deed bore date the 27th March 1884, and was presented to a Sub-Registrar for registration by Kuldip Singh on the 19th July 1884. Gopi Nath and his three sons were summoned to attend before the Sub-Registrar, and, failing to appear, a warrant was issued against them. On the 8th September, the executants, the vendors, denied execution of the deed, and, as a consequence, registration was refused. An appeal was made to the Registrar, and he directed an enquiry to be held in the matter by the Deputy Collector; in enquiring into the matter, the Deputy Collector reported that the parties had compromised the case, and a petition in accordance with the compromise was presented to the Registrar by Gopi Nath and his sons, in which they stated that they had received Rs. 305 as consideration for the sale, and that they were then ready to admit execution, and have the deed registered. The District Magistrate, however, insisted on the enquiry being carried through, being of opinion that, if the vendors had really executed the document before its presentation, they had made a false statement in denying execution, or, if that was not so, Kuldip Singh must have committed

1885.

MEHTER ALI

v.

QUEEN-
EMPRESS,

11 Cal. 530.

1885.

May 15.

11 Cal. 566.

¹ Full Bench Reference on Criminal Motion, No. 165 of 1885, from an order of *Y. Boxwell, Esq.*, District Magistrate of Gya, dated the 27th March 1885.

1885.
GÖPI NATH
v.
KULDIP
SINGH,
11 Cal. 506.

forger. A fresh enquiry was therefore held, and on it the Deputy Magistrate came to the conclusion that Gopi Nath and his sons had executed the deed, and that they had falsely denied execution before the Sub-Registrar, concluding his report with the words: "They may, therefore, be prosecuted under s. 82 (a) of the Registration Act." On the 27th March 1885, Mr. Boxwell, the Magistrate of the District, passed the following order: "Gopi Nath will be prosecuted for perjury before Mr. Hampton." Gopi Nath, after being summoned to appear to answer to a charge under s. 82 (a) of Act III. of 1877 on the 25th April, applied on the 18th April that proceedings should be stayed, as no sanction for the prosecution had been granted. The Deputy Magistrate, Mr. Hampton, rejected the application, stating that the prosecution had been directed by Mr. Boxwell, who was Registrar as well as Magistrate of the District. Gopi Nath, thereupon, applied to the High Court to have the proceedings taken against him set aside, on the ground that the District Magistrate had no jurisdiction to grant sanction; that the sanction did not comply with the terms of s. 195 of the Code of Criminal Procedure. Mr. Justice Prinsep and Mr. Justice Pigot on the 24th April 1885, after expressing a doubt as to the correctness of the decision in *Queen-Empress v. Balesar Mandal*,¹ ordered the record to be sent for, and directed that, in the meantime, proceedings before Mr. Hampton should be stayed. On the 28th April, after perusing the record, the same learned Judges referred to a Full Bench the question, whether, before proceedings can be taken before a Magistrate in regard to false evidence alleged to have been intentionally given before an officer acting under the Registration Act, sanction must have been given by such officer, or some officer to whom he is subordinate? The order of reference was as follows:—

"The irregularities complained of in this case relate to the manner in which sanction to prosecute has been granted, and to the proceedings subsequently taken; but, before we can properly consider the effect of those irregularities, we must first find whether any sanction is necessary, before proceedings can be taken before a Magistrate, regarding false evidence, said to have been given before a registration-officer.

"S. 195 of the Code of Criminal Procedure declares that no Court shall take cognizance of any offence punishable under s. 193 of the Indian Penal Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction or on the complaint of such Court, or of some other Court to which such Court is subordinate. The offence said to have been committed in this case is punishable under s. 82 of the Registration Act. It is, no doubt, of the same nature as that punishable under s. 193 of the Penal Code; but, if the terms of these sections be compared, it will be seen that, whereas under s. 82 of the Registration Act a sentence of seven years' imprisonment can be passed in any case of intentionally giving false evidence before a registration-officer, s. 193 of the Penal Code provides that that sentence shall be passed only in a case in which the false evidence has been given in a stage of a judicial proceeding. This raises the question whether a proceeding before a registration-officer is a judicial proceeding, which again involves a consideration of the second point, whether a registration-officer is a Court within the meaning of s. 195 of the Code of Criminal Procedure.

"Our attention has been directed to the case of *Queen-Empress v. Balesar Mandal*,¹ in which it was held that sanction to a prosecution, arising out of proceedings before a registration-officer, is necessary before it can be commenced.

¹1, L. R., 10 Cal. 604.

We are inclined to disagree with the view thus expressed with regard to the terms of s. 195 of the Code of Criminal Procedure, and of s. 83 of the Registration Act; and we, therefore, refer for determination by a Full Bench of this Court whether, before proceedings can be taken before a Magistrate in regard to false evidence alleged to have been intentionally given before an officer acting under the Registration Act, sanction must have been given by such officer, or some officer to whom he is subordinate."

1885.
Gopi NATH
v.
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SINGH,
11 Cal. 566.

On the hearing before the Full Bench—

Mr. *Mullick* (with him Baboo *Jogesh Chunder Dey*) appeared for Gopi Nath.

Mr. *Braunfeldt*, who appeared for Kuldip Singh, was not called upon.

The opinion of the Full Bench was as follows:—

It appears that the charge against the accused, with which we are now dealing, was not made under s. 193 of the Penal Code, but under s. 82 of the Registration Act. It is, therefore, not necessary, for the purposes of this case, to consider whether, when in holding an enquiry under that Act, the Registrar is acting as a "Court" within the meaning of s. 195 of the Criminal Procedure Code. We have only to consider whether, before instituting a charge under s. 82, any sanction at all is necessary.

We are of opinion that no sanction is required. It has been contended that, under s. 83 of the Registration Act, it is necessary that some one of the officers who are mentioned in that section must have given previous permission to institute proceedings; but we think that it is not so. The provisions of s. 83 are not obligatory. They rather seem to be intended for the purpose of enabling the officers of the Registration Department, when they should see fit, to institute any prosecution under the Act upon their own responsibility.

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Norris.

GOVERDHAN SINHA AND ANOTHER (PETITIONERS) v. THE QUEEN-EM-PRESS (OPPOSITE PARTY).¹

1885.
May 19.
11 Cal. 570.

Embankment—Addition to existing embankment—Notification, Publication of, under Bengal Embankment Act—Beng. Act II. of 1882 (Bengal Embankment Act), ss. 6, 76, cl. (b), and 80.

The words, "shall add to any existing embankment," in cl. b, s. 76 of Beng. Act II. of 1882, are not intended to mean any repair of an existing embankment, even if the effect of such repair be to make the embankment higher or broader, but only mean an extension in the length of an existing embankment.

The notification referred to in s. 6 of the Act must be published in the manner provided by s. 80; and it is not sufficient for such notification merely to be published in the *Calcutta Gazette*.

This motion arose out of a prosecution under the provisions of s. 76 of Beng. Act II. of 1882. The accused were charged with "adding to an embankment" within the prohibited area without having previously obtained the permission of the Collector as provided by cl. b of that section.

It was not disputed that the permission of the Collector had not been obtained, but the accused pleaded that what they had done merely amounted to

¹ Criminal Motions, Nos. 134 and 135 of 1885, against the order passed by Baboo *Umesh Chandra Batabyal*, Deputy Magistrate of Tumlook, dated the 10th of March 1885.

1885.

GOVERDHAN
SINHA

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QUEEN-

EMPRESS,

11 Cal. 570.

repairing the embankment, and not to an addition thereto; and, even if there had been any addition, that they could not be convicted, inasmuch as there had been no publication of the requisite notice under the provisions of s. 80.

The complainant, a sub-overseer of the Public Works Department, in the case against Goverdhan Sinha, gave evidence to the effect that the embankment had existed for a period of five years at a height of only 1 foot, and that the accused, in spite of being warned and prohibited from doing so, had raised it to a height varying from $2\frac{1}{2}$ to $3\frac{1}{2}$ feet. In answer, the accused produced evidence to the effect that the normal height of the embankment was from 4 to 5 feet, but that, owing to the encroachment of the river, it had been reduced in height, and that from time to time repairs were made, and that when the repairs complained of were made, it was only 1 foot in height. The Deputy Magistrate disbelieved the evidence on behalf of the accused, and came to the conclusion that the act of raising the embankment from a height of 1 foot to a height of from $2\frac{1}{2}$ feet to $3\frac{1}{2}$ feet constituted "an adding to it;" and, finding that the notice required was published in the *Calcutta Gazette*, convicted the accused and fined him Rs. 7, and ordered him to remove the additional earth.

The facts and the findings of the Deputy Magistrate in this case against the other accused, Sree Nath Biswas, were substantially the same.

The accused thereupon applied to the High Court for a rule to have the conviction set aside upon the ground that the publication of the notice was not sufficient, and that, even upon the facts admitted or proved, no offence had been committed, as the act did not amount to adding to the embankment, but merely to repairing it.

The application was made on the 17th April 1885 by Mr. *Pugh*, on behalf of the accused, before a Bench, consisting of *Prinsep* and *Pigot*, JJ., and a rule *nisi* was issued.

The rule came on for hearing before *Mitter* and *Norris*, JJ., on the 19th May 1885, and Mr. *Pugh* (Baboo *Tarak Nath Palit* and Baboo *Jogesh Chandra De* with him) contended that no offence had been committed, as it was not shown that any addition had been made to the embankment, so as to bring the accused within the term of cl. (b) of s. 76, and that the notification required by s. 6 must be published in the manner provided by s. 80; and as that had not been done, the decision was erroneous, and the conviction should be set aside.

Mr. *Pugh*, during the course of his argument, referred to a decision of a Bench of the High Court, consisting of *Prinsep* and *Macpherson*, JJ., in the matter of *Boykanto Nath Roy*, petitioner, decided on the 12th September 1884 (Criminal Motion No. 297 of 1884, *unreported*), in which the Court held that s. 76 does not make the mere repairing of an existing embankment without the permission of the Collector a punishable offence, but prohibits the erection of any new embankment, or addition to any existing embankment, and that publication of the notification in the *Calcutta Gazette* was not sufficient, but the provision of s. 80 must be complied with before a conviction could be sustained.

No one appeared on behalf of the opposite party.

The judgment of the Court (MITTER and NORRIS, JJ.) was as follows:—

In these two cases, the petitioners before us have been convicted under s. 76, cl. (b) of Beng. Act II. of 1882, called the Bengal Embankment Act, 1882. The facts proved against the petitioners are, that they have repaired existing embankments so as to make them higher, and probably broader, than they were before; and it was also proved that they did these acts without taking

the previous permission of the Collector as required by cl. b of s. 76. It is further found by the Magistrate that, under s. 6 of the Aft, the Lieutenant-Governor, by a notification, declared that the tracts within which these embankments exist are tracts within which the provisions of cl. b of s. 76 shall take effect. It is stated in the affidavit, and not contradicted in any way, that no proclamation and general notice of this declaration under s. 6 was published in the manner prescribed in s. 80 of the Aft.

There is no finding in the Magistrate's judgment that any such proclamation and general notice were published in accordance with s. 80.

Two points have been taken before us. In the first place, it is contended that the Magistrate has erred in construing the words, "shall add to any existing embankment," in cl. b of s. 76, as including a repair of the kind found in this case. It is contended that these words mean an addition to an existing embankment in the sense that such embankment is extended in its length.

The second objection is that, supposing the construction put upon the section in question by the Magistrate is correct, still the conviction is bad, because no proclamation and general notice of the fact that cl. b of s. 76 would take effect in that part of the country where these embankments exist had been published in accordance with s. 80 of the Act. We are of opinion that the conviction must be set aside upon both these grounds. We agree with the learned Counsel that the words, "shall add to existing embankments," are not intended to mean any repair to an existing embankment, even if the effect of such repair be to make the embankment higher or broader. These words only mean an extension in the length of an existing embankment. If the construction which has been put by the Magistrate were correct, it would be almost impossible to carry out the provisions of the Aft. Certainly it cannot be contended that any ordinary repair to an existing embankment would be included within the words "shall add to an existing embankment," and if any ordinary repair is not included, how is the line of demarcation to be drawn?

Then, again, these words, if construed in the way in which the Magistrate has construed them, would be meaningless in applying them to the provisions of s. 79, which says: "Whenever any person is convicted of an offence under either of the three last preceding sections, the convicting Magistrate may order that he shall remove the embankment or obstruction, or repair the damage, in respect of which the conviction is held, within a period to be fixed in such order." If throwing additional earth on an embankment means an addition to an existing embankment within the meaning of cl. b, it would be almost impossible for the convicting Magistrate to define the quantity of earth to be removed from the embankment, in order to carry out the provisions of s. 79. We are, therefore, of opinion that the construction put upon the words of cl. b of s. 76 is not correct, and that the construction for which the learned Counsel contends is the right one.

Then, as regards the other point, we are of opinion that, under s. 80, it was necessary to publish the general notice mentioned in s. 6 of the Aft in the way prescribed by s. 80. In this view we are supported by an unreported decision of this Court in Criminal Motion, No. 297 of 1884, dated 12th September 1884. The words, "every proclamation and general notice by this Aft required to be issued or given," used in s. 80, are sufficiently wide to include the notice referred to in s. 6.

Upon both these grounds, therefore, we are of opinion that the convictions in these two cases are wrong. We accordingly set aside the convictions and sentences in these two cases. The fines, if realized, will be refunded.

Conviction quashed.

1885.

GOVERDHAN

SINHA

v.

THE
QUEEN-
EMPRESS,

11 Cal. 570.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Norris.

1885.

May 22.

JOYDEO SINGH (PETITIONER) *v.* HARIHAR PERSHAD SINGH
(OPPOSITE PARTY).¹

11 Cal. 577. *Sanction—Fresh sanction granted more than six months after expiry of prior sanction—Grounds upon which such fresh sanction should not be granted—Criminal Procedure Code (Act X. of 1882), s. 195.*

Sanction was granted to prosecute a defendant for forgery and perjury alleged to have been committed by him in a civil suit, which was decided against him on the 22nd August 1882. The defendant then preferred an appeal, which was dismissed on the 9th August 1883. The plaintiff commenced criminal proceedings against the defendant, under the sanction, on the 23rd July 1884; but such proceedings having been commenced more than six months after the date of the sanction, the charge was dismissed. The plaintiff then on the 20th August 1884 applied for a fresh sanction, which was granted on the 13th April 1885.

Held that, assuming that the Munsif who granted the fresh sanction had power to do so, as to which the Court expressed no opinion, such fresh sanction should not have been granted, unless some explanation was given for the omission to commence proceedings within six months; and as no such explanation was given, or any special grounds shown why a fresh sanction should be given, the Munsif did not exercise a sound discretion in granting such fresh sanction, and consequently his order was set aside.

THIS was an application to set aside an order granting sanction to prosecute the petitioner for forgery and giving false evidence.

The facts were as follows :—

The petitioner, one Joydeo Singh, had been one of the defendants in a regular suit, in which Harihar Pershad Singh, the opposite party, was plaintiff. That suit was decided on the 22nd August 1882 against the defendant; and, on the application of the plaintiff, the Munsif, on the same day, granted sanction to the plaintiff to prosecute Joydeo Singh and one Charan Singh for forgery and giving false evidence. The defendants preferred an appeal against the Munsif's judgment, deciding the case against them, and the decree passed thereon, but that appeal was dismissed on the 9th August 1883. On the 23rd July 1884, the plaintiff instituted criminal proceedings against Joydeo Singh and Charan Singh under the sanction granted on the 22nd August 1882. The case came on for hearing on the 19th August 1884 before the Deputy Magistrate, who then, for the first time, discovered that the sanction upon which the proceedings were based had been granted more than six months previous to their being commenced, and he accordingly dismissed the case. The plaintiff, Harihar Pershad Singh, then on the 20th August 1884 applied to Moulvie Ata Hossain (Baboo Gocool Chand, the Munsif who had heard the regular suit, and granted the previous sanction, having meanwhile been transferred), the then Munsif of Arungabad, to renew the sanction granted by his predecessor to prosecute Joydeo Singh and Charan Singh; and that officer accordingly granted a rule, calling upon the petitioner to show cause why such application should not be complied with. The rule came on for argument on the 13th April 1885, and resulted in a fresh sanction being granted to prosecute Joydeo Singh. Joydeo Singh now applied to the High Court to set aside that order on the following grounds :—

(1) That the Munsif was wrong in renewing an order barred by limitation;

¹ Criminal Revision, No. 171 of 1885, against the order passed by Moulvie Ata Hossein, Munsif of Arungabad, dated the 13th April 1885.

(2) That there is no provision in the Code providing for the renewal of an order sanctioning a prosecution ;

(3) That the officer who granted the sanction not being the officer who had heard the original suit, or granted the previous sanction, could not give sanction without first holding a preliminary enquiry ; and

(4) That the order was therefore bad in law, and made without jurisdiction.

Munshi *Mahomed Yusuf* for the petitioner.

Mr. *Twidale* for the opposite party.

The judgment of the High Court (MITTER and NORRIS, JJ.) was delivered by MITTER, J.—The petitioner before us was defendant in a civil suit. The suit was decreed by the Munsif on the 22nd August 1882, and at the end of the judgment a sanction was given for the prosecution of the petitioner for forgery and for giving false evidence. There was an appeal preferred against the Munsif's decree, and that appeal was disposed of against the petitioner on the 9th August 1883. Then, on the 23rd July 1884, the plaintiff in the civil suit commenced the criminal proceeding for which he had obtained the sanction on the 22nd August 1882.

While this proceeding was pending, it was discovered that the sanction upon which the prosecution relied was more than six months old. Thereupon, on the 20th August, another application was made for obtaining a fresh sanction, which was given on the 13th April 1885.

This rule was obtained by the petitioner upon the plaintiff to show cause why the order of the Munsif, dated 13th April 1885, should not be set aside.

It is contended before us that, under s. 195 of the Criminal Procedure Code, it was not competent to the Munsif to give a fresh sanction for the prosecution. It seems to me to be unnecessary to express any opinion upon this point, because, assuming that the Munsif had power to grant the fresh sanction, he should not have granted it unless some explanation was given for the omission to commence the proceeding within six months. The order of the 13th April 1885 has been read to us. It discloses no special grounds for granting this fresh sanction. Neither does it appear from the record that any explanation was given by the opposite party to this rule as to why proceedings were not commenced at least within six months from the date when the decree of the Munsif was confirmed in appeal.

Under these circumstances, I am of opinion that the Munsif did not exercise a sound discretion in granting the fresh sanction prayed for. We accordingly set aside the order of the Munsif of the 13th April 1885.

Order set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Norris.

QUEEN-EMPRESS *v.* DURGA SONAR (ACCUSED).¹

Evidence—Deposition of accused person when admissible in evidence against him in subsequent proceeding—Evidence Act (I. of 1872), s. 80.

A deposition given by a person is not admissible in evidence against him in a subsequent proceeding, without its being first proved that he was the person who was examined and gave the deposition.

¹ Criminal Reference, No. 16, and Appeal, No. 322 of 1885, made by J. W. Badcock, Esq., Officiating Sessions Judge of Bhaugulpore, on the 4th of May 1885.

1885.

JOYDEO
SINGH

v.

HARIHAR
PERSHAD
SINGH,

11 Cal. 577.

1885.

May 26.

11 Cal. 580.

1885.

QUEEN-
EMPRESS

v.

DURGA
SONAR,

11 Cal. 580.

A pardon was tendered to an accused, and his evidence was recorded by the Magistrate. Subsequently, the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial, the deposition given by him before the Magistrate was put in and used in evidence against him without any proof being given that he was the person who was examined as a witness before the Magistrate.

Held that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate.

IN this case the accused and three others were charged with the murder of one Nemani Sonar.

On February 2nd, the accused, Durga, made a confession before the Joint-Magistrate, who recorded the usual memorandum at the foot of the confession as required by s. 164 of the Criminal Procedure Code. Subsequently, a pardon was tendered to Durga, on the 10th February, by the Joint-Magistrate, who recorded his reasons for so doing, as required by s. 337 of the Code, as follows: "I am inclined to believe that he (Durga) was under the impression that he would be pardoned when he made his statement to the police and before me, and that his confession, therefore, will not be evidence against him or the other accused."

Subsequently the pardon was revoked on the ground that he did not make a full disclosure of all the facts, and he was put upon his trial along with the other accused for the murder.

At the trial, the Sessions Judge did not admit the confession, as he considered he was bound by the statement of the Joint-Magistrate as recorded at the time of granting the pardon. The deposition made by Durga before the Joint-Magistrate was admitted in evidence against him, in which he stated that he had assisted at the murder.

No evidence was, however, given to prove that he was the person who had given the deposition before the Joint-Magistrate.

The Sessions Judge, agreeing with the assessor, acquitted the other accused, on the ground that Durga's deposition was no evidence against them, and that the other evidence was untrustworthy and unreliable; but he convicted Durga mainly upon the statement contained in his deposition, coupled with the fact that there was evidence which could be relied on, that a quarrel existed between him and the murdered man, and that they were seen together the evening before the body was found. He accordingly sentenced him to death, and referred the case to the High Court for confirmation of the sentence.

Durga also appealed.

No one appeared for either party.

The judgment of the High Court (MITTER and NORRIS, JJ.) was as follows:—

The Sessions Judge has admitted the depositions of the prisoner made before the Joint-Magistrate of Monghyr on February 10th, 1885, without any evidence of his identity.

At page 54 of the Sessions Record, the Judge says: "The Government Pleader then put in Durga's statement on oath, taken on February 10th, after the offer of a pardon was made under s. 337 of the Code of Criminal Procedure"—(then follow some words which are quite illegible)—"under s. 339 of the Code of Criminal Procedure." And we suppose he thought that, under s. 80 of the Evidence Act, it was admissible without proof that the Durga Sonar, who made the deposition, was the same Durga Sonar then being tried.

This was a gross blunder. Without the deposition, there is no sufficient evidence to warrant a conviction of the prisoner; and we accordingly set aside the conviction, and direct his discharge.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter, Mr. Justice Macpherson, and Mr. Justice Prinsep.

MATUKI MISSER (APPELLANT) v. QUEEN-EMPRESS (RESPONDENT).¹

1885.

May 13.

Causing disappearance of evidence of an offence—Omitting to report a sudden, unnatural, or suspicious death—Indian Penal Code (Act XLV. of 1860), ss. 176, 201—Criminal Procedure Code (Act X. of 1882), s. 45.

11 Cal. 619.

Before an accused can be convicted of an offence under s. 201 of the Indian Penal Code, it must be proved that an offence, the evidence of which he is charged with causing to disappear, has actually been committed, and also that the accused knew, or had information sufficient to lead him to believe, that the offence had been committed.

*Empress of India v. Abdul Kadir*² followed.

Held (per Prinsep and Macpherson, JJ.).—It is not necessary, in order to support a conviction, under s. 176 of the Indian Penal Code, against a person falling within the provisions of s. 45 of the Criminal Procedure Code, for not giving information of an occurrence falling under cl. d of that section, to show that the death actually occurred on his land, when the circumstances disclosed show that a body has been found under circumstances denoting that the death was sudden, unnatural, or suspicious; the finding of the body being a fact from which a Court might reasonably infer, in the absence of evidence to the contrary, that the death took place there.

Held (per Mitter, J.).—It is necessary, to secure a conviction in the latter case, to prove that the death took place, or occurred, in the village or on the land of the accused, and the finding of a body there does not of itself afford that proof.

In this case the appellant and one Bhatu Chowkidar were charged with offences under ss. 176 and 201 of the Indian Penal Code.

The facts were as follows:—

On or about November 16th, one Mussamat Bhulkia went into a field belonging to one Ghogan, the nephew of the appellant. On Ghogan finding her there, it was alleged by the prosecution that he had slapped her twice, and that she fell down, and the next day was found lying dead in a field not far from that in which she was, where she was alleged to have been hit. The prosecution further alleged that the death was caused, or accelerated, by the slaps, and that the appellant, in order to screen his nephew, induced Sangli, the deceased's son, to burn the corpse, and prevented any report being made. As a matter of fact, the corpse was burnt on the night of the day on which it was found, and no report was made to the police till the 25th November, when Bhatu gave information to a Sub-Inspector in a neighbouring village. An enquiry then took place, which resulted in Ghogan being put on his trial under s. 304 of the Penal Code, and discharged for want of sufficient evidence. Before the Sessions Court, Matuki, the present appellant, took the objection that, as Ghogan had been discharged, it must be held that no crime had been committed, and that a charge, therefore, under s. 201 would not lie; and he relied upon the decision in *Empress of India v. Abdul Kadir*³ as an authority for this proposition, but this objection was overruled by the Court, following the case of *The Queen v. Hardul Surma*.³

The nature of the evidence adduced in support of the charges, and the finding of the Sessions Judge, were as follows:—

¹ Criminal Appeal, No. 277 of 1885, against the conviction and sentence passed by J. W. Badcock, Esq., Sessions Judge of Bhagulpore, dated the 9th of April 1885.

² L. R., 3 All. 279.

³ 8 W. R. Cr. 68.

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Two witnesses, women, deposed to the fact of Ghogan assaulting Bhulkia, and their evidence, which had been held untrustworthy in Ghogan's case, was accepted by the Sessions Judge as reliable. Other witnesses deposed that they heard a rumour to the effect that Ghogan had hit Bhulkia; but two witnesses who helped to burn the corpse stated that they had not heard any such rumour. Bhatu stated to the police that, on the day the body was burnt, he heard that Ghogan had hit Bhulkia. The Sessions Judge came to the conclusion that both charges were proved, being of opinion that the appellant had a strong motive for concealing the death and disposing of the body, and that Bhatu would naturally act under his order, as he was a Brahmin, and an influential man.

He accordingly, agreeing with one of the assessors as to the charge against Bhatu under s. 201, convicted him, and sentenced him to six months' rigorous imprisonment, and, agreeing with both assessors, has convicted him of the charge under s. 176, and sentenced him to an additional term of one week's simple imprisonment.

In the case of the appellant, both the assessors found him not guilty on both charges; but the Sessions Judge, disagreeing with them, convicted him, and passed similar sentences to those passed on Bhatu.

This appeal was, therefore, preferred by Matuki Misser against the conviction and sentence. No one appeared on either side at the hearing.

The judgments of the High Court (MITTER and MACPHERSON, JJ.), before whom the appeal was heard, were as follows:—

MACPHERSON, J.—The appellant has been convicted under ss. 201 and 176 of the Penal Code. Under the former section, he has been sentenced to six months' rigorous imprisonment, and under the latter to simple imprisonment for one week. The conviction under s. 201 cannot, I think, stand in the absence of proof that the offence, the evidence of which he caused to disappear, was committed. The evidence of the two women who depose to having seen Ghogan Misser give two slaps to the woman Mussamut Bhulkia is, I think, wholly untrustworthy, and there is no other evidence to denote that any offence was committed; nor is there any proof that the appellant had, at the time when the body was disposed of, any knowledge or information which would lead him to believe that the offence of murder or culpable homicide had been committed.

The conviction under s. 176 is, I think, good. Under s. 45 of the Criminal Procedure Code, every occupier of land is bound to communicate forthwith to the nearest Magistrate, or to the officer in charge of the nearest police-station, any information which he may obtain respecting the occurrence in the village in which he occupies land (for this is the meaning which I put on the word "therein" in cl. d of that section) of any sudden or unnatural death, or of any death under suspicious circumstances. S. 176 of the Penal Code makes penal any *intentional* omission to furnish such information. It is proved that the dead body of Mussamut Bhulkia was found in the field of the appellant under circumstances alone consistent with the supposition that the death was sudden, unnatural, and suspicious; that the appellant knew it was true; and that, so far from giving information, he directed the chowkidar and relative of the deceased to dispose of it. There can be no question that he had "information" within the meaning of s. 45, and that his omission to communicate it was intentional. But there is no proof that death actually occurred in the village, that is to say, in the field where the body was found. The ques-

tion then arises, is proof of this fact essential to a conviction? Under the circumstances I think not. If a person finds on his land the dead body of a fellow-villager under circumstances denoting that the death was sudden, unnatural, or suspicious, he is, I conceive, in possession of "some information" respecting the occurrence of a death in his village which he is bound under s. 45 to communicate. The finding of the dead body on his land is a fact from which a Court might reasonably infer, in the absence of any evidence to the contrary, that death took place there. There is no evidence which I can accept in the present case as to the cause of death; but it is beyond question a case of death under suspicious circumstances. The section also provides for a case of sudden death. Assuming that there is proof that a death was sudden, and the body is found in the field of A, must the prosecution prove that the deceased did not drop down dead in the adjoining field of B, which is in the next village; and that it was not removed to the field of A after death? Such proof would be impossible in ninety-nine cases out of a hundred.

The words "the occurrence therein" are governed by the general words "any information which he may obtain respecting;" and the present case seems to me to come well within the section. I would therefore uphold the conviction under s. 176.

MITTER, J.—I entirely agree with my learned brother that the conviction under s. 201 of the Indian Penal Code cannot stand. I concur in the reasons given by him for coming to that conclusion.

But I regret that I am unable to assent to the proposition that, in order to support the conviction under s. 176 of the Indian Penal Code, the proof of the fact that death actually occurred in the village where the body was found is not essential.

Under cl. *d* of s. 45 of the Code of Criminal Procedure, an occupier of land in a village is bound to communicate to the nearest Magistrate, &c., the occurrence in it of any sudden or unnatural death, or of any death under suspicious circumstances. It seems to me, therefore, essentially necessary for a conviction to prove that the death *took place or occurred* in the village. The finding of the body in the village, standing by itself, does not, in my opinion, afford this proof. It seems to me that this circumstance alone does not *necessarily* lead to the inference that the death took place in the village. It is equally consistent with the death having taken place in another village, and the body having been subsequently removed to the appellant's village.

Then again, rejecting, as we do, the evidence of the two women, who depose to having seen Ghogan Misser give two slaps to the woman Mussamut Bhulkia, as wholly untrustworthy, there is no evidence to prove that her death was sudden. If there were any such evidence, it might have been open to us to infer that this sudden death took place in or near the fields where the body was found.

I am of opinion, therefore, that, there being no proof of the death of Mussamut Bhulkia having taken place in the appellant's village, all the requirements of s. 45 of the Code of Criminal Procedure have not been fulfilled, and consequently the conviction, under s. 176 of the Indian Penal Code, also should be set aside.

The Judges having disagreed upon the question as to whether the conviction under s. 176 was right or not, the question was referred to Mr. Justice Prinsep, who delivered the following judgment:—

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PRINSEP, J.—There is no question that the appellants are persons who fall within the category set forth in s. 45 of the Code of Criminal Procedure; that a body was found on their land, showing unmistakeable signs of an unnatural death, or a death under suspicious circumstances; and that they have neglected to communicate to the nearest Magistrate, or nearest police-station, any information regarding the same.

The only question is, whether it has been shown that the death occurred on the lands of the appellants.

The object of the law is clearly that the earliest information should be communicated by those who are in the best position to obtain the same, or who, from their connection with the land, are in some authority, and should accordingly be made responsible for this duty, in order that an inquest may be held. The necessity for enforcing strictly the performance of such a duty is too obvious to call for remark. The law requires that the death should have occurred on the land with which the particular person is connected in the manner set forth. I do not understand this to mean that this should be proved by the direct evidence of eye-witnesses, but there must be something amounting to proof of the fact. Thus, if a man were found with his throat cut in a field, it may fairly be presumed that he died there, so as to place an obligation on a person in the position of the appellants to give information of the death. In the words of s. 114 of the Evidence Act, the Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. It would be for the appellants to rebut such a presumption. They have not only failed to do so, but their conduct in having the body hurriedly burnt so as to destroy all trace of the cause of the unnatural or suspicious death would, in some degree, tend to confirm this presumption. It would practically defeat the object of the law, *viz.*, to assist public officers whose duty it is to trace out the cause of suspicious homicides, if there were such difficulties in the way of fixing responsibility on persons connected with land on which the body of a person, to all appearances murdered, were found—if before such a person were convicted for a neglect to perform the duty prescribed by s. 45 of the Code of Criminal Procedure, it were necessary to prove that the murder took place, or that the murdered person actually drew his last breath, on that land. The finding of the body on that land would, in my opinion, ordinarily raise the presumption that death had taken place on that spot, so as to impose an obligation on a person occupying one of the positions in relation to the land described in s. 45 to communicate information regarding the matter. If he neglected to give this information, and was prosecuted for such misconduct, he should be prepared to justify the omission.

I would therefore not interfere.

Appeal allowed in part.

APPELLATE CRIMINAL.

*Before Mr. Justice Miller and Mr. Justice Norris.*ADU SHIKDAR (APPELLANT) *v.* QUEEN-EMPRESS
(RESPONDENT).¹

1885.

May 29.

11 Cal. 635.

Confession made to a police-officer—Evidence (Act I. of 1872), s. 27—Murder, Charge of, when body is not forthcoming—Theft, Intention to convert.

No judicial officer, dealing with the provisions of s. 27 of Act I. of 1872, should allow one word more to be deposed to by a police-officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in itself to be a relevant fact against him.

S. 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence.

Empress of India v. Pancham; ² *Queen-Empress v. Babu Lal*,³ discussed and commented on.

Thus, when a police-officer deposed that an accused had told him that he had robbed K of Rs. 48, whereof he had spent Rs. 8, and had got Rs. 40, and that he had made over the Rs. 40 to him :

Held that the statement that he robbed K of Rs. 48 was not necessarily preliminary to the surrender of the Rs. 40, and was inadmissible in evidence against him.

When, also, a police-officer deposed to the fact that the accused, who was charged with murder, had stated to him that he and K had stolen some hides from C, and upon such statement he had sent for C, and recorded his information, and when it appeared that C had already informed the police of the fact of the theft, though the witness was not aware of it :

Held that the statement was inadmissible upon the ground that it would be most dangerous to extend the provisions of s. 27, and allow a police-officer, who is investigating a case, to prove an information received from a person accused of an offence in the custody of a police-officer, on the ground that a material fact was thereby discovered by him, when that fact was already known to another police-officer.

Although, under some circumstances, a charge of murder may be sustained when the body of the person said to have been murdered is not forthcoming, still, when that is the case, the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted.

When an accused charged with murder was alleged to have taken a boat from a place where it had been secured by its owner, and after proceeding some distance in it, had abandoned it, and when he was charged with the theft of the boat :

Held that the charge was unsustainable, inasmuch as it was evidently not his intention to convert it to his own use, and make it permanently his own property, but merely to make use of it for the purpose of aiding him in escaping.

In the case out of which this appeal arose, the prisoner was tried upon five charges, *viz.*, 1st, with the murder of one Ram Kristo Rishi; 2nd, with causing grievous hurt to the same person with a cutting instrument; 3rd, with robbery by voluntary causing hurt to the same person in order to commit theft; 4th, with the theft of a boat belonging to one Ammuddin; and, 5th, with the theft of 19 hides from the house of one Raj Chunder Rishi. The first four offences were alleged to have been committed on the 14th November 1884, and the last on the 11th November; and the prisoner was convicted on all five charges, and sentenced on the first to transportation for life.

¹ Criminal Appeal, No. 299 of 1885, against the order of *J. F. Bradbury, Esq.*, Officiating Sessions Judge of Backergunge, dated the 14th of March 1885.

² I. L. R., 4 All. 198.

³ I. L. R., 6 All. 309.

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He now appealed to the High Court against both the conviction and the sentence. The facts of the case as deposed to, so far as they are material, were as follows :—

Ram Kristo Rishi, who was alleged to have been murdered, cohabited with one Dhonmoni, who was called as a witness for the prosecution, at a village named Hogla, though his native village was Babla, about $1\frac{1}{2}$ hour's journey from Hogla. On the night of the 29th Kartic, corresponding with the 13th November, he left Hogla for Barisal; and Dhonmoni deposed that he had told her he was going there to sell hides, and that he would be back in about three days.

Ram Kristo Rishi and the accused started together in a boat hired by the former from one Kamaruddin. It was found that Ram Kristo had hired the boat, stating that he wanted it for the purpose of going to fetch his niece from Jhalokiti, which reason was manifestly false.

On their way to Barisal, Ram Kristo, who was an opium-smoker, stopped at a shop belonging to one Tarini Das, and pledged with Ishan Das, the manager, a silver key-chain for twelve annas, of which he took eight annas in cash, and the rest in opium. This was on the evening of the 29th Kartic. They then, apparently, went on to Barisal, where, on the 30th Kartic, Ram Kristo sold 21 hides for Rs. 50 to one Rahim Buksh, a butcher. The price was paid in cash, and no entry appeared in the books of Rahim Buksh as to who sold the hides, but it was clearly proved that Ram Kristo did; and, though it was attempted to be proved that the accused was with him when the sale took place, that portion of the evidence was disbelieved by the Sessions Judge and the assessors, and their opinion was confirmed by the High Court. It was proved, however, that the prisoner had a meal at the house of Rahim Buksh, the butcher, in Barisal, on the evening of the 30th Kartic, and that he knew of the sale of the hides.

Ram Kristo was never seen alive again after the evening of the 30th Kartic, and his body was never found.

Upon his not returning to Hogla when expected, Dhonmoni went in search of him to Nulchitta and Barisal, and, not finding him, or any trace of him, lodged a complaint with the police, and an enquiry was instituted by the head-constable into the matter.

Suspicion resting upon the accused, he was arrested, and the case was subsequently handed over to Prosono Kumar Mookerjee, a sub-inspector of police, who was called as a witness at the trial, and who, amongst other statements, made the following :—

"I began enquiry into the disappearance of Kristo Rishi on the 3rd December. I got no clue till the 7th December. I got hold of Adu on the 3rd December. The head-constable of Kiwari out-post, Nobin Ghose, made over his papers to me at the out-post, and I sent a constable for Adu, who was at home, or at least was not with the head-constable. On the 7th December, I obtained from Adu's wife some information about the hides Kristo Rishi was said to have sold at Barisal, and I then interrogated Adu about the hides again. He again denied all knowledge of them, but, when confronted with his wife, and told of what she had said, he acknowledged the truth of her statement, and made other statements. He said he had robbed Kristo Rishi of Rs. 48, whereof he had spent Rs. 8, and had Rs. 40. These he bade his wife bring forth; she got them from their house, and handed Rs. 40 to Adu, who handed the Rs. 40 to me. He then said that on his way back from Barisal he

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had left a boat in the Gopalpur "Bhorani Khal," and I sent Bidu and Gori-bulla Chowkidar to search there for it. Next day, the 8th December, they brought to me the smaller of the two boats lying outside the Court just now, which the witness, Ammuddin of Mogor, has since claimed as his. Adu also told me of Kristo Rishi's having pledged the key-chain with Ishan Das of Amrajuri on their way to Barisal, and I then proceeded with Adu to Amrajuri on the 8th December, and obtained the key-chain produced from the witness, Ishan Das. Further, in consequence of what he said, I traced the witness Josim and his family. They, in the first instance, denied that Kristo Rishi had gone on to their homestead. They said that he had come alongside the broken bank, and had spoken with them; had told them his name, Kristo Rishi, his place of abode, Babla, and that Adu had wounded him, and that then the tide had washed him away. All this they told me on the 20th December. On the 22nd, the inspector took up the enquiry, and I remained with him for a while. The Rs. 40 I got from Adu are now lying on the table in front of me. It was from Adu's statements to me that I discovered the theft of hides from Raj Chunder Rishi of Birchakathi. Adu told me on the 7th December that he and Kristo Rishi had stolen the hides; and I sent for Raj Chunder Rishi, and on the 8th December recorded his information of the theft. Hogla and Babla are about two dandas journey apart. Amrajuri is three dandas journey from Hogla, and on the way from Hogla to Barisal. The Gopalpur creek is about three dandas journey to the east of Hogla, and joins the Shirsha creek. Mogor is one day's journey from Hogla, and contiguous to Shuja-abad."

On the 17th November, Kamaruddin's boat, in which Ram Kristo and the accused were alleged to have travelled to Barisal, was found in the Kali-gera river, a few hours' journey from Barisal. It was suggested by the prosecutors that the 19 hides stolen from Raj Chunder Rishi were amongst those sold by the deceased at Barisal, and the prisoner was charged with the theft of them. It was also proved that Raj Chunder had, previous to Adu's arrest, lodged a complaint with the police of the theft of the hides, but it was alleged that Prosono Kumar Mookerjee did not know of the theft at the time he questioned the accused. In consequence of the statement made by the accused, the key-chain and keys were discovered with Ishan Das, and they were identified by Dhonmoni.

The boat belonging to Ammuddin was found by the police in consequence of the prisoner's statement; and though Ammuddin never reported its loss, he identified it, and stated that he had left it chained to a tree in a creek from which it had been taken away, as he missed it on the 1st Aughran, when he found the branch of the tree had been broken off, and the boat taken away.

The most important evidence called for the prosecution was that of two brothers, named Jasim and Muzuddin, and their mother, Asmem Bibi, who stated that, on the night of 30th Kartic, they heard a disturbance near their homestead, a village close to Ammuddin's village. The river flowed past their house, which was on the way from Barisal to Hogla. They asserted that shortly after the disturbance a man came to their yard, called out to them, and, in reply to questions, said his name was Kristo Rishi of Babla, and told them that "that thief Adu" had wounded him, and left him after robbing him of Rs. 50. They came out of their house, found the man with his bowels protruding through a gash in his stomach, and that he died at their feet. They then stated that to avoid trouble they had thrown the body into the river.

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The whole of this story was disbelieved by the Sessions Judge and the assessors owing to serious discrepancies, and the Judge characterised it as a fabrication concocted by the police, and in this view the High Court agreed.

The accused persistently denied that he had ever gone to Barisal with the deceased, and alleged that his statement had been extracted from him by the police ill-using him, and he denied the truth of it at the trial.

As stated above, the Sessions Judge convicted the prisoner on all charges, being of opinion that the prisoner's statement to the police-inspector was admissible in evidence, and, coupled with the other facts deposed to, proved his guilt; but inasmuch as the body of deceased was not found, and there was no evidence to show in what way the accused had caused his death, he sentenced him to transportation for life.

No one appeared on the hearing of the appeal.

The judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

NORRIS, J. (after setting out the facts, and detailing the evidence, continued).—I am inclined to think that the Judge has attached too little weight to the evidence as to the circumstances under which the accused made his statement; but, however that may be, I am of opinion that so much of the statement as related distinctly to facts thereby discovered was admissible in evidence, not as a confession, but as evidence of the facts thereby discovered.

Now, it seems to me that no facts deposed to were discovered by the prisoner's statement "that he had robbed Kristo Rishi of Rs. 48, whereof he had spent Rs. 8, and had Rs. 40." Upon this point the Sessions Judge says: "According to Straight J., in *Empress of India v. Pancham*,¹ and *Queen-Empress v. Babu Lal*,² the evidence of Adu's statement that he had robbed Kristo Rishi of Rs. 48 is inadmissible, but Stuart, C.J.'s opinion in the first case is in favour of its admission in explanation of the delivery of the money, and the case of *The Queen v. Pagaree Shaha*³ is a distinct authority therefor. S. 27, Act I. of 1872, moreover, legalises the reception of any statement of an accused, whether amounting to a confession or not, which leads to the discovery of a material fact, and it is clear that the confession of the robbery was the necessary preliminary of the surrender of the Rs. 40, and it is impossible to separate them. Had he not confessed the robbery, Adu would not have made over any money to the sub-inspector; and the surrender of the money must necessarily have been accompanied, or immediately preceded, by some explanatory statement. I have accordingly received the evidence thereof." Now, I cannot agree with the Judge when he says "the confession of the robbery was the necessary preliminary to the surrender of the Rs. 40," still less can I agree with him when he says "it is impossible to separate them," by which I suppose he means "impossible to separate this part of the prisoner's statement from what preceded and followed it."

I emphatically endorse the observation of Straight J., in *Queen-Empress v. Babu Lal*,² where he says: "No judicial officer dealing with such provisions should allow one word more to be deposed to by the police-officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary, to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. S. 27 was not intended to let in a confession generally, but

¹ 1 L. R., 4 All. 198.

² 1 L. R., 6 All. 509.

³ 19 W. R. (Cr.) 51.

only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence ;” and I must respectfully but firmly express my dissent from the observations of Stuart, C.J., in *Empress of India v. Pancham*,¹ where that learned Judge says : “ But I have no doubt in my own mind that statements by police-officers, embodying and including what may be understood as a confession or admission of guilt by an accused person, are not wholly inadmissible, but may be received and applied so far as they prove merely corroborative circumstances, and not an absolute confession of guilt.”

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I am also of opinion that the prisoner's admission that he had assisted Ram Kristo in the theft of Raj Chunder Rishi's hides was inadmissible. The fact of the theft of these hides was already known, though not to the sub-inspector ; and I think it would be a most dangerous thing to extend the provisions of s. 27, and allow a police-officer who is investigating a case to prove an information received from a person accused of an offence in the custody of a police-officer, on the ground that a material fact was thereby discovered by him, when that fact was already known to another police-officer.

Now, considering the whole oral evidence, and accepting the prisoner's admissions (subject to what I have said I think ought to be rejected) as true, how does the case stand ?

I think it may be taken to be proved that the prisoner and Ram Kristo left Hogla in company on the night of 29th Kartic in Kamaruddin's boat ; that on the way Ram Kristo pawned the chain and keys to Ishan Chunder Das ; that they continued their journey to Barisal, where they arrived on 30th Kartic, and where Ram Kristo sold 21 hides for Rs. 50, which he received in cash, to Rahim Buksh ; that the prisoner, though not actually present at the sale, knew of it, and knew that Ram Kristo had received Rs. 50 ; that they left Barisal in company ; that at some period he quitted Kamaruddin's boat, took Ammuddin's boat, travelled a certain distance in it, then abandoned it, and walked home ; and that Ram Kristo has not since been heard of. This is all that I think can be taken to be proved, even accepting the prisoner's admission as true.

I do not think that is sufficient to convict the prisoner of murder.

In *Russell on Crimes*, 4th Edition, Vol. I., p. 770, it is said : “ It has been considered a rule that no person should be convicted of murder unless the body of the deceased has been found.” And a very great Judge says : “ I would never convict any person of murder or manslaughter unless the facts were proved to be done, or at least the body be found dead. But this rule, it seems, must be taken with some qualifications ; and circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness, being afterwards alarmed in the night by violent noise, went upon deck, and there observed the prisoner take the captain up, and throw him over-board into the sea, and that he was not seen or heard of afterwards ; and that, near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood ; the Court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea ; and the jury being of that opinion, the prison-

¹ I. L. R., 4 All. 198.

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er was convicted, and (the conviction being unanimously approved of by the Judges) was afterwards executed.

But where, upon an indictment against the prisoner for the murder of her bastard child, it appeared that she was seen with the child in her arms on the road from the place where she had been at service to the place where her father lived, about 6 in the evening, and between 8 and 9 she arrived at her father's without the child, and the body of a child was found in a tide-river near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to show that it was not the body of such child, it was held that she was entitled to be acquitted; the evidence rendered it probable that the child found was not the child of the prisoner; and with respect to the child, which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was, unless there were evidence to show that her child was actually dead."

I will not go so far as to say that, under no circumstances, in this country, could a charge of murder be sustained without proof of the finding of the dead body; but considering the well-authenticated instances of the subsequent appearance in the flesh of persons said to have been murdered, and whose death has been deposed to by eye-witnesses, the production of bones, alleged to be those of a man, and discovered to be those of a woman, and the numerous false charges which are brought against innocent people, I should require the strongest possible evidence as to the fact of the murder if the dead body were not forthcoming; that evidence is, I think, wanting here.

If the evidence of Jasimuddin, his brother, and mother, as to Ram Kristo's dying declaration is put on one side, as I think it ought to be, there is no evidence to support the charges of grievous hurt and robbery.

With regard to the charge of stealing Ammuiddin's boat, I do not think it can be sustained, as there is not only no evidence that the prisoner intended to convert it to his own use, and make it permanently his own property, but the evidence is entirely the other way.

The charge of the theft of the 19 hides from Raj Chunder Rishi's verandah rests entirely upon the prisoner's statement to Mookerjee, which I have already said, I think, was inadmissible.

Thus, in my opinion, all the charges against the prisoner fail, and he must be acquitted of them all, and discharged from jail.

Appeal allowed.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Grant.

IN THE MATTER OF THE PETITION OF RAJENDRO CHUNDER ROY CHOW-
DHRY AND ANOTHER.¹

1885.
July 20.
11 Cal. 737.

Recognisance to keep the peace—Power of a District Magistrate to call on a person residing in another district to furnish security—Criminal Procedure Code (Act X. of 1882), s. 107—Procedure.

The provisions of s. 107 of Act X. of 1882 do not empower a Magistrate to issue process on persons not residing within the limits of his district.

¹ Criminal Revision Case, No. 260 of 1885, against the order passed by Mr. L. P. Sherris, Joint-Magistrate of Backergunge, dated the 16th of May 1885.

The proper course for a Magistrate to pursue, where he believes that certain persons who are resident beyond the limits of his district are likely to commit a breach of the peace within his district, is to cause information of the fact to be given to the Magistrate within whose district such persons reside, and to produce evidence in support of such view, in order that proceedings may be taken against them by a Court which has jurisdiction.

RAJENDRO CHUNDER ROY CHOWDHRY and Mohima Chunder Roy Chowdhry, two zemindars, residents of Furreedpore, holding property both in Backergunge and Furreedpore managed by agents, were called upon by the Joint-Magistrate of Backergunge to show cause why they should not be bound over to keep the peace for one year by entering into a recognizance-bond, with sureties, for Rs. 20,000.

The Joint-Magistrate found that these persons were likely to commit a breach of the peace in the district of Backergunge, and ordered them each to execute a bond, with sureties, to the amount of Rs. 5,000, to keep the peace for one year. The zemindars applied to the High Court to have the order set aside, on the ground that, as they were residents of Furreedpore, the Joint-Magistrate of Backergunge had acted without jurisdiction in binding them down to keep the peace. This objection was also taken before the Joint-Magistrate.

Baboo *Doorga Mohun Dass* for the petitioner.

Baboo *Chunder Kant Sen* for the other side.

The judgment of the Court (PRINSEP and GRANT, JJ.) was delivered by PRINSEP, J.—The order binding over the petitioners to keep the peace must be set aside. It appears that these persons were not within the jurisdiction of the Magistrate of Backergunge, but that they were within the jurisdiction of the Magistrate of Furreedpore, and it has been found that they are likely to commit a breach of the peace within the district of Backergunge. Under such circumstances, as held by a Full Bench of the Allahabad High Court in the case of *Joy Prokash Lall*,¹ and several decisions of this Court, these persons cannot be bound over by the Magistrate of Backergunge. The proper course for him to take, if he thinks there is evidence that they are likely to commit a breach of the peace within the district of Backergunge, is to have information laid before the Magistrate of Furreedpore, and have evidence in support thereof forthcoming, so that proceedings may be taken by a Court of competent jurisdiction.

Order set aside.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Grant.

IN THE MATTER OF THE PETITION OF HURENDRO NARAIN SINGH CHOWDHRY AND OTHERS.

HURENDRO NARAIN SINGH CHOWDHRY v. BHOBIANI PREA BARUANI AND OTHERS.²

Criminal Procedure Code (Act X. of 1882), s. 145—Procedure under that section—Attendance of witnesses—Process to enforce attendance.

Proceedings under s. 145 of the Criminal Procedure Code should, on all points of procedure, be regarded as summons-cases, and although it is discretionary with a Magis-

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MATTER OF
THE PETITION
OF RAJENDRO
CHUNDER
ROY CHOW-
DHRY,
11 Cal. 737.

1885.

July 13.

11 Cal. 762.

¹ 1 L. R., 6 All. 26.

² Criminal Revision, No. 227 of 1885, against the order passed by Lieutenant-Colonel T. B. Michell, Deputy Commissioner of Goalpara, dated the 7th May 1885.

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11 Cal. 762.

trate to issue a summons on a witness in such a case, yet, when any one of the parties applies at a proper time for process to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance; and where such refusal is made, it is incumbent on the Magistrate to record his reasons for such refusal.

For some time previous to the 12th December 1884, disputes had arisen between Bhubani Prea Baruani and others (hereafter called the first party) and Hurendro Narain Singh Chowdhry and others (hereafter called the second party) regarding the right to possession of the Dhupghata forest.

And on the 12th December 1884, in consequence of further disputes which had arisen between the parties of the first and second part, the Deputy Commissioner directed the Collector of Gouripore to take possession of the forest on behalf of Government, until one of the contending parties had established their right to possession in the Civil Court.

This order of the Deputy Commissioner was, on application by the parties concerned, set aside by the High Court on the 6th March 1885, and the Deputy Commissioner was directed to give the parties an opportunity of proving their right to possession of the forest in a proceeding regularly held under s. 145 of the Criminal Procedure Code.

Whereupon the Deputy Commissioner framed an enquiry under s. 145 of the Criminal Procedure Code, making the title of the proceeding *Queen-Empress v. Bhubani Prea Baruani and others (first party) and Hurendro Narain Singh Chowdhry and others (second party)*. The notices issued to the opposing parties did not set out the boundaries of the forest. During such enquiry it appeared that the Deputy Commissioner declined to issue process to compel the attendance of certain witnesses required by the second party, and to grant a commission for the examination of certain of such party's witnesses resident out of the jurisdiction of the Court; and further declined to hear the arguments of the pleaders of both the first and second parties before coming to his decision.

The order of the Deputy Commissioner was as follows:—

"In accordance with the orders of the High Court, dated the 6th of March 1885, I have proceeded under the provisions of ch. 12 of the Code of Criminal Procedure to enquire as respects the fact of actual possession of the Dhupghata forest, the subject of dispute. The enquiry has been a protracted one. Twenty-eight witnesses altogether have been examined; and a great number of documents, which, in my opinion, have no bearing on the enquiry, have been filed. I have confined the investigation as much as possible to the fact of actual possession on the 12th of December 1884, on which date the forest was taken possession of by the Collector of Goalpara. The dispute regarding the right to possess this forest has been the cause, for some years past, of constant disturbances in the district, and neither of the contending parties would have recourse to the Civil Court.

"The evidence I have taken regarding the fact of actual possession is extremely conflicting. What the one party asserts the other party directly denies. I am satisfied, however, that at the time the Collector took possession of the land in dispute, the zemindar of Gouripore (the first party) was, and had been for long, in actual possession of it, although his possession was disputed by the second party, and constant efforts were made to oust him from it. I took the evidence of all the witnesses produced by the second party, but I did not think it necessary to hear the arguments of Counsel on either side. I find that the zemindar of Gouripore (first party) was in possession of the Dhupghata forest on the 12th December 1884 (on which date the

Collector of Goalpara attached it), and I declare him to be entitled to retain possession thereof until evicted therefrom in due course of law, and I forbid all disturbance of such possession until such eviction."

Hurendro Narain Singh Chowdhry and others (second party) applied to the High Court to have the order set aside on the following grounds:—

(1.) That the Deputy Commissioner was in error in confining the enquiry to the fact of possession on the 12th December 1884, on which date the forest was taken possession of by him as Collector.

(2.) That the Deputy Commissioner should have enquired into, and come to a finding as to, the fact of actual possession at the time when the dispute arose between the parties, and the proceedings were instituted.

(3.) That the Deputy Commissioner ought to have issued processes and compelled the attendance of the witnesses cited by the second party, and should have heard the arguments of the pleaders before coming to any decision.

(4.) That the Deputy Commissioner ought not to have confined his investigation to the taking of the evidence of witnesses produced by the parties.

(5.) That the Deputy Commissioner should have acceded to the prayer for the examination by commission of such of the witnesses of the second party as were out of the jurisdiction.

(6.) That the Deputy Commissioner ought to have considered the documentary evidence adduced by the second party.

(7.) That the Deputy Commissioner has assigned no reasons whatever for refusing to rely on the testimony of such of the witnesses as were examined by the second party.

(8.) That the enquiry and order made was defective and bad *ab initio*, inasmuch as the boundaries of the disputed tract of the forest were not specified in the notices issued or the order passed.

(9.) That the Deputy Commissioner ought to have ascertained and found which of the two parties was last in actual peaceful possession of the forest, and of how much and what part thereof.

(10.) That the Deputy Commissioner ought not to have ordered the first party to be maintained in possession of the whole of the forest, inasmuch as the evidence of the said first party does not prove that the whole of the forest called the Dhupghata forest in the proceedings was in their possession.

(11.) That, under the circumstances of the case, the Deputy Commissioner ought to have made or directed a local enquiry.

The *Advocate-General* (Mr. G. C. Paul), Baboo Hem Chunder Bannerjee, and Baboo Uma Kali Mookerjee, for the petitioners.

Mr. Pugh, Baboo Srenath Doss, and Baboo Kishore Lall Sircar, for the opposite party.

The order of the Court (PRINSEP and GRANT, JJ.) was as follows:—

This matter has already been before another Division Bench of this Court. It relates to a dispute between two zemindars regarding a forest. On a former occasion the Deputy Commissioner, finding that there were disputes regarding this forest, directed the Collector to assume possession until one of the contending parties had established his right to it in the Civil Court. This order was set aside in March last by a Division Bench of this Court, which held that it was the duty of the Deputy Commissioner to give the parties an

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opportunity of proving their possession of the forest in a proceeding regularly held under s. 145, and having the parties then before it, the High Court directed such proceedings to be initiated.

It would have been fruitless to enquire which of the parties at the time that this order was passed was in actual possession, inasmuch as the possession was admittedly with the Collector, and therefore, as we understand it, the object of this proceeding would be to ascertain the possession as it existed at the time when the Collector took over possession.

The next point on which it is necessary for us to express an opinion relates to the property now in dispute. It is made the subject of complaint by the learned Advocate-General that no specific boundaries have been pointed out. But, so far as we can learn from the proceedings, the parties themselves and the Deputy Commissioner who tried the case knew very well what was the subject-matter of dispute, *viz.*, the tract of country known as this forest. We therefore think that there is nothing in this contention.

After the Deputy Commissioner had instituted proceedings under s. 145, the second party by two petitions applied for summonses on their witnesses. Both these applications were refused by the Deputy Commissioner without any stated reasons. Now, the terms of s. 145 are somewhat obscure in this respect. They merely declare that on the day of trial the Magistrate shall receive the evidence produced by the parties respectively. It is nowhere declared in the Code whether these proceedings are to be regarded as what is known as summons cases or as warrant-cases, but we are inclined to think that from their nature they should be regarded on all points of procedure as summons-cases. We think, however, that, although it is altogether discretionary with the Magistrate to issue summons on the witnesses cited by each party in such a case, at the same time when any one of the parties comes at a proper time before him, and asks for processes to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance, as he has apparently done in the present case. The applications for summonses were in this case made on the 31st March, and the case was not decided until the 7th May, so that there was ample opportunity to serve the summonses. The Magistrate, however, has, on one application, stated: "The parties must produce their witnesses. This is an application to summon no less than 99 witnesses in a proceeding under s. 145 of the Code of Criminal Procedure;" and on the other application he records a similar order, the number of witnesses here being 114 instead of 99. But the number of witnesses summoned is not necessarily a reason for refusing to grant a process. If the parties had produced 99 and 114 witnesses in Court, the Magistrate would have been bound to examine them. There is no reason to refuse an application for summons simply because a large number of witnesses is mentioned therein.

We think that there are no valid grounds for the next objection taken; because it does not appear that the Magistrate refused to examine any witnesses who were in attendance. The order recorded is that the pleaders did not wish to examine any more of the witnesses who were in attendance.

The next objection taken relates to the omission of the Magistrate to consider the documentary evidence tendered. He states it as his opinion that it has no bearing on the enquiry. As observed by the learned Advocate-General, the Magistrate has probably arrived at this conclusion, because he has refused, in another portion of his judgment, to hear the arguments of the pleaders on both sides. It is not improbable that if he had heard their arguments he would

have his attention directed to the next points on which the documentary evidence was intended.

The Magistrate was also wrong in refusing to hear the argument of pleaders before deciding this case.

We think, therefore, that the case should be re-heard by the Deputy Commissioner, who will give the parties an opportunity of securing the attendance of their witnesses if they make applications for processes within reasonable time, reserving, however, to himself the discretion of refusing the applications if he considers that the witnesses have been cited merely for purposes of vexation, delay, or defeating the ends of justice, or for other valid or sufficient cause. But he should in no case refuse to issue a process without invariably recording his reasons for such refusal.

Re-hearing ordered.

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CRIMINAL REVISION.

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF JUGGESHWAR DASS AND OTHERS.

JUGGESHWAR DASS AND OTHERS *v.* KOYLASH CHUNDER CHATTERJEE.¹

1885.

Sep. 22.

12 Cal. 55.

Mischief—Penal Code (Act XLV. of 1860), ss. 341, 425—Wrongful restraint—Invasion of right causing wrongful loss.

Where complainant had, for the purpose of removal, placed certain goods upon a cart, and accused came and unyoked the bullocks, and turned the goods off the cart on to the road, and complainant thereupon went away at once, leaving them lying there, *held* that, under these circumstances, a conviction under s. 341 of the Penal Code could not be sustained; but that there was such "mischief" as to bring the offence within s. 425.

Held, also, that s. 425 does not necessarily contemplate damage of a destructive character. It requires merely that there should be an invasion of right, and diminution of the value of one's property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it.

THE petitioners in this case have been convicted of an offence under s. 341 of the Penal Code. It appears from the evidence that, on the 5th of August last, the complainant was engaged in removing an iron chest and a box from his shop to another *hdt.* The accused came up and ordered him not to move them; and, on his refusing to obey, overturned the cart, thereby throwing the boxes on to the road, where complainant left them lying, and himself went off to the new *hdt.* The *hdt.* from which he was at the time removing belonged to the employers of the accused.

The accused swore that they knew nothing of the occurrence alleged by complainant, but were found guilty of causing wrongful restraint, and sentenced to fifteen days' rigorous imprisonment, under s. 341 of the Penal Code.

Against this sentence the accused presented the present petition.

Mr. R. Mitter and *Munshi Serajul Islam* for the petitioners.

The judgment of the Court (Pigot and O'Kinealy, JJ.) was delivered by

PIGOT, J.—The petitioners have been found guilty by the Magistrate of an offence under s. 341 of the Indian Penal Code. The complainant was examined by the Magistrate at the time of the issue of the summons, and before the issue of the summons. In his evidence endorsed on the back of the petition taken by the Magistrate, he states that he was not himself present when the occurrence, of which he chiefly complains, took place. Before the Magistrate he appears to have stated that he was present. What he complained of was this, that when, on the 5th August, he or those in his employ were removing some things to the new *hdt.* at Champdani from the *hdt.* belonging to the persons in whose employ the accused are, the accused said the things must not be removed, and, on his not listening to that, they turned the cart upside down, and the things fell down to the ground, where they remained some days afterwards. This

¹ Criminal Revision, No. 336 of 1885, against the order of *J. G. Ritchie, Esq.*, Officiating Joint-Magistrate of Serampore, dated the 14th August 1885.

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12 Cal. 55.

story of the complainant was not controverted, and upon this state of things the Magistrate found the accused guilty under s. 341 of the Indian Penal Code.

We do not think that, under the circumstances, the conviction under that section can be sustained. The charge was one of wrongful restraint, and whether the evidence of the complainant, as given when the summons was issued or before the summons was issued, is to be taken, or that given at the hearing before the Magistrate, it appears to us inconsistent with the idea of wrongful restraint. In one case he was not present, and in the other he went away to the new *hdt* after the things were thrown down from the cart. But we think that the case does come under s. 425 of the Indian Penal Code, that there was such a change in the situation of the property done by the persons who brought it about with intent to cause, or knowing they were likely to cause, wrongful loss or damage to any person, that is, the complainant, as diminished its value or utility, or affected it injuriously. We think those words are sufficiently satisfied by the circumstances of this case. There was an unlawful removal of goods from the cart, and an unlawful change in their situation, with the knowledge that that change must amount to an inconvenience, more or less serious, to the owner of the goods, and must, to some extent, diminish the utility of the goods which it was desired to remove from one place to another by the fact of their being cast out of the conveyance in which they were to be removed. To that extent the utility of those goods was diminished, and to that extent they were injuriously affected. We think it is not necessary that the damage required by this section should be of a destructive character. All that is necessary is, that there should be an invasion of right and diminution of the value of one's property caused by that invasion of right, which must have been contemplated by the doer of it when he did it.

As to punishment, we do not think that, under the circumstances, the punishment was excessive. The offence is one which, though not of very great gravity, is not without a certain amount of seriousness. We think that the reasons stated by the Magistrate in his judgment were quite sufficient to show that such a sentence was, under the circumstances, desirable. We, therefore, set aside the conviction under s. 341, and for it substitute a conviction under s. 426, and we direct that the prisoners be imprisoned for the remainder of the sentence not yet suffered by them.

(The remainder of the judgment was not material to this report.)

Conviction altered, but sentence confirmed.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Field, and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF KRISHNANUND DAS.

KRISHNANUND DAS v. HARI BERA.¹

1885.
Sep. 4.

12 Cal. 58. *Sanction to prosecution—Criminal Procedure Code (Act X. of 1882), s. 195—Notice to accused.*

No notice is necessary to the person against whom it is intended to proceed, before the Court, before which the alleged offence has been committed, can, under s. 195 of the Criminal Procedure Code, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section.

¹ Reference to the Full Bench in Criminal Motion, No. 105 of 1885, against the order of Baboo Kali Podo Mookerji, Deputy Magistrate of Balasore, dated the 20th February 1885.

THE petitioner, Krishnanund Das, on the 30th December 1884, lodged a complaint in the Court of the Deputy Magistrate of Balasore against Hari Bera and others for forcibly cutting and taking away the paddy from his field. The case was tried on the 19th February 1885, when the accused were discharged, because, in the opinion of the Magistrate, the evidence for the prosecution was "at the best but suspicious, and the oral testimony was untrustworthy."

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On the 20th February 1885 an application was made to the Deputy Magistrate by Hari Bera for sanction to prosecute Krishnanund under s. 211 of the Penal Code, which sanction was granted without any notice being given to Krishnanund.

On motion made to the High Court to have the order granting the sanction set aside, on the ground (among others) that no such notice had been given, that Court granted a rule to show cause why the order should not be set aside. The following order was made eventually on 24th April 1885 by the Court (PRINSEP and PIGOT, JJ.) referring the case to a Full Bench:—

"This matter arises out of an order passed under s. 195 of the Code of Criminal Procedure, giving sanction to a prosecution, under s. 211 of the Penal Code, against the petitioner for having made a false charge.

"In his judgment dismissing that charge the Magistrate stated: 'I shall be quite prepared to sanction the prosecution of the complainant under s. 211 of the Penal Code, if accused wishes to prosecute him.'

"On the following day application was made for sanction to prosecute the complainant in that case, which was at once granted.

"On motion made to a Division Bench (FIELD and BEVERLEY, JJ.), a rule was granted to show cause why the proceedings of the Deputy Magistrate sanctioning the prosecution of the petitioner under s. 211 of the Penal Code should not be set aside, on the ground that, before granting sanction to prosecute under s. 211, the Deputy Magistrate did not serve the petitioner with notice, and give him an opportunity to be heard.

"After hearing petitioner's pleader in favour of the rule, and considering the case of *Abbilakh Singh v. Khub Lal*,¹ we are not prepared to agree in the view therein expressed regarding the proceedings which are necessary, before sanction, under s. 195 of the Code of Criminal Procedure, can be given to a prosecution for an offence as therein specified.

"We accordingly direct that this case be referred to a Full Bench of this Court in order that it may determine whether in a case, such as is described in s. 195 of the Code of Criminal Procedure, in which sanction to prosecute was not given immediately upon termination of the proceedings in the course of which the offence is alleged to have been committed, it is necessary, before sanction be given, that notice should be given to the person concerned so as to give him an opportunity of appearing and being heard."

The opinion of the Full Bench was as follows:—

In our opinion no notice is necessary to the person against whom it is intended to proceed, before the Court before which the alleged offence has been committed can, under s. 195 of the Code of Criminal Procedure, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section.

¹ I. L. R., 10 Cal. 1100.

CRIMINAL REVISION.

Before Mr. Justice Wilson and Mr. Justice Ghose.

1885.

Aug. 24.

12 Cal. 133.

IN THE MATTER OF THE PETITION OF DINONATH MULLICK.

DINONATH MULLICK *v.* GIRIJA PROSONNO MOOKERJEE.¹

*Recognizance to keep the peace—Criminal Procedure Code (Act X. of 1882), s. 107
—Power of District Magistrate to call on person residing in another district
for security.*

A Magistrate has no jurisdiction to take proceedings under s. 107 of the Criminal Procedure Code against a person not personally within his jurisdiction. *In the matter of the Petition of Jai Prokash Lal*² and *In the matter of the Petition of Rajendro Chunder Roy Chowdhry*³ followed.

Even assuming there was jurisdiction, it was not a case where the Magistrate should have called upon the petitioner to appear personally, he residing at a distance, there being no special circumstance making his personal attendance necessary, and the Magistrate having power under s. 116 to allow him to appear by a pleader.

THE petitioner Dinonath Mullick, through an agent, made an application to the Deputy Magistrate of Bongong to the effect that, as a breach of peace was apprehended on the part of Girija Prosonno Mookerjee and his servants, on their attempt to put up by force a bund on the *khal* belonging to the petitioner, they might be required to enter into recognizances to keep the peace towards him. A similar application was also subsequently made on the part of Girija Prosonno Mookerjee and his men to obtain security to keep the peace towards the petitioner and his servants. The Magistrate, after calling on the police for a report, directed both parties and their respective partisans to appear before him on 6th August to show cause why they should not be bound down to keep the peace under s. 107 of the Criminal Procedure Code.

Notice was thereupon issued on the petitioner (among others) calling upon him to appear personally before the Deputy Magistrate, and to show cause why he should not be bound down to maintain peace.

On or about the 3rd or 4th of August 1885, the petitioner made an application with a medical certificate to the Deputy Magistrate that he might be excused from personally attending on the ground of illness, but that application was refused, and a warrant was issued against the petitioner for his personal attendance in the Court of the Deputy Magistrate at Bongong, under which warrant he was arrested, but released on bail.

The petitioner stated that he resides at No. 81, Upper Circular Road in Calcutta, and never went to his zemindari where breach of peace was apprehended, the said zemindari being in the district of Jessore and under the management of his naib. He prayed that the proceedings of the Deputy Magistrate might be set aside, and that he might be allowed to appear by his mooktear on the following grounds:—

(1.) That the proceedings of the Deputy Magistrate at Bongong were illegal and irregular.

(2.) That the order of the Magistrate under the circumstances of the present case directing his personal attendance was illegal and unjust.

¹ Criminal Revision, No. 333 of 1885, against the order of Baboo Trolukya Nath Sen, Deputy Magistrate of Bongong, dated the 3rd August 1885.

² I. L. R., 6 All. 26.

³ I. L. R., 11 Cal. 737.

(3.) That, under s. 107 of the Criminal Procedure Code, a Magistrate has no jurisdiction to issue process on a person not residing within the limits of the district.

Mr. Pugh and Baboo Boidonath Dutt for the petitioner.

Mr. Pugh, for the petitioner, contended that, under s. 107 of the Criminal Procedure Code, the Magistrate had no jurisdiction to issue process on a person not residing within the limits of his jurisdiction, and cited *In the matter of the Petition of Jai Prokash Lal*¹ and *In the matter of the Petition of Rajendro Chunder Roy Chowdhry*.²

The judgment of the Court (WILSON and GHOSE, JJ.) was as follows:—

WILSON, J.—The petitioner in this case is Baboo Dinonath Mullick. He has obtained a rule to show cause why certain proceedings taken by the Deputy Magistrate of Bongong, under s. 107 and the following sections of the Criminal Procedure Code, should not be set aside so far as they affect the petitioner. The principal ground on which it is contended that those proceedings are illegal is this: it is said that, under s. 107, the Deputy Magistrate had no jurisdiction to take such proceedings against a person who was not in any sense personally within the jurisdiction of that Deputy Magistrate.

The construction of the section taken by itself may not be wholly free from doubt. It is not very clearly worded: and it might perhaps be capable of two constructions. It might perhaps be read as meaning that where a Magistrate receives information that any person, wherever that person may be, is likely to commit a breach of the peace within the local limits of such Magistrate's jurisdiction, he may take proceedings. On the other hand, the jurisdiction of the Magistrate is ordinarily confined within local limits, and this is a personal jurisdiction, that is to say, not a jurisdiction for punishing offences, but a jurisdiction for restraining persons from committing offences. It may well be said that the section should be read, with reference to that primary rule, that the Magistrate's jurisdiction is local; and that the words, "where a Magistrate receives information that any person is likely to commit a breach of the peace within the local limits of his jurisdiction," apply only to any person subject to his jurisdiction. Speaking for myself personally, I should, from the words themselves alone, be disposed to think that the narrower construction of the words is the correct one. It is, we think, certainly the one most in accordance with convenience. The wider construction would empower any Magistrate in any part of India, who receives an *ex-parte* information that a breach of the peace is likely to be committed within his jurisdiction by any person in any part of India, to require the attendance of that person from any part of India in his Court. That would be a very great hardship and a wholly unnecessary hardship, because the last part of the section provides that, whenever a breach of the peace is likely to be committed, proceedings may be taken against any person in the district in which he is. Considerations of convenience, therefore, are in favour of the narrower construction.

The authorities also support that view. We have been referred to two cases: the first case is *In the matter of the Petition of Jai Prokash Lal*,¹ in which the point was considered by a Full Bench of the Allahabad Court, and they came to the conclusion that the Magistrate has no jurisdiction to take such proceedings against a person who is not within the local limits of his jurisdiction. The same question appears to have been considered by a Division Bench of this Court in

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1885. a case for revision under s. 435, Code of Criminal Procedure, *In the matter of the Petition of Rajendro Chunder Roy Chowdhry*,¹ and the same construction appears to have been put upon the section. We think it right to follow these decisions. On that ground, in our judgment, the whole of the proceedings, so far as they affect Baboo Dinonath Mullick, are without jurisdiction, and must be set aside.

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We think it right to add that, had we come to the conclusion that there was jurisdiction, we should still be of opinion that that jurisdiction had not been judiciously exercised. We can find no sufficient materials before the Deputy Magistrate tending to involve Baboo Dinonath Mullick himself in any matter pointing to a breach of the peace. Therefore proceedings ought not to have been taken against him.

Further, having regard to the fact that the person against whom proceedings were taken was at a distance, and that there was no special circumstance making his personal attendance necessary, it appears to us that it would have been a very unwise exercise of jurisdiction to require him to appear personally, seeing that the Magistrate had power under s. 116 to allow him to appear by a pleader.

The whole of the proceedings of the Deputy Magistrate will be set aside so far as they affect the petitioner.

Proceedings set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

ASKAR MEA v. SABDAR MEA.²

1885.
Sep. 17.
12 Cal. 137.

Criminal Procedure Code (Act X. of 1882), ss. 133, 135—Application for order to remove obstruction—Disputed title—Jurisdiction of Criminal Court.

Where an application is made under s. 133 of the Criminal Procedure Code, calling on a person to remove an obstruction, and such person *bond fide* raises a question of title:

Held that the case then becomes one for a Civil Court. The section contemplates only an enquiry as to the existence or non-existence of the obstruction complained of, not an enquiry into disputed questions of title.

This was a reference from the Deputy Commissioner of Sylhet under s. 438 of the Criminal Procedure Code.

The application was, under s. 133 of the Criminal Procedure Code, for the opening of a road alleged to be public, and to have been closed by Sabdar Mea and others. An order was issued under s. 133 of the Criminal Procedure Code, calling on them to remove the obstruction, or to appear and show cause why it should not be removed.

Sabdar Mea showed cause by petition, in which he alleged, among other things, that the road was not a road at all, much less a public one, and applied that a jury might be appointed. The Assistant Commissioner, Mr. Pope, ignoring apparently the application for a jury, proceeded to take evidence, and directed that the road should be opened.

¹ I. L. R., 11 Cal. 737.

² Criminal Reference, No. 162 of 1885, made under s. 438, by G. Stevenson, Esq., Deputy Commissioner of Sylhet, dated the 3rd of September 1885.

The Deputy Commissioner, in referring the case, submitted that the procedure of the Assistant Commissioner was defective in law on (among others) the following ground :—

“ According to the High Court rulings cited under s. 133 of Prinsep’s Edition of the Criminal Procedure Code [compare also the ruling in *Basaruddin Bhuia v. Bahar Ali*¹], the Assistant Commissioner had no power to go further into the case once the plea that the road was not a public one was set up.

No doubt, the result, as stated by the Assistant Commissioner, is practically to render this part of the Code a dead letter. But such is the interpretation of the law.”

The Court (PIGOT and O’KINEALY, JJ.) delivered the following judgment :—

We think the Magistrate is right in the reference made, and direct that the order be set aside.

We do so on the ground that, in this case, a *bond fide* question seems to exist, as to whether there ever was a public road in the place in question. When such a question arises, it is one for the Civil Courts, as the case of *Basaruddin Bhuia v. Bahar Ali*¹ decides.

The enquiry contemplated by those sections of the Criminal Procedure Code is an enquiry into the existence or non-existence of the obstruction complained of—not an enquiry into disputed questions of title.

Order set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

QUEEN-EMPRESS v. TAFALLAH.²

Escape from lawful custody—Arrest under civil process, Escape from—Criminal liability of officer suffering escape—Penal Code (Act XLV. of 1860), s. 223.

S. 223 of the Penal Code applies only to cases where the person who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested under civil process.

TAFALLAH, a peon of the Munsif’s Court, was entrusted with a warrant for the arrest of a judgment-debtor, named Alimulla Sircar, in execution of a decree. He arrested Alimulla, but, while bringing him to the Munsif’s Court, Alimulla escaped. The Munsif thereupon held a proceeding, and recorded his opinion that there were grounds for a magisterial enquiry “under s. 651 of the Civil Procedure Code,” and forwarded copies of his proceedings to the Sub-Divisional Magistrate, with the request that he would deal with the matter according to law, and an intimation that the peon Tafallah would be sent when notice of the date fixed was received.

The Deputy Magistrate, however, summoned the accused under s. 651 of the Civil Procedure Code, and, without framing a charge, convicted him under s. 223 of the Indian Penal Code, and sentenced him to a fine of Rs. 50, or, in default, to three months’ simple imprisonment.

¹ I. L. R., 11 Cal. 8.

² Criminal Reference, No. 161 of 1885, made under s. 438, by J. Whitmore, Esq., Officiating Sessions Judge of Rungpore, dated the 4th of September 1885.

1885.

ASKAR MEA

v.

SABDAR MEA,

12 Cal. 137.

1885.

Sep. 12.

12 Cal. 190.

1885.

QUEEN-
EMPRESS

v.

TAFALLAH,
12 Cal. 190.

The matter was brought to the notice of the Sessions Judge, who, under the provisions of s. 438 of the Code of Criminal Procedure, referred the case to the High Court, stating his reasons for so doing as follows:—

“ Assuming that s. 223 applies, I do not think that the omission to frame a charge caused any failure of justice, for the peon, as is evident from his statement to the Deputy Magistrate, perfectly understood what he was being tried for. It is not, therefore, upon this ground that I refer the case.

“ But, after the best consideration I have been able to give the matter, I cannot assure myself that s. 223 (as amended by Act XXVII. of 1870) applies to the facts. The question turns upon the meaning of the words ‘lawfully committed to custody.’ I have not been able to find any High Court ruling in point, but I do not think that ‘arrested under a warrant’ and ‘committed to custody’ are interchangeable terms. I do not wish to distinguish between ‘arrest’ and ‘custody,’ but between ‘arrest’ and ‘committal.’ The latter expression seems to be confined to the direct action of a Court itself when the person to be committed is before it. I would base this view on the last para. of s. 336 of the Civil Procedure Code, and upon the language used in the ruling *In the matter of Hastie*,¹ where the words ‘one stage only when a man has been arrested (as here) and is brought up for committal, but has not yet been committed’ seem to clearly recognize a distinction between ‘arrest’ and ‘committal.’

“ I need hardly observe that the question whether a Civil Court peon who negligently suffers his prisoner to escape *en route* is or is not criminally liable under s. 223 of the Indian Penal Code is of considerable practical importance, and, as the above considerations seem to me to show that he is not, I would beg to recommend that the Magistrate’s order be set aside.”

No one appeared on the reference.

The opinion of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

We think that the Sessions Judge is right in considering the conviction to be illegal. S. 223 of the Penal Code applies only to cases where the person who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has simply been arrested under civil process. We, therefore, set aside the conviction, and order the fine, if paid, to be refunded.

Conviction quashed.

¹ I. L. R., 11 Cal. 451 (cf. p. 460).

CRIMINAL REVISION.

Before Mr. Justice Wilson and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF E. G. BUSKIN.

1885.

Sep. 2.

IN THE MATTER OF THE PETITION OF C. F. THOMAS.

E. W. HART *v.* E. G. BUSKIN.¹

12 Cal. 192.

E. W. HART *v.* C. F. THOMAS.*Railway Act (IV. of 1879), ss. 17, 31—Passenger not producing season ticket when called upon—Travelling without a ticket—Order for recovery of fare.*

A passenger who has obtained a monthly ticket is liable to be called upon to produce it at any time on the journey which it covers, and if he does not so produce it, he is liable under ss. 17 and 31 of the Railway Act to pay the fare for the journey between the stations for which his ticket was issued. The order under s. 31, in case of his refusal to pay it, should be one merely for recovery of the amount due as the fare, and not an order to pay such sum or any other sum as if it were a fine.

A passenger who has such a ticket, which is still in force, and in his possession, cannot be said to be travelling without a ticket within the meaning of s. 31, merely because he does not happen to have the ticket with him, and therefore cannot produce it when called upon to do so.

In these two cases the petitioners were prosecuted under the Railway Act (IV. of 1879), s. 31. Mr. Buskin, the petitioner in the first case, was a monthly ticket-holder on the Eastern Bengal State Railway, his ticket entitling him to travel between Barrackpore and Sealdah stations. He was on 29th June last, when travelling to Sealdah, called upon to produce his ticket, but having inadvertently left it behind at his house, he was unable to produce it.

The Deputy Magistrate found that he was technically guilty of omitting to show his ticket when called on, and made an order that he should be "fined annas 14, realizable by distress and sale if not paid."

Major C. F. Thomas, the petitioner in the second case, was also a monthly ticket-holder, on the same line, between the same stations, and on the 3rd July was found travelling without a ticket. He had had his ticket when coming to Sealdah in the morning, but had left it at his office, and when asked to produce it on the return journey could not do so. In this case the Deputy Magistrate inflicted a "nominal fine of one anna."

The defendants in both cases petitioned the High Court to have the order of the Deputy Magistrate set aside.

Mr. *Hill* for the petitioners.

S. 31 of Act IV. of 1879 deals with cases of passengers who, without desiring to defraud, are found travelling without tickets. Now, the wording of the Magistrate's order shows that he treated the matter as a criminal one, inasmuch as the petitioners have been *fined* in one case fourteen annas, and in the other one anna. I submit that the petitioners could not be prosecuted criminally; the matter before the Court was a matter of civil liability with the provision that the debts due from the petitioners might be recovered by distress or warrant. This is clear from s. 32, which differs from s. 31. The case of *Tooke Bibee v. Abdool Khan*² points out that a proceeding of the nature of this case is not a criminal one. Under s. 31 there is an implied pre-existing

¹ Criminal Revision, Nos. 324 and 325 of 1885, against the order of Baboo Roy Ram Sunkur Sen, Bahadoor, Deputy Magistrate of Sealdah, dated the 25th July 1885.

² 1. L. R., 5 Cal. 536.

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liability that the passenger will pay the fare, but till conviction there is no pre-existing liability to pay a fine. The punishment of fine throughout the Act is kept entirely distinct from the payment of fares.

As to whether a matter is to be considered a criminal or civil proceeding, see *Queen v. Fletcher*¹ and *Mellor v. Denham*.² I submit the proceedings under s. 31 are civil proceedings.

[WILSON, J.—We need not trouble you further on that point.]

As regards the demand made to Buskin to pay his fare, that, I submit, was not enough; a specific amount should have been demanded. Suppose, for instance, Buskin had been unable to prove that he had started from Barrackpore, then, if the matter was a civil one, the Railway Company, knowing where the train had started from, would have to make a demand of a specific sum. As to this point, see *Brown v. Great Eastern Railway Company*.³ With regard to the reasonableness of a bye-law which requires a passenger to show his ticket when required, see *Saunders v. South Eastern Railway Company*.⁴ With regard to the case of Major Thomas, the Magistrate had no power to fine him one anna; he might have declared him liable to a payment of fourteen annas, but he has not done so. I submit that the cases have been treated criminally, and for that reason, if for no other, the orders must be quashed. Could the petitioners, however, be charged with offences under s. 31? S. 31 refers to s. 17, and that latter section refers to the question of the creation of the contract. I submit the liability of the petitioners is one arising out of the contract created by s. 17.

[WILSON, J.—“Travelling without a ticket” in s. 31 must mean travelling without having taken a ticket.]

Yes; tickets are taken from the passengers to Calcutta at Barrackpore, and, if s. 31 were not read so, those passengers could be proceeded against as having travelled without tickets. There is no such liability arising out of the second part of s. 31, which refers to passengers “having such a ticket and not showing it.” Those words have the meaning of a contumacious refusal to show a ticket. As to this, see *Dearden v. Townsend*.⁵

Mr. Bonnerjee, *contra*, contended that in substance the order of the Magistrate was correct; and that, although he had, under a mistake, made use of the word “fine,” yet it was clear that the matter was intended to be treated civilly.

The following judgment was delivered by the Court (WILSON and GHOSH, JJ.):—

WILSON, J.—The facts of this case are these: The petitioner, Mr. Buskin, was the holder of a monthly ticket entitling him to travel on the Eastern Bengal State Railway between Barrackpore and Sealdah. On the morning of the 29th June last, he travelled by a train from Barrackpore to Sealdah. Being asked, while in the train, by a ticket-collector in the service of the Railway Administration to show his ticket, he was unable to do so, having accidentally left it at his house in Barrackpore. The ticket-collector asked him to pay his fare, and he refused. The fare from Barrackpore to Sealdah was fourteen annas. The ticket-collector knew that Mr. Buskin held a monthly ticket.

¹ L. R., 2 Q. B. D. 43.

² L. R., 5 Q. B. D. 467.

³ L. R., 2 Q. B. D. 406.

⁴ L. R., 5 Q. B. D. 456 (461).

⁵ L. R., 1 Q. B. 10.

Application was made to the Police Magistrate of Sealdah by the station-master of Sealdah for a summons against Mr. Buskin, in respect of a charge of having travelled without a ticket, and, when asked to pay his fare, refusing to do so, ss. 17 and 31 of the Indian Railway Act (IV.) of 1879 being referred to. After some intermediate proceedings, on the 3rd July a summons was issued against Mr. Buskin, requiring him to attend on the 15th July, and answer a complaint charging him with having travelled without a ticket, and refusing to pay his fare when asked to do so, and further with not showing his ticket and giving it up when demanded. Mr. Buskin appeared, and after some adjournments the matter was finally disposed of on the 25th July. The Magistrate, having found that Mr. Buskin was unable to show his ticket on the occasion in question, said : " The defendant is, therefore, technically guilty of the omission as laid down in the Act, and is fined annas fourteen, realizable by distress and sale if not paid."

We are asked to set aside this order.

Upon the main question, we think the Magistrate is right, that is to say, we think Mr. Buskin was bound to pay the fare from Barrackpore to Sealdah amounting to fourteen annas.

By s. 17 of the Railway Act (IV. of 1879) : " Every person desirous of travelling on a railway shall, upon payment of his fare, be furnished with a ticket specifying in English and the principal vernacular language of the district in which the ticket is issued, the class of carriage for which, and the place from and place to which the fare has been paid, and the amount of such fare ; and every passenger shall, when required, show his ticket to any railway-servant duly authorized to examine the same, and shall deliver up the same to any railway-servant duly authorized to collect tickets." By s. 31 : " Any passenger travelling on a railway without a proper ticket, or having such a ticket and not showing or delivering up the same when so required under s. 17, shall be liable to pay the fare of the class in which he is found travelling from the place whence the train originally started, unless he can prove that he has travelled a less distance only, in which case he shall be liable to pay the fare of the class aforesaid only from the place whence he has travelled. Every such fare shall, on application by a railway-servant to a Magistrate, and on proof of the passenger's liability, be recoverable from such person as if it were a fine, and shall, when recovered, be paid to the Railway Administration.

Under these sections the Railway Administration is to furnish every passenger with a proper ticket ; no passenger is to travel without such a ticket ; every passenger is to show or deliver up his ticket when called upon ; and any passenger who fails in either of these points is liable to pay the ordinary fare for his journey, or if he cannot show where he got into the train, the ordinary fare from the starting point of the train.

We do not think Mr. Buskin's case falls within the provision as to travelling without a ticket. We do not think that a passenger who has been duly furnished with a proper ticket, which is still in force and still in his possession, can be said to be travelling without a ticket, while making a journey covered by that ticket. But Mr. Buskin does seem to us to have failed to show his ticket within the meaning of the Act. There is no distinction drawn between one kind of ticket and another. Every passenger, whether a season ticket-holder or not, may be called upon to show his ticket, and if he is so called upon and has not got his ticket with him to show, he may be required to pay the ordinary fare. We are of opinion that, having regard to the language and extent of s. 17 of the Act, s. 31 should be read thus : Any passenger travelling on a railway without

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being furnished with a proper ticket, or having been furnished with such a ticket and not showing or delivering up the same when so required under s. 17, shall be liable, &c., &c. The Magistrate was therefore right in holding that Mr. Buskin was liable to pay fourteen annas, the fare from Barrackpore to Sealdah.

But the form of the order as described in the judgment by which Mr Buskin is to be "fined fourteen annas" is wholly wrong. Many sections of the Railway Act deal with frauds by passengers and other acts of wilful wrong, and these sections say that the offender is to be punished with a fine. But s. 31, dealing with innocent persons who may, like Mr. Buskin, find themselves in the wrong by mere accident, has nothing to do with punishment or penalty or fine. It simply makes a fare recoverable, and recoverable in a summary way. If any final order is drawn up in this case, it must order payment of fourteen annas as the fare from Barrackpore to Sealdah. In substance, however, the order of the Magistrate is correct.

The case of *Hart v. Thomas* is similar to Mr. Buskin's in every respect except one; but that one is very material. The Magistrate has not awarded the amount of the fare, which alone he could do under the section; but has imposed an arbitrary fine of one anna. The order is therefore wrong in substance, and must be set aside.

CRIMINAL REVISION.

Before Mr. Justice Miller and Mr. Justice Agnew.

IN THE MATTER OF THE PETITION OF BHOLA NATH DAS.¹

1885.

Dec. 4.

12 Cal. 427.

Police Act (V. of 1861), s. 29—Police-constable—"Neglect of duty"—"Lawful order"—Extra drill.

A District Superintendent of Police directed his constables to cut down the jungle in the vicinity of their lines, and, on their refusal to comply, ordered them extra drill every day. One of such constables not turning out to such extra drill was thereupon prosecuted and convicted of neglect of duty under s. 29, Act V. of 1861.

Held that s. 29 provided for no such offence, and that any neglect of duty short of a violation of duty does not amount to an offence under that section.

Held, further, that the omission to attend such extra drill did not amount to an offence under that section, as the words "lawful order" used in the section mean an order which the authority mentioned therein is competent to make, and it did not appear that a District Superintendent of Police was competent to order his constables to cut down the jungle in the vicinity of their lines, and, on their refusal to do so, to order them extra drill.

In this case the accused, who was a constable in the Goalpara Police Force, was charged with neglect of duty under s. 29, Act V. of 1861.

It appeared from the statement of the complainant, who was an inspector, that the District Superintendent of Police had recently ordered his men to cut down the jungle in the vicinity of their lines. Some of the men, and amongst them the accused, considered this work derogatory, and refused to obey the order. The District Superintendent thereupon, as a punishment, ordered these men extra drill every day. On the 3rd July, the first day on which such extra drill was ordered, the accused absented himself. The present charge was, therefore, brought against him, and he was convicted of an offence under the above-mentioned section, the Deputy Commissioner being of opinion that the

¹ Criminal Revision, No. 302 of 1885, against the order of *Lieutenant-Colonel T. B. Michell*, Deputy Commissioner of Goalpara, dated the 6th of July 1885.

District Superintendent was perfectly right in ordering the men to clear the jungle and in punishing them for their disobedience. The Deputy Commissioner, being of opinion that the accused was one of the ringleaders, sentenced him to three months' rigorous imprisonment. The accused then sent an application for revision to the High Court, and upon the papers being laid before Prinsep and Grant, JJ., a rule was issued against the Deputy Commissioner to show cause why his order should not be set aside, and pending the hearing of the rule the accused was directed to be released on bail.

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The rule came on to be heard in the vacation on September 18th, before a Bench consisting of Pigot and O'Kinealy, JJ., who considered that the question of whether the District Superintendent of Police had power to order extra drill as a punishment was of some difficulty and of importance to the police-authorities, and that they should have an opportunity of being heard. The case was, therefore, adjourned till after the vacation, and accordingly now came on for hearing before a Bench consisting of Mitter and Agnew, JJ.

Baboo *Dwarka Nath Chakrabati* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

Baboo *Dwarkanath Chakrabati*, for the petitioner, contended that failure to appear to undergo punishment is not a neglect of duty, as liability to undergo punishment is hardly a duty. Assuming it to be so, there is no finding by the Court below that the failure to appear was "wilful" as contemplated by s. 29, Act V. of 1861; the District Superintendent of Police had no authority to order extra drill, which is a corporal punishment; therefore failure to obey that order is not a breach or violation of duty under s. 29, Act V. of 1861. S. 7 authorizes the District Superintendent of Police to punish his subordinates, but it does not authorize him to inflict corporal punishment. The order to cut jungle was illegal, it not being the duty of a constable to cut jungle; therefore the punishment awarded for failing to do what was unlawful is illegal, and therefore omission to comply with the order would not be an offence under s. 29.

The *Deputy Legal Remembrancer*.—The order to cut jungle is legal, because the Police Manual provides that the constables are to keep their lines clean. The power to order extra drill, although not expressly provided, has been recommended in the Police Manual in the case of officers receiving very small pay.

Baboo *Dwarkanath Chakrabati* in reply.

The judgment of the High Court (MITTER and AGNEW, JJ.) was as follows:—

The petitioner in this case has been convicted by the Deputy Commissioner of Goalpara in a summary trial of the offence of neglect of duty under s. 29 of Act V. of 1861 under the following circumstances:—

The petitioner, who is a constable in the Goalpara Police Force, was ordered by the District Superintendent of Police to cut down the jungle in the vicinity of the lines occupied by the said Police Force. On his refusal to obey this order, the District Superintendent ordered extra drill every day for the petitioner and other similar delinquents. The petitioner not having attended the extra drill thus ordered has been convicted as aforesaid, and sentenced to three months' rigorous imprisonment.

The offence of which the petitioner has been found guilty is that "of neglect of duty under s. 29 of Act V. of 1861." The section in question does not provide for any such offence. It deals with offences constituted either by any

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violation of duty, or wilful breach or neglect of any rule or regulation or lawful order made by competent authority on the part of a police-officer. Any neglect of duty short of a violation of duty does not amount to an offence under s. 29 of Act V. of 1861. But, apart from this error, it seems to us that, under the circumstances of this case, the omission on the part of the petitioner to attend the extra drill ordered by the District Superintendent of Police did not amount to an offence under this section. The words "lawful order" used in the section mean an order which the "authority" mentioned therein is competent to make. It has not been shown to us that the District Superintendent of Police in this case was competent to order his constables to cut down the jungle in the vicinity of their lines, and that, on their refusal to do so, to order extra drill in respect of them. That being so, the prosecution in this case, in our opinion, failed to establish that there was any violation of duty, or wilful breach or neglect of any lawful order made by competent authority on the part of the petitioner. We, therefore, set aside his conviction and the sentence passed upon him upon that conviction.

H. T. H.

Conviction quashed.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Ghose.

J. BRUCE v. C. CRONIN.¹

1886.
Jan. 7.
12 Cal. 438.

Merchant Seamen's Act (Act I. of 1859), s. 83—17 & 18 Vic., c. 104, ss. 243 (cls. 1 and 2), 288—Merchant Shipping Act, 1854—43 & 44 Vic., c. 16, s. 10—Merchant Seamen (Payment of Wages and Rating) Act, 1880—Imprisonment for desertion.

The amendment of cls. 1 and 2 of s. 243 of 17 and 18 Vic., c. 104, by 43 and 44 Vic., c. 16, s. 10, does not affect the liability of seamen in Calcutta to imprisonment for offences under s. 83, cls. 1 and 2, of Act I. of 1859.

This was a reference to the High Court by the Chief Presidency Magistrate of Calcutta under s. 432 of the Code of Criminal Procedure.

It appeared that one Cornelius Cronin, a fireman on board the British steamship "City of Cambridge," was charged by the Chief Engineer of the vessel, under cl. 2 of s. 83 of Act I. of 1859, with being absent without leave from the vessel; the accused pleaded guilty, and was sentenced to 24 hours' imprisonment with hard labour.

The Chief Presidency Magistrate passed the following judgment convicting the accused, but, having regard to the importance of the question decided, and to the fact that his predecessor had in July 1885 come to a different conclusion in a similar case (holding that the Court had no power to imprison for offences under cls. 1 and 2 of s. 83 of Act I. of 1859), made his judgment contingent on the opinion of the High Court, as to whether the amendment of cls. 1 and 2 of s. 243 of 17 & 18 Vic., c. 104, by 43 & 44 Vic., c. 16, affected the provisions of Act I. of 1859, so as to do away with the liability of seamen in Calcutta to imprisonment for the offences specified in cls. 1 and 2 of s. 83 of Act I. of 1859. The accused was released, pending the decision of the High Court, on his own recognizances to appear for judgment when called upon.

¹ Criminal Reference, No. 3 of 1886, made under s. 432 by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 21st of December 1885.

"The question before the Court is whether under s. 83, cls. 1 and 2, of the Indian Merchant Shipping Act (Act I. of 1859), seamen are liable to imprisonment for the offences therein specified, *viz.*, desertion, neglecting or refusing to join, or to proceed to sea, absence within twenty-four hours before sailing, and absence without leave, or whether they are only liable to fine.

"My predecessor, Mr. Reily, in a judgment delivered on the 8th July 1885, has held that the Court has no power to inflict imprisonment, and, as I understand it, for the following reason, *viz.*, that the authority under which the Indian Legislature passed Act I. of 1859 is to be found in s. 288, 17 and 18 Vic., c. 104, which is as follows: 'If the Governor-General of India in Council, or the respective Legislative authorities in any British possession abroad, by any Acts, ordinances, or other appropriate legal means, apply or adapt any of the provisions in the third part of this Act contained to any British ships registered as trading with, or being at, any place within their respective jurisdiction, and to the owners, masters, mates, and crews thereof, such provisions, when so applied and adapted as aforesaid, and as long as they remain in force, shall, in respect of the ships and persons to which the same are applied, be enforced, and penalties and punishments for the breach thereof shall be recovered and inflicted, throughout Her Majesty's dominions in the same manner as if such provisions had been hereby so adapted and applied, and such penalties and punishments had been hereby expressly imposed.'

"This section is recited in the preamble of Act I. of 1859 of the Legislative Council in India.

"S. 83 of the said Act will be seen to be a transcript of s. 243 of 17 & 18 Vic., c. 104.

"S. 243, as it originally stood, empowered Criminal Courts to inflict imprisonment for the offences specified in cls. 1 and 2, but this section has been amended by 43 & 44 Vic., c. 16, to the effect that Criminal Courts shall have no power to inflict imprisonment for offences under cls. 1 and 2 of s. 243.

"After giving the matter my best consideration, it appears to me that the Indian Act I. of 1859 was passed under the general powers of legislation given to the Legislature of this country by the Indian Councils' Act 24 & 25 Vic., c. 67, and that the object of s. 288 of the Statute, and the reason of its recital in the preamble of Act I. of 1859, was that, according to s. 288, judgments and orders passed by the Criminal Courts of this country were to be enforced throughout Her Majesty's dominions in the same manner as if such provisions had been applied and adapted, and the penalties and punishments had been imposed, by the Merchant Shipping Act of 1854, which would not otherwise have been the case.

"I am of opinion that the repeal, or otherwise, of 17 & 18 Vic., c. 104, can in no way further affect Act I. of 1859 of the Indian Legislature; but that the latter must be considered to be in force in India until it is repealed by specific legislation.

"The effect, I take it, of the partial repeal of s. 243 of the Statute is to take away the power of enforcing orders passed under Act I. of 1859 outside the limits of British India, which was the only special effect of s. 288 of the Merchant Shipping Act of 1854.

"I would here refer to the use of the words 'within the United Kingdom' at the beginning of s. 10 of 43 & 44 Vic., c. 16, which is the section that expressly provides that a seaman or apprentice shall not be liable to imprisonment for the offences mentioned in cls. 1 and 2, s. 243 of 17 & 18 Vic., c. 104.

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That section commences as follows: 'The following provisions shall, from the commencement of the Aft, have operation within the United Kingdom.'

"If it were held that the amendment of Part III. of the Merchant Shipping Aft of 1854 acted *ipso facto* as an amendment of the Indian Aft, it would seem to follow that, if altogether new provisions were substituted for Part III. of the Merchant Shipping Act of 1854, the Indian Act, whilst remaining unchanged upon the Indian Statute Book, might have to be read as meaning something entirely different from, and perhaps contradictory to, its express terms.

"It would appear that the British Legislature considered that different provisions might be necessary in different dependencies of the empire, and would seem to have provided for such a contingency by the passing of s. 288 of the Merchant Shipping Aft of 1854.

"I can see no grounds for supposing that by s. 288 it was intended in any way to curtail the powers conferred by the Indian Councils' Aft 24 & 25 Vic., c. 67.

"The sentence of the Court is that the accused do undergo twenty-four hours' imprisonment with hard labour, but inasmuch as the question is one of very great moment to the mercantile community, and one on which it appears to me most desirable that an authoritative ruling should be obtained, I direct that the following question be referred to the High Court, under s. 432 of the Code of Criminal Procedure, and that, pending the decision of the High Court, the accused be enlarged on his own recognizance of Rs. 10 to come up for judgment when called upon.

"Whether the amendment cls. 1 and 2 of s. 243 of 17 & 18 Vic., c. 104, by Aft 43 & 44 Vic., c. 16, affects the provisions of Aft I. of 1859 of the Indian Council, so as to do away with the liability to imprisonment in Calcutta for the offences specified in cls. 1 and 2 of s. 83, Aft I. of 1859?"

No one appeared for either party on the reference.

The following was the opinion of the Court (CUNNINGHAM and GHOSE, JJ.):—

We agree with the Magistrate in the view he has taken of this matter. The amendment of cls. 1 and 2 of s. 243 of the Merchant Shipping Aft, 1854 (17 & 18 Vic., c. 104), by 43 & 44 Vic., c. 16, does not, in our opinion, affect the liability of seamen in Calcutta, under s. 83 of Aft I. of 1859, to imprisonment. Had any such change been intended, it would doubtless have been expressly enacted in Aft V. of 1883, passed subsequent to the above Aft 43 & 44 Vic., c. 16, which, in ss. 35, 36, and 37, amends some portions of Aft I. of 1859.

T. A. P.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Field.

OPENDRO NATH GHOSE (ACCUSED) *v.* DUKHINI BEWA (COMPLAINANT).¹

1886.

Jan. 7.

Criminal Procedure Code, Act X. of 1882, s. 435—Further enquiry—Inferior Criminal Court—Magistrate of the District, Powers of.

12 Cal. 473.

A Magistrate of a District is competent, under s. 435 of the Criminal Procedure Code, to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own District.

THIS was a reference to the High Court under the following circumstances :—

One Opendro Nath Ghose was found at night in the house of the complainant, and was sent up for trial by the police under s. 451 of the Penal Code. The Joint-Magistrate who tried the case, after examining the complainant and one other witness, discharged the accused, on the ground that there was no evidence of any Criminal attempt. The complainant applied to the District Magistrate for a further enquiry into the case, and the District Magistrate directed a further enquiry by a Deputy Magistrate. Pending this further enquiry, the accused applied to the Sessions Judge to have the order directing the further enquiry set aside, on, amongst other grounds, the ground that the Joint-Magistrate was not subordinate to the District Magistrate for the purpose of Ch. XXXII. of the Criminal Procedure Code. The Sessions Judge on this point referred the case under s. 438 of the Criminal Procedure Code to the High Court.

Mr. Justice Prinsep and Mr. Justice Grant, before whom the reference was heard, having regard to the different opinions expressed by the High Courts on this point (for which see the cases referred to in the opinion given on the Reference), referred to a Full Bench the question, whether a Magistrate of a District, acting under s. 435 of the Code of Criminal Procedure, can call for and examine the proceedings of a Magistrate of the first class, exercising jurisdiction in the same district as an inferior Court, by reason of such Magistrate being subordinate to him under s. 12.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown.—The plain ordinary meaning of the words “inferior Criminal Court” in s. 435 is perfectly clear. That being so, it is not allowable, by comparing the words by which the plain intention of the Legislature is now expressed with words in a repealed Act, to arrive at a meaning contrary to that clearly expressed in the Act now in force.

Inferior includes subordinate ; a subordinate Court must be inferior to the Court to which it is subordinate, as it can neither be equal (*i.e.*, co-ordinate) or superior to that Court.

According to the construction put upon “inferior Court” in *Nobin Kristo Mookerjee v. Russick Lall Laha*,² that a Court is only inferior to another when it is subject to its appellate jurisdiction, the Court of a Magistrate of the third class in s. 6 of the Criminal Procedure Code is not inferior to the Court of

¹ Reference to a Full Bench in Criminal Motion, No. 214 of 1885, against the order of the District Magistrate of Howra, *W. H. Grimley, Esq.*, dated the 27th March 1885.

² I. L. R., 10 Cal. 268.

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Session, as appeals do not lie from it to the Judge, but to the District Magistrate; but the Court of a District Magistrate is inferior.

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By the use of the more comprehensive word "inferior" in s. 435 of the present Code in place of the word "subordinate" in s. 295 of the previous Code, the necessity for inserting the last paragraph of the latter section in the new Act was done away with, and this was probably why the one word was changed for the other. See ss. 17—195. But whatever might have been the reason, it cannot be inferred, solely from the substitution of the one word for the other, that the Legislature intended to limit the authority of District Magistrates to Magistrates of the second and third class, and the authority of Sessions Judges to Magistrates of the first class. Any such rule, being of the greatest administrative importance, would not have been left to inference, but would have been clearly expressed.

No one appeared on the other side.

The opinion of the Full Bench was as follows :—

GARTH, C.J., MITTER, WILSON, and TOTTENHAM, JJ.—The question submitted to us for determination is whether a Magistrate of the first class is a Criminal Court inferior to the Magistrate of the district, within the meaning of s. 435 of the Code.

The learned Judges who have made this reference to a Full Bench were induced to do so, because of the importance of the question, and because the existing rulings of this Court in *Nobin Kristo Mookerjee v. Russick Lall Laha*,¹ and in *Queen-Empress v. Nowab Jan*,² followed as they were by the High Court of Allahabad in the case of *Jhinguri v. Bachu*,³ by a single Judge, were found to be in conflict with later rulings on the same point by the High Courts of Madras and Bombay as reported in the cases of *In the matter of the Petition of Padmanabha*⁴ and *Queen-Empress v. Pirya Gopal*.⁵ The ruling by the High Court of Madras was that of a Full Bench.

And it appears that in a more recent case at Allahabad—*Queen-Empress v. Laskari*⁶—a Full Bench of the High Court have practically dissented from the ruling of this Court by holding that the Magistrate of a District is competent to call for and deal with the record of a Magistrate of the first class under ss. 435 and 437 of the Code.

We think that the question should be answered in the affirmative.

The supposed difficulty lies in assigning a meaning to the word "inferior" in s. 435. The learned Judges who decided the case of *Nobin Kristo Mookerjee v. Russick Lall Laha*¹ thought it necessary to attach a limited or technical meaning to the word, and held that the words "inferior Criminal Court" must be construed to mean inferior so far as regards the particular matter in respect of which the superior Court is asked to exercise its revisional jurisdiction. They were accordingly of opinion that in cases tried by a Magistrate of the first class, whose jurisdiction to try is equal to that of the Magistrate of the District to whom no appeal would lie, the former officer is not inferior to the latter, although he is subordinate to him: because they considered the term "inferior" to refer only to judicial authority in respect of the particular case of which revision is sought.

¹ 1 L. R., 10 Cal. 268.

² 1 L. R., 10 Cal. 551.

³ 1 L. R., 7 All. 134.

⁴ 1 L. R., 8 Mad. 18.

⁵ 1 L. R., 9 Bom. 100.

⁶ 1 L. R., 7 All. 853.

It appears to us, however, unnecessary to devise any special or technical meaning for the word "inferior" in s. 435, unless we find that its ordinary meaning is not applicable. And we see no reason for holding that it is not. If we take the ordinary meaning of the word, there can be no question but that all subordinates are inferior to the authority to which they are subordinate; although inferiors are not necessary subordinates. So within the territorial jurisdiction of a High Court, all other Courts are inferior to it: in a Sessions Division the Sessions Court is superior to all other local Criminal Courts, and all such other Courts are inferior to it; and in a District all other Magistrates are by s. 17 of the Code subordinate to the Magistrate of the District, and consequently inferior to him: and inferior as much for the purpose of s. 435 as in any other respect.

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The High Court can, under that section, call for the record of any proceeding before any Criminal Court within the local limits of its jurisdiction; a Court of Session may do so as regards every other Criminal Court in the Sessions Division; and the Magistrate of the District can do the same as regards every other Magistrate's Court within his District. We entirely agree with the learned Judges who decided the case of *Nobin Kristo Mookerjee v. Russick Lall Laha*¹ in the opinion that the word "inferior" in s. 435 was advisedly substituted for the word "subordinate" used in the corresponding section (295) of the Code of 1872. But we think that the true reason for this substitution must be that which is suggested by Mr. Justice Straight in the Full Bench case of *Queen-Empress v. Laskari*.² It seems to us, as to the High Court of Allahabad, that the reason for this change in the word used was to meet the rulings that a District Magistrate is not subordinate to the Sessions Judge, and to provide that, nevertheless, the revisional authority of the latter over the former should remain unquestionable. We cannot suppose that there was any intention on the part of the Legislature to suggest that Courts *subordinate* to the Magistrate of the District are not also *inferior* to him.

We, therefore, in reply to the question referred to the Full Bench, state our opinion that a Magistrate of the District is competent under s. 435 to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own District.

FIELD, J.—When the case of *Nobin Kristo Mookerjee v. Russick Lall Laha*¹ was before Mr. Justice McDonell and myself, the question now referred to a Full Bench was a new one, and had not been discussed or considered by the other High Courts (so far as the reports show), or by other Judges of this Court. I gave in the judgment in that case reasons which then appeared to me to support the view there taken. Since the appearance of that judgment, the question has been fully considered and discussed by the Madras and Bombay High Courts, who have taken a different view from that acted upon in the case of *Nobin Kristo Mookerjee v. Russick Lall Laha*.¹ My colleagues adopt the view taken by the Madras and Bombay High Courts. Under these circumstances, although I cannot say that my mind is wholly free from doubt, I think I ought to defer to the large majority who are in favour of a construction different from that which I originally accepted.

I therefore concur in holding that a Magistrate of a District can, under s. 435 of the Code of Criminal Procedure, call for and examine the proceedings of a Magistrate of the first class.

T. A. P.

¹ I. L. R., 10 Cal. 268.² I. L. R., 7 All. 853.

CRIMINAL REVISION.

Before Mr. Justice Miller and Mr. Justice Beverley.

1885.

Dec. 11.

12 Cal. 495.

IN THE MATTER OF CHANDRA KANT BHATTACHARJEE AND OTHERS.

CHANDRA KANT BHATTACHARJEE *v.* THE QUEEN-EMPRESS.¹

Sentence—Cumulative sentences—Separate convictions for more than one offence where acts combined form one offence—Penal Code (Act XLV. of 1860), ss. 143, 147, 324, 353 (Act VIII. of 1882), s. 4—Criminal Procedure Code, Act X. of 1882, s. 235.

Four persons were charged with being members of an unlawful assembly consisting of themselves and others, the common object of which assembly was resisting the execution of a legal process, namely, the arrest of a judgment-debtor by a Civil Court peon, who went with a warrant for his arrest accompanied by other persons, A and B, for the purpose of identifying him, and with using force or violence in prosecution of the common object, such force or violence consisting of an assault on the Civil Court peon, and another by means of a dangerous weapon on A. The Deputy Magistrate convicted all the accused of offences under ss. 147 and 353 of the Penal Code, and sentenced them to six months' rigorous imprisonment under the former section and two months' rigorous imprisonment under the latter. He further convicted one of the accused of an offence under s. 324 in respect of the assault on A, and sentenced him to one month's rigorous imprisonment in respect of that offence, and directed that the sentences were to take effect one on the expiry of the other.

Held that the offence of rioting was completed by the assault on A, and that the assault on the peon was a further offence under the first sub-section of s. 235 of the Code of Criminal Procedure.

Held, further, that, even if A had not been assaulted, the conviction and sentences passed for rioting and the assault on the peon were legal, inasmuch as the acts of the accused taken separately constituted offences under ss. 143 and 353 of the Penal Code, and, combined, an offence under s. 147; and under s. 235, sub-s. 3, of the Code of Criminal Procedure, the accused might be charged with and tried at one trial for the offence under s. 147, and those under ss. 143 and 353, and therefore also separately convicted and sentenced for each such offence, provided the punishment did not exceed the limit imposed by s. 71 of the Penal Code, as amended by s. 4 of Act VIII. of 1882, which limit had not been exceeded in the present case.

THE facts of the case were as follows: One Ramdoyal Dey, a Civil Court peon, accompanied by Abbas Mirdha, Lal Mahmood, and others, went to the house of Kashi Chandra Bhattacharjee, a judgment-debtor, for the purpose of arresting him under a warrant which he held. It was alleged that, after Kashi Chandra was arrested, the accused, Chandra Kant Bhattacharjee, Soshi Bhattacharjee, Kali Prosonno Mookerjee, and Mohini Bashi Mondol and others, who were armed with *latties* and a *dao*, came and rescued Kashi Chandra from the custody of the peon, and that, in effecting his release, they assaulted the peon, and that, upon Abbas Mirdha and Lal Mahmood, who had accompanied the peon to identify the judgment-debtor, attempting to prevent the accused releasing Kashi Chandra, Abbas Mirdha was assaulted and wounded, and Lal Mahmood was also struck.

The defence set up on behalf of the accused was that Chandra Kant and not Kashi Chandra was arrested, and that, upon his getting away from the peon, and entering his house, the peon and a number of others followed him and assaulted him and dragged him out in spite of his resisting the ille-

¹ Criminal Revision, No. 421 of 1885, against the order of *H. Beveridge, Esq.*, Sessions Judge of Fureedpore, dated September 14th, 1885, affirming the order of Baboo *Rajoninath Chatterjee*, Deputy Magistrate of Madaripore, dated August 31st, 1885.

gal arrest, and that it was not till after the peon and the others with him had discovered their mistake that he was released.

The Deputy Magistrate disbelieved the evidence for the defence, and found that the accused formed members of an unlawful assembly, with the common object of resisting the execution of a legal process, namely, the arrest of Kashi Chandra, and that force or violence was used by the unlawful assembly in prosecution of the common object. He also found that the accused resisted the peon in the execution of his duty to arrest the judgment-debtor. Upon these findings he convicted all the accused under ss. 147 and 353 of the Penal Code, and sentenced them to six months' rigorous imprisonment under s. 147, and two months' under s. 353. He also convicted Soshi Bhattacharjee of an offence under s. 324 of the Penal Code in respect of the hurt caused to Abbas, and passed a sentence of one month's rigorous imprisonment upon him in respect of that charge.

The Deputy Magistrate further directed that the sentences were to take effect one on the expiry of the other.

The accused then appealed to the Sessions Judge against the conviction and sentences. But the Judge confirmed the findings of the lower Court, and, considering the sentences passed not too severe, dismissed the appeals. The accused then applied to the High Court under its revisional powers to send for the record, upon the ground that the conviction and sentences under s. 353 as well under s. 147 of the Penal Code could not be sustained.

The case now came on to be argued.

Baboo *Ombica Churn Bose* for the petitioners.

No one appeared for the opposite party.

The judgment of the High Court (MITTER and BEVERLEY, JJ.) was as follows :—

In this case the record was sent for in order to ascertain whether the conviction and sentence under s. 353, as well as that under s. 147 of the Indian Penal Code, can be sustained.

It is contended before us that, inasmuch as by its definition in s. 146 of the Indian Penal Code, the offence of rioting involves the use of force or violence, the accused cannot be separately convicted and sentenced for the use of the same force under s. 353.

The facts, as found by both the lower Courts, are that one Ramdoyal Dey, a Civil Court peon, accompanied by Abbas Mirdha and Lal Mahmood, went to arrest one Kashi Chandra Bhattacharjee, that the process was resisted by the accused, and that both the peon and Abbas Mirdha were assaulted in the struggle that ensued.

The four accused were convicted under ss. 147 and 353 of the Indian Penal Code, and sentenced to a separate punishment under each section. Soshi Bhusan Bhattacharjee has also been convicted and sentenced under s. 324 of the Indian Penal Code for the assault committed on Abbas.

It having been found by the lower Courts that force was used both to the peon and also to Abbas, it seems clear that the force used to either by any member of the unlawful assembly would suffice to constitute the offence of rioting. It follows that the offence of rioting was completed by the assault on Abbas, and that the assault on the peon was a further offence under the first sub-section of s. 235 of the Code of Criminal Procedure.

1885.

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But the matter has been argued before us on the assumption that it was the force used towards the peon that constituted or completed the offence of rioting, and that the accused cannot fairly be convicted and sentenced under another section for the use of the same force.

We think that this view of the law is wrong, and that, even if Abbas had not been assaulted, the conviction and sentences passed for the assault on the peon were legal, and must be upheld. Sub-s. 3 of the section in question (235 of the Code of Criminal Procedure) runs as follows: "If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined, or for any offence constituted by any one or more of such acts.

In the present case we have acts separately constituting offences under ss. 143 and 353 of the Indian Penal Code, and, when combined, constituting an offence under s. 147 of the Indian Penal Code. Under the sub-section quoted, therefore, the accused might be charged with and tried at one trial for the offence under s. 147, for that under s. 143, or for that under s. 353. It follows that they might also be separately convicted and sentenced for each offence.

S. 235, however, goes on to say that "nothing in this section shall affect the Indian Penal Code, s. 71;" and turning to that section as amended by Act VIII. of 1882, we find it laid down that, in cases (such as that before us) falling under sub-s. 3 of s. 235 of the Code of Criminal Procedure, "the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

Now, the aggregate punishment actually awarded under ss. 147 and 353 of the Indian Penal Code is eight months' imprisonment only, whereas the Deputy Magistrate might have awarded two years' imprisonment under s. 147 alone. There is, therefore, nothing illegal in the sentences passed.

H. T. H.

Conviction and sentences upheld.

CRIMINAL REVISION.

Before Mr. Justice McDonell and Mr. Justice Beverley.

1886.

Feb. 18.

12 Cal. 520.

IN THE MATTER OF THE PETITION OF HAIDAR ALI.¹

Security for good behaviour—Criminal Procedure Code (Act X. of 1882), ss. 110, 112.

The mere fact that a person from whom security is required has been previously convicted of offences against property is not sufficient to justify proceedings under s. 110 of the Code of Criminal Procedure, unless there be additional evidence that the person complained against has done some act or resumed avocations indicating on his part an intention to return to his former course of life.

ONE Haidar Ali, on the evidence of certain constables, who stated that he, Haidar, was a thief and an old offender, and had neither residence nor employment; that he had only been released two months from jail, after having

¹ Criminal Revision, No. 61 of 1886, against the order of the Bench of Presidency Magistrates, consisting of Messrs. O. C. Dutt, M. S. Dutt, and S. Dutt, dated the 14th of January 1886.

undergone a sentence of five years' rigorous imprisonment for house-breaking ; and that he had, likewise, undergone a sentence of two years' rigorous imprisonment for theft in 1878, was called upon by a Bench of Presidency Magistrates to show cause, under s. 110 of Act X. of 1882, why he should not execute a bond with two sureties for his good behaviour in the sum of Rs. 100 each for a period of one year ; and on failure to find security was sentenced to simple imprisonment for one year, or until such time as he should be able to furnish the security.

The prisoner applied under the revisional sections to have this order set aside.

No one appeared at the hearing.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

We think that the proceedings of the Bench in this case ought to be set aside on two grounds. In the first place, the order made, under s. 112 of the Code of Criminal Procedure, does not comply with the provisions of that section. This is a mere technical irregularity ; but on general grounds we think that the mere fact that the person from whom the security was demanded had been previously convicted of offences against property is not in itself sufficient to justify proceedings under s. 110 of the Code, unless there is additional evidence (which in this case there is not) that the person complained against has done some act, or resumed avocations, that indicate on his part an intention to return to his former course of life, and to pursue a career of preying on the community. In this case the person from whom security was required had only recently been released from jail, and we think it was rather the duty of the police to assist him in finding honest employment than to apply to have him incarcerated for a further period merely on the ground of his previous convictions.

We set aside the order of the Bench, and direct that Haidar Ali be released.

T. A. P.

Order set aside.

CRIMINAL REVISION.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

CHUNDER KOOMAR PODDAR *v.* CHUNDRA KANTA GHOSE AND ANOTHER.¹

1885.

Nov. 19.

Criminal Procedure Code, 1882, s. 145—Inquiry as to possession—"Actual possession."

12 Cal. 521.

Under s. 145 of the Criminal Procedure Code, a Magistrate has to look to the "actual possession," that is, the possession, however obtained, of the party in possession at the time of the inquiry. *Ambler v. Pushong*² followed.

This case merely followed the interpretation put on s. 145 of the Criminal Procedure Code in the case of *Ambler v. Pushong*.³

Baboo *Rashbehari Ghose* for the petitioner.

Baboo *Durga Mohun Dass* for the opposite party.

J. V. W.

¹ Criminal Revision, No. 344 of 1885, against the order of F. H. Barrow, Esq., Officiating Magistrate of Fureedpore, dated June 12th, 1885.

² I. L. R., 11 Cal. 365.

CRIMINAL MOTION.

1885.

Nov. 23.

12 Cal. 522.

*Before Mr. Justice Mitter and Mr. Justice Agnew.*DARSUN LALL v. JUMUK LALL.¹*Criminal Procedure Code, 1882, s. 437—Power of Sessions Judge to order further inquiry.*

A Sessions Judge is not competent, under s. 437, Criminal Procedure Code, to direct the re-opening of the proceedings, merely because, in his opinion, the Subordinate Magistrate has not rightly appreciated the credit due to the witnesses. "Further inquiry" under that section means the taking of additional evidence, not the re-hearing of the same evidence.

THIS case merely followed the interpretation put on s. 437 of the Criminal Procedure Code in the cases of *Chundi Churn Bhattacharjee v. Hem Chunder Banerjee*;² *Jeabunkristo Roy v. Shib Chunder Dass*;³ and *Queen-Empress v. Ameer Khan*.⁴

Baboo *Koruna Sindhu Mookerjee* for the petitioner.

Baboo *Kashi Kanto Sen* for the opposite party.

J. V. W.

CRIMINAL REFERENCE.

Before Mr. Justice McDonell and Mr. Justice Beverley.

1886.

Feb. 5.

12 Cal. 535.

UPENDRA NATH DHAL (PETITIONER) v. SOUDAMINI DAS (OPPOSITE PARTY).⁵*Maintenance—Criminal Procedure Code (Act X. of 1882), ss. 488, 489.*

A Magistrate has no power, under s. 488 of the Code of Criminal Procedure, to make an order for maintenance at a progressively increasing rate.

He may, however, under s. 489, from time to time, alter the rate of the monthly allowance granted as maintenance under s. 488.

REFERENCE to the High Court under s. 438 of Act X. of 1882.

On the 29th October 1885 the Deputy Magistrate of Midnapore, under s. 488 of Act X. of 1882, passed an order for the maintenance of an illegitimate child on the following scale: (1), from date for two years at Rs. 1-8 per month; (2), after two years for two years more at Rs. 3 per month; (3), after that time until marriage at Rs. 6 per month.

The Sessions Judge being of opinion that the order, in as far as it prescribed a prospective increase of the allowance, was improper—*Musumat Munglo v. Jumna Das*⁶—sent up the case to the High Court, recommending the alteration of the order.

No one appeared for either party on the reference.

¹ Criminal Motion, No. 372 of 1885, against the order of *J. M. Kirkwood, Esq.*, Sessions Judge of Patna, dated 30th July 1885.

² I. L. R., 10 Cal. 207.

³ I. L. R., 10 Cal. 1027.

⁴ I. L. R., 8 Mad. 336.

⁵ Criminal Reference, No. 248 of 1885, made by *R. M. Towers, Esq.*, Sessions Judge of Midnapore, dated the 30th of December 1885, against the order of the Deputy Magistrate of Midnapore, dated the 29th of October 1885.

⁶ 2 All. H. C. 454.

The opinion of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

We think that the Sessions Judge is right. A Magistrate has no power to make an order under s. 488 of the Code of Criminal Procedure for maintenance at a progressively increasing rate. Under that section the allowance must be ordered at a fixed monthly rate, but under s. 489 it may be altered from time to time. We accordingly set aside that part of the Deputy Magistrate's order which directs a prospective increase in the rate, and direct that the allowance be levied at the rate of Rs. 1-8 only per mensem till such time as it may be altered under s. 480.

T. A. P.

Order varied.

CRIMINAL REVISION.

Before Mr. Justice McDonell and Mr. Justice Beverley.

DULAR DAT RAI (ACCUSED) *v.* NIJABAT HOSEIN (COMPLAINANT).¹

Revision—Criminal Procedure Code, 1882, Ch. XXXII.—Sonthal Pergunnahs—Act XXXVII. of 1855, s. 4 (cl. 1)—Scheduled Districts' Act (XIV. of 1874).

Under s. 4 (cl. 1) of Act XXXVII. of 1855 (which is still in force in the Sonthal Pergunnahs) all sentences passed in criminal cases are final.

An order under that Act sentencing an accused to imprisonment is not open to revision under Ch. XXXII. of the Code of Criminal Procedure.

On the 29th November 1885, one Nijabat Hosein laid a complaint in the Court of the Magistrate of Deoghur, in the Sonthal Pergunnahs, against one Dular Dat Rai under ss. 447 and 291 of the Penal Code. On the 6th December 1885 Dular Dat Rai was found guilty under s. 447, Penal Code, and was sentenced to a month's rigorous imprisonment. The prisoner applied to the High Court under the revisional sections, and obtained a rule calling upon the Crown to show cause why the conviction and sentence should not be set aside on certain grounds which are immaterial for the purposes of this report.

Baboo *Ambica Churn Bose* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown objected that the Court had no jurisdiction to hear the application, inasmuch as Act XXXVII. of 1855 was still in force in the Sonthal Pergunnahs; that the Scheduled Districts' Act, although repealing Act XXXVII. of 1855, had never been put into force in the Sonthal Pergunnahs; and that, therefore, Act XXXVII. remained unrepealed as far as that district was concerned; and that under s. 4 of that Act the order of the Magistrate was final, and not subject to revision by the High Court.

The order of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

On the 5th December last one Dular Dat Rai was convicted summarily of criminal trespass under s. 447, Indian Penal Code, by the Deputy Magistrate in charge of Deoghur in the Sonthal Pergunnahs, and was sentenced to one month's rigorous imprisonment. Upon his application to this Court, the Division Bench which at that time had charge of the criminal business of the Court made the following order :—

“Let a rule issue calling on the other side to show cause why the order complained of should not be set aside as prayed. Send for the record, and let

¹ Criminal Revision, No. 482 of 1885, against the order passed by *W. M. Smith, Esq.*, Deputy Magistrate of Deoghur, dated the 6th of December 1885.

1886.

UPENDRA
NATH DHAL
6?

SOUDAMINI
DASI,
12 Cal. 535.

1886.

March 1.

12 Cal. 536.

1886.

DULAR
DAT RAINIJABAT
HOSEIN,
12 Cal. 536.

the Magistrate have notice of this order. In the meantime, and until the further order of this Court, let the petitioner be enlarged on bail to the amount of Rs. 50."

It was objected that this Court had no jurisdiction to entertain the application. The order of the Court was, however, complied with, and the question of jurisdiction has since been fully argued before us.

The question turns upon the construction to be placed on the wording of s. 4, cl. 1, of Act XXXVII. of 1855.

We have ascertained that the rule was issued under a mistaken belief that that Act had been repealed and was no longer in force.

The Aft in question was repealed by the Scheduled Districts' Aft, 1874; but s. 2 of that Aft says: "This Aft extends in the first instance to the whole of British India other than the territories mentioned in the first schedule hereto annexed; and it shall come into force in each of the Scheduled Districts on the issue of a notification under s. 3 relating to such district."

The Sonthal Pergunnahs is one of the Scheduled Districts, and it does not appear that any notification under s. 3 has been issued relating to the Sonthal Pergunnahs. The Scheduled Districts' Aft is, therefore, not in force in the Sonthal Pergunnahs, and Aft XXXVII. of 1855 has not, therefore, been repealed.

The Code of Criminal Procedure is in force in the Sonthal Pergunnahs as in the rest of British India; but s. 1 of the Code provides that, "in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed by any other law now in force."

S. 2 of Aft XXXVII. of 1855 vests the administration of criminal justice in an officer or officers, to be appointed in that behalf by the Lieutenant-Governor of Bengal; and s. 4, cl. 1, provides that "all sentences in criminal cases which shall be passed by such officer or officers to the extent of the powers which may be, from time to time, conferred upon them respectively by the Lieutenant-Governor of Bengal according to the provisions of this Aft, shall be final." The question is, whether the use of the word "final" in this section bars this Court from exercising its powers of revision under Ch. XXXII. of the Code of Criminal Procedure.

We think that it has this effect, and that this Court has no revisional jurisdiction in the present case.

We think that a sentence can only be said to be final when it cannot be set aside or interfered with by any Court or authority, whether on appeal or otherwise.

S. 430 of the Code provides as follow: "Judgments and orders passed by an Appellate Court upon appeal shall be final except in the cases provided for in s. 417 and Ch. XXXII." Ch. XXXII. treats of Reference and Revision. According to the use of the word in the Code itself, therefore, a final order would not be open to revision unless that power were expressly reserved.

In this view we are supported by the decision of a Division Bench of this Court (MITTER and MACLEAN, JJ.), *In the matter of H. P. Boerresen*, dated 30th August 1880, in which it was held that this Court had no power to interfere in its revisional jurisdiction with a conviction passed by the Sub-divisional Officer of Doomka.

We accordingly discharge the rule. The petitioner will be required to undergo the remainder of his sentence.

T. A. P.

Rule discharged.

CRIMINAL REVISION.

*Before Mr. Justice McDonell and Mr. Justice Beverley.*KRISHNA DHONE DUTT AND OTHERS (PETITIONERS) *v.* TROILOKIA NATH BISWAS AND OTHERS (OPPOSITE PARTIES).¹

1886.

Feb. 8.

12 Cal. 539.

Criminal Procedure Code, Act X. of 1882, s. 145—"Tangible immoveable property"—Julkur, Dispute regarding a.

A dispute concerning the right to fish in a *julkur* is not a dispute concerning any "tangible immoveable property" within the meaning of s. 145 of the Code of Criminal Procedure.

Enquiries under s. 145 should be directed to the question as to which party is in possession of the subject of dispute before any proceedings in the Court have been taken in the matter.

THIS application arose out of a dispute between Krishna Dhone Dutt and others (first party) and Troilokia Nath Biswas and others (second party) concerning the possession of a *julkur* forming part of *julkur* Narainpur, but demarcated by an embankment; *julkur* Narainpur being in the possession of certain persons who held under the first party.

On the 16th August 1885, a petition was presented by the first party to the Deputy Magistrate, alleging that a breach of the peace was imminent in respect of the demarcated portion of this *julkur*, containing 105 bighas, inasmuch as the second party had excavated a *khal* or canal leading to the *julkur* with the object of drawing off and catching the fish of the *julkur*. This petition was not taken up by the Magistrate until the 24th August; but on the 23rd August it appeared that the embankment was cut, so as to effect a junction between the *khal* and the *julkur*.

On the 24th August, the Deputy Magistrate, having found that a breach of the peace was imminent, called upon the different parties to put in written statements of their respective claims as regarded possession of the 105 bighas forming the subject of dispute.

On the 17th November the Joint-Magistrate, to whom the case had been transferred, held that neither of the parties were in possession of the portion of the *julkur* in dispute on the 24th August, and he accordingly attached that portion of the *julkur*; but found that the second parties, having cut the embankment on the 23rd August, were in possession of the *khal* or cutting on the 23rd August, and he therefore ordered the second parties to be retained in possession of the *khal* or cutting till ousted by a decree of a Civil Court.

The first party applied to the High Court under the revisional sections of the Code to have this order set aside.

Mr. Henderson (with him Baboo Nil Madhub Bose) for the petitioners contended, *first*, that the dispute was not one concerning any "tangible immoveable property," and that, therefore, no order should have been made under s. 145—*Bejoy Nath Chatterjee v. Bengal Coal Co.*² and *Pramatha Bhushana Deb Roy v. Doorga Churn Bhattacharji*; ³ *second*, that, assuming that s. 145 did apply, the Magistrate should not have restricted the enquiry as to possession to the 24th August, but should have considered which party was

¹ Criminal Revision, No. 451 of 1885, against the order passed by H. F. T. Maguire, Esq., Joint-Magistrate of Alipore, dated the 17th of November 1885.

² 23 W. R. Cr. 45.

³ 1 L. R., 11 Cal. 413.

1886. in possession on the 16th August—*Ambler v. Pushong*;¹ that the subject of dispute was the 105 bighas which had been found to be in possession of neither party, but the order made placed the second party in possession of the *khal*, regarding which there was no dispute.
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- Baboo *Ambica Charan Bose* for the opposite party.
- The order of the Court (McDONELL and BEVERLEY, JJ.) was as follows:—
- The circumstances under which this rule was issued were the following:

On the 16th August a petition appears to have been presented to the Magistrate, alleging that a breach of the peace was imminent, in respect of a certain area of 105 bighas forming a part of a large *julkur*, or lake, called Nairainpur *julkur*, which the Joint-Magistrate says is admittedly in the possession of certain persons who hold under the first party. In that petition it was alleged that the second party had excavated a *khal* or canal leading to the *julkur* with the object of drawing off and catching the fish of the *julkur*. On the 23rd August it would appear that the embankment was cut, so as to effect a junction between the *khal* and the *julkur*; and on the 24th idem the Magistrate made an order in writing, under s. 145 of the Code of Criminal Procedure, calling upon the parties concerned to put in written statements of their respective claims as regards possession of the 105 bighas which form the subject of dispute. On the 17th November the Joint-Magistrate disposed of the matter in this way. He held that, as regards the 105 bighas, no one was in possession on the 24th August, the date on which the Magistrate's order was made, and he accordingly attached so much of the *julkur*, but he found that the second parties, having cut the embankment on the 23rd, were in possession of that cutting on the 24th, and he, therefore, ordered them to be retained in possession of that cutting, till ousted by a decree of the Civil Court.

It is contended that the Joint-Magistrate's order is bad on several grounds. In the first place, it is said that, the subject of dispute being merely the right of fishing in the *julkur*, the dispute was not concerning any tangible immovable property; and that, therefore, no order under s. 145 should have been made by the Magistrate. In support of this contention we have been referred to the remarks made in the cases of *Bejoy Nath Chatterjee v. Bengal Coal Co.*² and *Pramatha Bhusana Deb Roy v. Doorga Churn Bhattacharji*.³ We think that there is force in this contention; and that the order of the Joint-Magistrate is bad on this ground.

In the next place, it is contended that, even supposing the Joint-Magistrate had jurisdiction to proceed under s. 145, he was wrong in limiting the enquiry to the fact of possession on the 24th August, which was the date on which the Deputy Magistrate made his order. It is said that the enquiry should have been directed as to which party was in possession on or before the 16th August when the proceedings were instituted by the petition of that date, and that anything which occurred subsequently, which had the effect of changing the position of the parties, should not have been taken into account. We also think that there is force in this objection; and that the enquiry in such cases should be directed to the question as to which party was in possession of the subject of dispute before any proceedings in the Court had been taken in the matter.

Then a further objection, which we consider to be fatal to the order of the Joint-Magistrate, is this: That, whereas the subject of dispute was

¹ I. L. R., 11 Cal. 366.

³ I. L. R., 11 Cal. 413.

² 23 W. R. Cr. 45.

the 105 bighas which the Joint-Magistrate has found to be in the possession of neither party, the order he has made puts the second party into the possession of the *khal* or cutting regarding which there was no dispute, and as to the possession of which there was no question before him. The effect of this order is virtually to give to the second party possession of the whole of the *julkur*, so far as the fish may be drawn with the water into the *khal*. On all these grounds we think that the order of the Joint-Magistrate was bad in law, and must be set aside.

We, accordingly, make the rule absolute, and set aside the Joint-Magistrate's order.

T. A. P.

Order set aside.

CRIMINAL REFERENCE.

Before Mr. Justice McDonell and Mr. Justice Beverley.

RAM SUNDER DE (COMPLAINANT) *v.* RAJAB ALI AND ANOTHER (ACCUSED).¹

Bench of Magistrates—Order irregularly made—Hearing of part of case by one Bench, and decision by another.

Where, in a summary case, a Bench of Magistrates, after recording the evidence for the prosecution, postponed the case for the hearing of evidence for the defence; and on the day fixed for hearing, another Bench of Magistrates, none of whom had been members of the former Bench, recorded the evidence for the defence, and acquitted the accused, *held*, on a reference to the High Court, that the order must be set aside as being irregularly made.²

THE facts, as far as they are material for this report, were stated in the reference as follows:—

"The complainant prosecuted the defendants for mischief, the alleged offence having consisted in the destruction of a fence which had been some years *in situ*. After previous enquiry, under s. 202, the case was made over by me to the Comillah Bench of Honorary Magistrates for trial. A Bench consisting of three Honorary Magistrates recorded the depositions of witnesses summarily, and postponed the case to admit of the appearance of witnesses for the defence. On the day fixed for hearing the latter, four Honorary Magistrates, none of whom had previously attended, recorded the evidence for the defence, and acquitted the accused, on the ground that the case was a civil one.

"The deliberate destruction of a fence which had been in existence for 'five or seven years' appears to me to amount to mischief punishable under s. 426 of the Civil Procedure Code. It is absurd to allege that a man has a right to take the law into his own hands and enforce so ancient a claim so summarily. Things might, indeed, be different had the fence been newly erected, but no civil claim will excuse the causing such wrongful loss as appears to have been caused in this case. Again, the fact that one set of Honorary Magistrates commenced the proceedings, and, after hearing the evidence for the prosecution, remanded the case for the defence (thereby showing that they considered a *prima facie* case made out), while another set acquitted the defendants, was in itself materially prejudicial to the prosecutor, and the more so in that the case

¹ Criminal Reference, No. 17 of 1886, made by F. H. B. Skrine, Esq., Officiating Magistrate of Tipperah, dated the 3rd of February 1886.

² See *Sufferuddin v. Ibrahim*, I. L. R., 3 Cal. 754, and *Tarada Baladu v. Queen*, I. L. R., 3 Mad. 112.

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having been summarily tried, the record on which the second set based their opinion was necessarily scanty."

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No one appeared on the reference.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

Without going into the question whether or not any criminal offence has been committed, we think that the order of the Bench acquitting the accused must be set aside, on the ground that no member of that Bench was a member of the Bench which heard the evidence for the prosecution in the case. The trial was a summary one, in which the evidence is not recorded at any length; and it was, therefore, the more necessary that the case should have been disposed of by one or more Magistrates before whom the witnesses had been examined. We accordingly set aside the order of dismissal, and direct that the matter be tried *de novo*, or, if possible, disposed of by a Bench of whom one or more of the Magistrates who heard the evidence for the prosecution shall be members.

J. V. W.

Order set aside.

CRIMINAL REVISION.

Before Mr. Justice Wilson and Mr. Justice Porter.

1886.

April 14.

DHARMA DAS GHOSE (PETITIONER) v. NUSSERUDDIN (OPPOSITE PARTY).¹

12 Cal. 660.

Mischief—Penal Code (Act XLV. of 1860), s. 425—Revenue sale—Damage done between date of sale and grant of certificate—Wrongful loss to property held under incomplete title.

The damage contemplated in s. 425 of the Penal Code need not, necessarily, consist in the infringement of an existing, present, and complete right, but it may be caused by an act done *now* with the intention of defeating and rendering infructuous a right *about to come into existence*.

Any person who contracts to purchase property, and pays in a portion of the purchase-money, has such an interest in that property, although his title may not be complete, or his right final and conclusive, that the destruction of such property may cause to him wrongful loss or damage within the meaning of s. 425.

ONE Dharma Das Ghose was charged before the Deputy Magistrate of Sealdah with having committed mischief under the following circumstances :—

On the 14th December 1885 a small holding held by the accused from Government was sold by the Collector of the 24-Pergunnahs for arrears of revenue, and was purchased by the complainant, who, in accordance with the sale-law, on the day of sale, had deposited a portion of the purchase-money. The accused was present at the sale, and knew that the holding had been purchased by the complainant. Previously, however, to the completion of this sale, and prior to the expiry of the 60th day from the sale on which a certificate would have been granted to the complainant, the accused cut down certain fruit-trees on this holding, and was thereupon charged with committing the offence above mentioned. The Deputy Magistrate found the above facts proved against the accused, and found that the accused had the intention to cause wrongful loss to the complainant, who at the time had a prospective proprietary right in the

¹ Criminal Motion, No. 140 of 1886, against the order of *Moulvi Syud Ameer Hassein*, Deputy Magistrate of Sealdah, dated the 8th of February 1886.

holding, and convicted him under s. 425 of the Penal Code, sentencing him to a fine of Rs. 100, or in default two months' rigorous imprisonment.

On the 29th March 1886 the prisoner obtained a rule from PRINSEP and GRANT, JJ., calling upon the complainant to show cause why the conviction and sentence should not be set aside, on the ground that the act committed by the petitioner did not amount to mischief.

This rule came up for hearing on the 14th April 1886 before WILSON and PORTER, JJ.

Baboo *Umbica Churn Bose*, in support of the rule, contended that the offence was not committed, because at the time when the trees were cut down the legal title to the holding was still in the hands of the accused, the title of the complainant not having become complete, inasmuch as, under the sale-law, the sale could not become complete and final until the expiry of 60 days from the date of sale, and that, until the purchaser obtained his certificate of sale, he had not the rights of a proprietor, and could not have suffered any wrongful loss by the action of the accused.

Baboo *Rajendro Nath Bose* showed cause.

The order of the Court (WILSON and PORTER, JJ.) was as follows :—

The question raised in this rule is, whether on the facts found the offence of mischief was committed. [Here followed the facts and intention with which the act was done, as found by the Deputy Magistrate.]

The offence of mischief is defined in s. 425 of the Indian Penal Code : "Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits mischief." The first explanation to that section is that "it is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed." "It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not." And the second explanation is that "mischief may be committed by an act affecting property belonging to the person who commits the act." A person, therefore, who destroys property which at the time belongs to himself, with the intention of causing, or knowing that it is likely to cause, wrongful loss or damage to anybody else, is guilty of the offence of mischief.

Under Aft XI. of 1859, after a sale has taken place, and the money is paid, and thirty days have elapsed, and no appeal has been filed, the sale becomes final and conclusive.

The time is now altered by s. 4 of Beng. Aft VII. of 1868 from thirty to sixty days. Under s. 28 of Aft XI. of 1859, upon the sale becoming final and conclusive, the sale-certificate is to be given, which sale-certificate is evidence of title from the date specified in it.

The contention before us is that the offence of mischief was not committed in this case, because at the time when the trees were cut down the legal title was still in the accused person, and the title of the complainant had not then become final and conclusive. No doubt, the complainant's title had not become complete, nor had become final and conclusive, but it appears to us that it would be a great fallacy to say that therefore he had no such interest in the land that an interference with it might cause wrongful loss or damage. Any

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man who contracts to purchase property, and pays in portion of the purchase-money, has an interest in such property, though his title may not be complete, and his right final and conclusive; and we think it clear that he has such an interest that the destruction of the property may cause wrongful loss or damage to him. On this ground, therefore, we think that mischief has been committed in this case.

But there is another ground also for holding that the accused is guilty of mischief. The damage contemplated in s. 425 of the Indian Penal Code need not, necessarily, consist in the infringement of an existing, present, and complete right, but it may be caused by an act done now with the intention of defeating and rendering infructuous a right about to come into existence. This is clearly shown by *illus d.* to s. 425 itself.

That illustration says :

"A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief." A very little alteration in the words makes the case fit the present. A, knowing that his property has been sold in satisfaction of a public demand, in order to satisfy that public demand, and that the purchaser's title will, after the lapse of sixty days, become final and conclusive, destroys the fruit trees upon the land with the intention of thereby preventing the purchaser from obtaining the benefit of the purchase he has made, under which his title, now inchoate, will become final and conclusive after sixty days: A has committed mischief.

We think, therefore, that this rule should be discharged.

T. A. P.

Rule discharged.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Grant.

1886.

March 15.

LAL MIAH AND ANOTHER (COMPLAINANTS) v. NAZIR KHALASHI AND OTHERS (ACCUSED).¹

12 Cal. 696.

Criminal Procedure Code, 1882, s. 133—Removal of obstruction in public way—Question of title.

The powers given by s. 133 and the following sections of the Criminal Procedure Code, 1882, as to the removal of obstructions in public ways, are not intended to be exercised when there is a *bond fide* dispute as to the existence of the public right; the procedure under those sections not contemplating an inquiry into disputed questions of title.

This case merely followed the decisions in *Bhasiruddeen Bhuia v. Bahar Ali*² and *Askar Mea v. Sabdar Mea*.³

J. V. W.

¹ Criminal Reference, No. 38 of 1886.

² I. L. R., 11 Cal. 8.

³ I. L. R., 12 Cal. 137.

VOLUME XIII.

APPELLATE CRIMINAL.

*Before Mr. Justice Wilson and Mr. Justice Porter.*KALACHAND SIRCAR AND OTHERS *v.* QUEEN-EMPRESS.¹*Evidence Act (I. of 1872), s. 154—Hostile witness.*

1886.

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13 Cal. 53.

The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is, not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.

In this case there were four persons committed to the Sessions Court and charged as follows :—

Kalachand Sircar and Moser Sheikh with the murder of one Sital Chunder De, and with having wrongfully confined the said Sital Chunder De and four other persons, namely, Ketu, Adu, Lalu, and Meher, and with causing hurt to them with the object of compelling them to confess to the commission of theft and of compelling them to restore the property stolen.

Prannath Shaha with abetting all the above offences.

And Prosunno Coomar Shome, head constable, with abetment of hurt only.

The facts as stated by the prosecution were : That on the 18th October 1885 the house of one Shibnath Sircar was broken into, and property stolen therefrom ; that on the night of the 19th October, Ketu, Adu, Lalu, and Meher, were brought to the house of Prannath Shaha, and were there tortured and beaten with the object of extorting a confession from them regarding the persons implicated in the theft from Shibnath Sircar ; that at a later period that night Kalachand Sircar and Moser Sheikh were sent to bring Sital Chunder De to the same place, representing to him that he was sent for by Prosunno Coomar Shome, the head constable ; that on his appearance he was beaten so severely that he died of the injuries received then and there ; that the body of Sital was then removed from the house and placed on the side of the road not far from the house ; that a nephew of the deceased the next morning went to the police-station, and informed the police that the persons who had committed the crime were Prannath Shaha and his servants, Kalachand Sircar and Moser Sheikh, the head constable Prosunno Coomar, and a number of subordinate police-officers.

The matter was then inquired into by the Magistrate. Ketu, Adu, Lalu, and Meher, then gave evidence to the effect that the outrage was committed by Prannath Shaha and his servants, representing the police as taking no active part in the transaction.

On this part of the case in the Sessions Court the same witnesses, Ketu, Adu, Lalu, and Meher, there deposed that the two servants of Prannath, Kalachand and Moser Sheikh, took part in the outrage upon Sital, but that they

¹ Criminal Appeal, No. 173 of 1886, against the order passed by *W. H. Page, Esq.*, Sessions Judge of Furriddpore, dated the 4th of January 1886.

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13 Cal. 53.

did so neither in the presence nor with the sanction of Prannath Shaha, but under the orders of Prosunno Coomar Shome, the head constable.

At the time when each of the four witnesses in turn gave this evidence, the Government pleader, considering the witness to be hostile, asked permission of the Court to cross-examine under s. 154 of the Evidence Act. Objection to this was taken, but overruled, and the Government pleader, on obtaining leave from the Court, elicited from each witness that he had made a different statement in the Magistrate's Court; and in turn each witness thereupon stated that the evidence given by him before the Magistrate was the real truth of the story.

It was in the course of the trial in the Sessions Court proved that Ketu, Adu, Lalu, and Meher, were men of the worst character, two of them being at the time under police-surveillance.

The Sessions Judge and the assessors, considering that the story told by these witnesses before the Magistrate's Court was not to be believed, rejected the story given by them in the Sessions Court, save so much thereof as was elicited in the cross-examination held under s. 154 of the Evidence Act, and was confirmatory of the evidence given in the Magistrate's Court.

The prisoners, Kalachand and Moser, were thereupon found guilty of culpable homicide not amounting to murder, and were sentenced to rigorous imprisonment for seven years; and Prannath Shaha, who was found guilty of abetment of the same offence, was sentenced to ten years' rigorous imprisonment; Prosonno Coomar Shome being acquitted.

The prisoners, Kalachand, Moser, and Prannath, appealed.

Mr. *M. P. Gasper* (with him Baboo *Jasoda Nundun Pramanick*) for the appellants.—The treatment of the four witnesses of the Crown as hostile was not justifiable; there was no hostility, they merely made two contradictory statements. The effect of their evidence, I submit, is that they have proved themselves to be utterly unworthy of belief; all the evidence in chief brought out under s. 154 ought to be struck out, and, there being no other evidence directly in point, the prisoners must be acquitted. The evidence given by the witnesses before the Magistrate is not sufficient to convict unless it is corroborated by independent testimony. See *Queen v. Amanullah*.¹ As to the result of such cross-examination, see *Faulkner v. Brine*; ² *Wright v. Beckett*; ³ *Reg. v. Ball*.

[WILSON, J.—The English law at the time the last case was decided was entirely different to the law out here.] I refer to that case for the conclusion that you were formerly not allowed to do away with the effect of such evidence.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The Court (WILSON and PORTER, JJ.) were of opinion that the convictions could not safely be sustained, and acquitted the prisoners; but as regards that part of the case touching upon the cross-examination of the four witnesses for the prosecution under s. 154 of the Evidence Act, the following passage in their judgment is extracted:—

The Sessions Judge, in concurrence with the assessors who sat with him, has selected the story told by the four witnesses for the prosecution before the Magistrate, and has rejected the one that was told before him. He arrived at this result partly in this way: When the witnesses, one after another, told the

¹ 21 W. R. 49.² 1 F. & F. 254.³ 1 M. & R. 423.⁴ 8 C. & P. 745.

story sworn to in his own Court, he allowed the advocate for the prosecution to cross-examine these, his own witnesses, apparently on the ground that they were hostile (of which we can see no trace), and so brought out by reference to their depositions given before the Magistrate the story which had been given in the Magistrate's Court.

It appears to us that there was no sufficient ground for allowing such cross-examination. We can see nothing on the face of their evidence to lead to the supposition that they were hostile witnesses, that is, witnesses who were trying to defeat the prosecution by suppressing the truth. The mere fact that at a sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from the contradictions in their evidence—contradictions so far as Prannath is concerned, not in the details, but in the whole texture, of the story—is not that they are witnesses hostile to this side or to that, but that they are witnesses who ought not to be believed, unless supported by other satisfactory evidence, which they are not. That in itself is sufficient to show that the conviction of Prannath cannot be supported.

But it is a somewhat different question whether the conviction of Kalachand and Moser Sheikh can be supported. As to them, these four witnesses, Adu, Meher, Ketu, and Lalu, have not contradicted each other in any specific and precise way; but there is a substantial contradiction between the story now told against Kalachand and Moser Sheikh, and the story as told in the first information given at 4 o'clock on the day after the occurrence. In the first information it was represented that the outrage was committed by Prannath and his servants, and Prosunno Coomar, the jemadar, and the whole body of the police. That is quite inconsistent with the story believed in the Court below, that Kalachand and Moser Sheikh and others committed this crime with the sanction of Prannath, and in his presence, or with the other story that they did so under the orders of Prosonno Coomar, the police-jemadar alone.

When these witnesses have told such fundamentally different stories about the whole transaction, and when they are proved to be disreputable men, and the story told by them is on the face of it so full of unexplained improbabilities, we do not think it safe to act upon their unsupported testimony as to the *paris* these two men, Kalachand and Moser Sheikh, are said to have taken in the alleged outrage.

We, therefore, set aside the convictions, and acquit all three prisoners, Prannath Shaha Chowdhuri, Kalachand Sircar, and Moser Sheikh, and direct their release.

T. A. P.

Conviction set aside.

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CRIMINAL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

1886.

May 27.

IN THE MATTER OF THE CORPORATION OF THE TOWN OF CALCUTTA *v.* MATOO BEWAH AND OTHERS.¹

13 Cal. 108. *Beng. Act IV. of 1876, s. 248—Conviction for keeping animals without license—Continuing offence between date of summons and date of conviction—Second prosecution for same offence on different date.*

Under s. 248 of Beng. Act IV. of 1876, a milkman, who has been convicted and fined for keeping an animal without a license, cannot again be prosecuted for the continuance of the same offence before conviction, nor can he be separately prosecuted for the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction.

In a summons taken out on the 27th March against a milkman for an offence under s. 248, Beng. Act IV. of 1876, the offence was stated to have been committed on the 16th March; the case was fixed for the 8th April, when the defendant was convicted and fined by the Magistrate. Another summons had been taken out against him on the same day (27th March) for a similar offence stated to have been committed on the 25th March. *Held* that he could not be convicted on the second charge.

THE facts stated in the reference were as follows:—

The defendants, who are milkmen, were prosecuted under a summons taken out by Mr. Rebeiro, overseer, on the part of the Corporation of Calcutta, on the 27th March last, under s. 248 of Beng. Act IV. of 1876. The application stated that the offence was committed on 16th March, and the case was fixed for hearing on the 8th April, when it came on for hearing before the Presidency Magistrate, who convicted them, and fined them Rs. 8, Rs. 12, and Rs. 15 respectively.

Prior to the trial of this case a summons was also taken out against them on the same date, *i. e.*, 27th March, by Mr. George, inspector, on the part of the Corporation, under the same section.

The application stated that the offence was committed on 25th March, and the case was fixed for hearing on 10th April, when the case came on for trial before the Honorary Magistrate, he entertained doubt as to whether the defendants could be tried on the second summons taken out against them, pending the first summons and before its disposal. It was contended on behalf of the Corporation that there were two distinct offences, one committed on the 16th March and the other on the 25th, and that the conviction on the first summons was no bar to the trial of the defendants under the second summons. The Honorary Magistrate, however, was of opinion that s. 248 contemplated one substantive offence for keeping animals without license, and the fine not exceeding Rs. 100 covered the offence committed up to the date of conviction, and that the defendants could not be prosecuted for the same offence committed between the date of the first summons and the conviction on it; but at the request of the Corporation he referred for the opinion of the High Court the following questions:—

1. Whether, under s. 248 of Beng. Act IV. of 1876, a milkman who keeps any animal without such license as is mentioned therein, and who has been convicted and fined under that section by the Magistrate, can again be prosecuted for the continuance of the same offence before the date of such conviction.

¹ Criminal Reference No. 2 of 1886 has been referred to by Baboo Aushootosh Dhur, one of the Justices of the Peace for the Corporation of the Town of Calcutta, dated the 16th April 1886.

2. Whether, under s. 248 of Beng. Act IV. of 1876, a milkman who keeps any animal without such license as is mentioned therein can be separately prosecuted for the same offence for each day the offence is continued, as a separate and distinct offence under that section before conviction.

The parties were not represented on the hearing of the reference by the High Court.

The opinion of the Court (Pigot and Macpherson, JJ.) was as follows :—

We are of opinion that both questions should be answered in the negative. The section contemplates one offence and one prosecution, a conviction upon which is to involve a liability to fine not exceeding Rs. 100, and to a further fine not exceeding Rs. 20 for each day during which the offence is continued.

In *Garrett v. Messenger*¹ the offence was the keeping a house for public dancing, &c., without a license, and the section under which the prosecution was instituted provided that “every person keeping such house, &c., without such license as aforesaid, shall forfeit the sum of £100 to such person as will sue for the same.” Two actions were brought under the Act by common informers, each to recover a penalty of £100. A verdict was taken in the first, and in the second, Wills, J., held that the penal powers of the Act were exhausted by the recovery of one penalty : the full Court concurred in this view, Bovil, C.J., saying that, if the Legislature had intended that there should be more than one penalty, that intention would no doubt have been expressed in clear and unequivocal terms. That case was referred to in *Millnes v. Bale*,² where the distinction is pointed out between cases where a penalty is imposed in respect of a complex and continuous act, and those where it is imposed in respect of a simple uncomplicated offence which is complete.

In this case, the keeping of animals without a license is, as in the case of *Garrett v. Messenger*,¹ the keeping a house of entertainment without a license was a comprehensive offence to be proved by many acts, all of which constitute only one offence for which only one penalty is recoverable—that penalty being a fine not exceeding Rs. 100, and such further fine as may be imposed ; those of the acts done which are committed after summons and before conviction must be treated as part of it.

We therefore answer both questions submitted to us by the Magistrate in the negative.

J. V. W.

CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Macpherson.

IN THE MATTER OF THE PETITION OF RAM DAS MAGHI AND ANOTHER.³

Judgment—Form and contents of judgment—Criminal appeal to Magistrate—Criminal Procedure Code, 1882, ss. 367, 424.

A Magistrate, after hearing an appeal from the Deputy Magistrate, gave the following judgment : “I see no reason to distrust the finding of the lower Court. The sentence

1886.

IN THE
MATTER OF
THE CORPO-
RATION OF
THE TOWN OF
CALCUTTA
v.
MATOO
BEWAH,
13 Cal. 108.

1886.

May 20.

13 Cal. 110.

¹ L. R., 2 C. P. 583.

² L. R., 10 C. P. 595 and 597.

³ Criminal Revision, No. 192 of 1886, against the order passed by A. Boruah, Esq., Magistrate of Bogra, dated the 24th of March 1886, modifying the order passed by A. C. Chatterji, Esq., Deputy Magistrate of Bogra, dated the 19th of March 1886.

1886.
IN THE
MATTER OF
THE PETITION
OF RAM DAS
MAGHI,
13 Cal. 110.

passed, however, appears harsh. I reduce the term of imprisonment to fifteen days. The fines and terms of imprisonment in default will stand." *Held*, following the decision in *Kamruddin Dai v. Sonaton Mandal*,¹ that it was not a judgment within the meaning of ss. 367 and 424 of the Criminal Procedure Code.

THIS case merely followed the decision in *Kamruddin Dai v. Sonaton Mandal*,¹ holding on the authority of that case that the judgment given by the Magistrate was not a judgment in accordance with ss. 367 and 424 of the Code. The Court ordered the judgment to be set aside, and directed that the appeal should be reheard.

Baboo *Isvar Chandra Chakrabati* for petitioners.

Baboo *Durga Mohun Das* for opposite party.

J. V. W.

APPELLATE CRIMINAL.

Before Mr. Justice O'Kinealy and Mr. Justice Agnew.

ADYAN SING v. QUEEN-EMPRESS.²

1886.
June 30.
13 Cal. 121.

Discharge of accused—Further enquiry and order of commitment passed simultaneously by Sessions Judge—Depositions not read over to accused—Oral evidence—Statement of mooktear as to faulty record—Criminal Procedure Code (Act X. of 1882), s. 360—Evidence Act (I. of 1872), s. 91.

A Sessions Judge, after hearing a general statement made by a mooktear engaged in the case, considered that the depositions of certain witnesses taken in the Magistrate's Court did not conform with the requirements of s. 360 of the Code of Criminal Procedure, and refused to admit the depositions as evidence, and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions on behalf of the Crown; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held*, on appeal, that the conviction and sentence must be set aside.

ON the 31st December 1885 one Adyan Sing was alleged to have inflicted a severe wound on the arm of one Budhun, from which he subsequently died.

The Assistant Magistrate who held an enquiry into the case discharged the accused under ss. 209 and 253 of the Criminal Procedure Code.

The wife of the deceased then applied to the Sessions Judge to have the order of discharge set aside.

The Sessions Judge, on the 11th February, passed the following order: "I think the commitment of the accused on a charge of culpable homicide not amounting to murder should be ordered, but before so ordering, notice should be given to Adyan to show cause why such order should not be passed; if it is passed, I shall also direct the examination of the Inspector, Sub-Inspector, Assistant Surgeon, and Sub-Deputy Magistrate." On the hearing of this rule the Sessions Judge passed the following order: "I direct the commitment of the accused; it should be made at once, after taking the additional evidence referred to in my proceedings of the 11th instant in the presence of the accused if possible."

During the course of the trial before the Sessions Judge, Counsel for the accused attempted to contradict the witnesses for the prosecution by putting to

¹ I. L. R., 11 Cal. 449.

² Criminal Appeal, No. 331 of 1886, against the decision of *T. M. Kirkwood, Esq.*, Sessions Judge of Patna, dated the 29th March 1886.

them questions as to statements made by them in the Court of the Assistant Magistrate, and tendering their depositions in that Court as evidence against them. The Sessions Judge refused to admit these depositions on the ground, apparently, that a mooktear, who appeared for the defence, and who had conducted the case before the Assistant Magistrate, had told him (the Sessions Judge) that the Assistant Magistrate had not read these depositions over to the witnesses, and that it was the constant practice of the Assistant Magistrate to overlook this provision of s. 360 of the Criminal Procedure Code. Counsel for the accused thereupon applied that the Assistant Magistrate might be examined as a witness in the case, but this application was refused, on the ground that oral evidence by the Assistant Magistrate as to what was stated to him by the witnesses could not be received, the recorded depositions being the only proof of those statements under s. 91 of the Evidence Act.

At the conclusion of this trial the Sessions Judge, accepting the opinion of the majority of the jury, convicted the accused of grievous hurt, and sentenced him to three years' rigorous imprisonment.

The prisoner appealed.

Mr. G. Gregory (with him Baboo Omirtonauth Bose) for the appellant contended (1) that the order of commitment by the Sessions Judge simultaneously with the order for fresh evidence to be taken by the Assistant Magistrate was illegal; and on this point cited an unreported case of *In re Dahoo Singh* decided by Prinsep and Grant, JJ., dated 4th March 1886, Criminal Motion No. 96 of 1886, in which Mr. Kirkwood, the same Sessions Judge, had directed further enquiry to be made after the accused had been discharged by the Magistrate, and at the same time directed the accused to show cause why he should not be committed by the Sessions Court; and on the hearing of the rule, ordered the commitment of the accused, and directed the Magistrate to take the depositions of two fresh witnesses. On the case coming up before Prinsep and Grant, JJ., they set aside the order of commitment, remarking: "It seems to us that the Sessions Judge's order amounts to simultaneously directing further enquiry into the alleged offence, and to ordering commitment of the accused. Before the accused could be properly committed, it would be necessary to consider the value of the entire evidence against them, including the evidence which is now to be taken. Under these circumstances, we think the order of commitment was premature; it must accordingly be set aside. The Deputy Magistrate will proceed to carry out the orders of the Sessions Judge regarding further enquiry, and pass such orders therein as may seem to him proper on consideration of the evidence to be taken, and on consideration of the evidence previously taken by him." (2) That the Judge was wrong in not accepting the depositions in evidence; that s. 91 of the Evidence Act did not apply; that if the depositions could not be considered as the depositions of these witnesses by reason of the omission of the Magistrate, then it followed that there was no written record of what the witnesses actually said, and parol evidence was therefore receivable. (3) That the statement of the mooktear should not have been received by the Judge.

The Deputy Legal Remembrancer (Mr. Kilby) for the Crown.

The Court (O'KINEALY and AGNEW, JJ.) passed the following order:—

In this case the prisoner has been convicted of causing grievous hurt, and sentenced to three years' rigorous imprisonment and a fine of Rs. 200. On his trial before the Sessions Judge of Patna, whilst certain of the witnesses were

1886.

ADYAN SING

v.

QUEEN-
EMPRESS,
13 Cal. 121.

1886. under cross-examination, their depositions before the committing officer were tendered in evidence in order to contradict what they were then saying.

ADYAN SING

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EMPRESS,

13 Cal. 121.

No objection was taken to the reception in evidence of these depositions by the Crown; but the Sessions Judge, because a mooktear in Court, who is said to have conducted the case in the lower Court on behalf of the accused, made a general statement that the committing officer was not in the habit of reading over depositions to the witnesses, himself raised the objection, and refused to receive the evidence tendered on behalf of the prisoner. We think that he was wrong in doing so. There was no ground on which he could refuse the depositions. Further, we think that, if he had refused them rightly, the prisoner should not have been debarred from calling the Assistant Magistrate for examination.

We set aside the conviction and sentence, and direct that the prisoner be re-tried.

Let the depositions, if tendered in evidence, be received.

T. A. P.

Conviction set aside.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Grant.

GOLUCK CHANDRA PAL AND OTHERS (PETITIONERS) v. KALI
CHARAN DE (OPPOSITE PARTY).¹

1886.

April 30.

13 Cal. 175.

Criminal Procedure Code, s. 145—Penal Code, s. 188—Disobedience to order of public servant—Inquiry as to possession—Parties to inquiry.

In May 1883 the District Magistrate of Tipperah held an inquiry as to the possession of certain lands claimed by A and B, and having found on the evidence taken by him that A was in possession, he passed an order on the 21st of May 1883, declaring that A was entitled to hold possession of the disputed land until evicted in due course of law, and forbidding B and all others to disturb A's possession until such disturbance should be effected in due course of law. Previously to November 1885, B sold an eight-anna share of his interest in the disputed land to C, who at the time of his purchase had notice of the order of the 21st of May 1883. In November 1885, B and others went to the disputed lands, and attempted to turn A out of possession by force, and to compel the tenants of the lands to pay rent and give kabuliats to B and C. At the time that B and his companions went to the disputed land, the latter were aware of the order of the 21st of May 1883, though none of them was a party to the inquiry then made by the District Magistrate. In December 1885, they were all tried, and found guilty of disobedience to an order duly promulgated by a public servant. *Held* that the conviction was right.

Semble, that a reference by a Magistrate to a police-report which clearly sets out the probability of a breach of the peace is a sufficient statement of the reasons for the Magistrate's being satisfied of the existence of a dispute likely to cause a breach of the peace, within the meaning of s. 145 of the Code of Criminal Procedure.

In this case one of the accused, Bukshi Shonar, was tried and convicted under s. 15 of the Penal Code for harbouring persons hired for an unlawful assembly, while the others were tried and convicted for disobedience to an order duly promulgated by a public servant under s. 188 of the Penal Code. The facts of the case are as follows:—

Early in 1883, a dispute arose between Kutubudin, one of the accused, and rival zemindars named Nag, as to the ownership of a certain piece of land

¹ Criminal Revision, No. 72 of 1886, against the order passed by Baboo Sarat Chandra Dass, Deputy Magistrate of Tipperah, dated the 22nd of December 1885.

of which both parties claimed to be in possession. In May 1883, the District Magistrate, Mr. Hopkins, in consequence of certain reports which he had received from the police, held a proceeding under s. 145 of the Code of Criminal Procedure, and, having come to the conclusion on the evidence that the Nag zemindars were in possession of the disputed lands, he recorded an order declaring that the Nag zemindars "are entitled to retain possession of Jowar Nilakhi," the disputed land, "until evicted in due course of law, and all parties, Kutubudin and all others, are forbidden to disturb such possession until such disturbance is effected in due course of law." This order was passed on the 21st of May 1883. Kutubudin applied to the Sessions Judge to cancel the order of the District Magistrate, but the application was rejected.

Some time before November 1885, Kutubudin sold a moiety of the disputed land to one Abdul Baree, who purchased with full knowledge of the order of the 21st of May 1883, and on the 21st of November 1885, one Kali Charan De, the tahsildar of the Nag zemindars, complained to the District Magistrate that Kutubudin and the other accused had gone in a body to Nilakhi armed with *lathies* and spears, and had by force extorted money from the ryots of that place, and forced them to sign *kabuliats* in favour of Kutubudin and Abdul Baree. The District Magistrate made over the case to the Deputy Magistrate, who found that all the accused, with the exception of Bukshi Shonar, had, with full knowledge of the order of the 21st of May 1883, gone to Nilakhi for the purpose of supporting the claims of Kutubudin and Abdul Baree; he found the charge made by the tahsildar proved as against all but Bukshi Shonar, whom he found guilty of harbouring the others, knowing that they had been employed to become members of an unlawful assembly, and he sentenced them, some to imprisonment, and some to pay a fine. These findings and sentences were upheld by the District Magistrate on the 7th of January 1886. Thereupon the accused applied to the High Court under the provisions of s. 439 of the Code of Criminal Procedure, and obtained a rule calling upon the other side to show cause why the convictions should not be set aside.

Mr. *Evans* for the petitioners argued (1) that the order of the 21st of May 1883 was not directed to any of the accused; and (2) that order was not a legal one, and the accused were not bound by it. He referred to *Chunder Madhub Ghose v. Juggut Chunder Sen*¹ and *Kunund Narain Bhoop's case*.²

Mr. *Gasper* and Baboo *Ambica Charan Bose* for the opposite party.

The judgment of the Court (PRINSEP and GRANT, JJ.) was as follows:—

This is an application made on behalf of twenty-four persons, one of whom, Bukshi Shonar, has been convicted under s. 157 of the Indian Penal Code, and the others under s. 188. As regards Bukshi Shonar, it is sufficient to state that there is evidence which has been believed by the Deputy Magistrate and by the District Magistrate in appeal, which is sufficient for his conviction. There are no grounds for interfering as a Court of Revision in respect of this person.

It appears that in 1883 an order was passed by the Magistrate under s. 145 of the Code of Criminal Procedure in a dispute between certain members of the Nag family and Kutubudin, in which it was decided that the former was in possession of certain lands, and it was declared that they were entitled to retain possession thereof until evicted in due course of law, all disturbance of such possession until such eviction being forbidden.

1886.

GOLUCK
CHANDRA
PAL
v.
KALI CHARAN
DE,
13 Cal. 175.

¹ 4 C. L. R. 483.

² I. L. R., 4 Cal. 650.
I. L. R., Cal. 88.

1886.

GOLUCK
CHANDRA
PAL
v.

KALI CHARAN
DE,
13 Cal. 175.

The petitioners are in the service of Kutubudin and one who has purchased a small share of his property which adjoins the land in dispute, or have been engaged by those who represent these persons in the immediate neighbourhood of this land. They have now been convicted under s. 188 of the Indian Penal Code of having disobeyed an order passed in 1883 under s. 145 of the Code of Criminal Procedure, knowing that by this order they were directed to abstain from interfering with the possession of the Nag family.

The first objection raised is that, inasmuch as the order was not directed to them, they have not been properly convicted under s. 188.

The order in question was, no doubt, passed in a proceeding to which none of the petitioners were parties, but it was a general order, and had the effect of notifying to all concerned in the dispute then under adjudication that, as between those persons and the Nags, the Nags were to be maintained in possession. The petitioners are either servants of Kutubudin, the unsuccessful party in that case, or the purchasers of a share in his estate, and the attempt made to disturb the possession of the Nag family is exactly on the same grounds as set up in that case. That the petitioners were aware of the Magistrate's order is clear, and the only question, therefore, is whether they can properly be punished for direct disobedience to it. That order not only forbade all disturbance with the possession of the Nag family, but referred the opposite party to the Civil Court for a determination of the claim to possession set up by him. It is in consequence of an assertion of this very same claim that the present proceedings were instituted. The facts found show that these petitioners at the instance of Kutubudin have attempted to disturb the possession of the Nags in disobedience of the Magistrate's order, and they are therefore liable for the consequences as much as Kutubudin. We are accordingly of opinion that on the facts found by the lower Courts the petitioners have been rightly convicted.

It is next objected that the order in question was not a legal order, and that therefore the petitioners were not bound to obey it.

It appears that, instead of putting on the record of this trial as an exhibit the order itself, the Magistrate has made part of that record the whole of the previous record. This, we remark, was a most unusual and unnecessary proceeding, since the only portion of that record which was relevant to this trial was the order itself. Mr. Evans accordingly claimed the right to refer to all these proceedings, and contends that there is *nothing* to show that the Magistrate recorded a proceeding setting out the grounds upon which he considered that a breach of the peace was imminent, such as would authorize his interference between the parties; and he further contends, on the authority of certain cases decided in this High Court, that the proceedings are bad for want of jurisdiction, and that consequently the order was without authority, and cannot be enforced.

The cases on this point are, we observe, contradictory, and if it really arose, we should feel bound to refer the matter for settlement by a Full Bench; but on examination of the record we find no valid ground for this objection. The Magistrate refers to a police-report which clearly sets out the probability of a breach of the peace, and we must regard that report as forming part of, and incorporated with, the Magistrate's proceeding.

We accordingly see no sufficient grounds for interfering as a Court of Revision.

The rule is discharged.

P. O'K.

Rule discharged.

CRIMINAL REVISION.

*Before Mr. Justice O'Kinealy and Mr. Justice Agnew.*ANUND MOYI DABIA (PETITIONER) *v.* SHURNOMOYI (OPPOSITE PARTY).¹*Criminal Procedure Code, s. 145—Julkur right—Tangible immoveable property—Dispute regarding a julkur.*

1886.

June 28.

13 Cal. 179.

A dispute concerning a *julkur* right is not a dispute concerning "tangible immoveable property" within the meaning of s. 145 of the Code of Criminal Procedure, and cannot be inquired into by a Magistrate under the provisions of that section.

IN this case, the petitioner, Rani Anund Moyi Dabia, and the Maharani Shurnomoyi, each claimed to be in possession of the fishery of a *chora* or abandoned bed of the river Dhurla, which is commonly called the *Dasherhat chora*. The Maharani based her claim on a decree which she had obtained against the predecessors of the petitioner in the year 1867, and on the fact that in 1282 B.S. she had leased the fishing to her jotedar, Baboo Lukhi Kanto Sirkar, who had all along remained in possession. Rani Anund Moyi Dabia claimed to be in possession of the fishery by her ijaradar, Chandro Canto Manjhi. The Deputy Magistrate of Kurigram held a proceeding under s. 145 of the Criminal Procedure Code, and, having come to the conclusion on the evidence that the Maharani Shurnomoyi was in possession, passed the following order on the 10th of March 1886 :—

"Under these circumstances" (referring to the evidence of the disputes between the parties), "it appearing to me on the grounds duly recorded that a dispute, likely to induce a breach of the peace, existed between Maharani Shurnomoyi, zemindar of Pergunnah Bahirbond, and Rani Anund Moyi, zemindar of Pergunnah Pangah, concerning the fishery known as the *Dasherhat chora*, situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said fishery, and being satisfied by due inquiry had thereupon, without reference to the merits of the claim of either of the said parties to the legal right of possession, that the claim of actual possession by the said Maharani Shurnomoyi from Kowalipara Ghât down to the river Dhurla as marked in the plan is true, I do decide and declare that she is in possession of the said fishery from G. to H. marked in the plan, and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of her possession in the meantime."

Rani Anund Moyi Dabia presented a petition to the High Court under s. 439 of the Criminal Procedure Code, to set aside the order of the Deputy Magistrate.

Mr. *Evans* (Baboo *Grija Sunkur Mozoomdar* with him) for the petitioner contended that the subject of dispute being merely the right to a fishery, and not the right to possession of tangible immoveable property, the Deputy Magistrate had no jurisdiction to pass any order under s. 145 of the Code of Criminal Procedure. He referred to *Promotha Bhusana Deb Roy v. Doorga Churn Bhattacharjee*² and to *Krishna Dhone Dutt v. Troilokia Nath Biswas*.³

Baboo *Srinath Das* for the opposite party.

¹ Criminal Revision, No. 220 of 1886, against the order passed by *T. J. Mendes, Esq.*, Deputy Magistrate of Kurigram, dated the 10th of March 1886.

² 1. L. R., 11 Cal. 413.

³ 1. L. R., 12 Cal. 539.

1886.
ANUND MOYI
v.
DABIA
SHURNOMOI,
13 Cal. 179.

The judgment of the Court (O'KINEALY and AGNEW, JJ.) was delivered by

O'KINEALY, J.—We are of opinion that this rule should be made absolute.

The only point that we have to decide is whether the Deputy Magistrate, in dealing with the case, dealt with it merely as a case of dispute regarding a julkur right, or a case of dispute for possession of land covered with water. If it were a case of possession of land covered by water, and the right to fish was the ordinary right of a person who owned the land, clearly the Magistrate would have jurisdiction. On the other hand, if what he has decided was merely the right to fish and nothing more, the cases in this Court go to show that the Magistrate could not decide the case. Therefore, as I have already said, what we have to decide is, whether the Magistrate tried this as a case for possession of land covered with water, or simply as a dispute about the right to fish.

The Magistrate says: "I do decide and declare that she is in possession of the said fishery from G. to H." * * * ; and there is nothing to show that the Magistrate tried this case as for possession of land covered with water.

That being so, we must set aside the order of the Deputy Magistrate.

Order set aside.

P. O'K.

CRIMINAL REVISION.

Before Mr. Justice Miller and Mr. Justice Grant.

1886.
July 22.

POONIT SINGH (PETITIONER) v. MADHO BHOT AND ANOTHER (OPPOSITE PARTIES).¹

13 Cal. 270. *Penal Code, s. 182—False information to a public servant, Charge of—Criminal Procedure Code, s. 195—Sanction to prosecution—Separate convictions for one statement, Illegality of.*

An information was given to a police-officer, in the course of which two persons were named in whose houses stolen property belonging to a certain individual would be discovered: on complaint the information was found to be false, and the accused was convicted and punished for two offences under s. 182 as affecting two different persons. Held that, although the information related to two different persons, the accused could be charged with having made only one false statement, and punished for one offence under s. 182.

S. 195 of the Criminal Procedure Code clearly shows that a complaint directly made by a public servant mentioned therein is quite as sufficient as his sanction.

*Empress of India v. Radha Kishan*² dissented from.

This was an application for revision under s. 435 of the Criminal Procedure Code. The petitioner, Poonit Singh, was a resident of Bhutowli in Arrah, of which village Anandi Doss was a part-proprietor. A theft was reported to have taken place in the house of Anandi Doss, and a police-inquiry was pending. On the 3rd of April, Poonit Singh appeared before the District Superintendent, and asked that the houses of certain zemindars and mahajans of Arrah be searched, as he had overheard "four bad characters of his village (Bhutowli) say in the cutchery verandah that they had committed the theft in Anandi Doss's house, and the stolen property was in the houses of Chunder Koomar, Abdulla, and another." In consequence of this information, which was duly

¹ Criminal Revision, No. 282 of 1886, against the order passed by J. R. Hand, Esq., Deputy Magistrate of Arrah, dated the 23rd of June 1886.

² I. L. R., 5 All. 36.

recorded at the thanna the same day by the Sub-Inspector, the police searched the houses of Chunder Koomar and Abdulla. No property was found, and the original case was reported as false.

Upon complaint the Deputy Magistrate convicted Poonit Singh on two distinct charges under s. 182 of the Penal Code, one in the matter of Chunder Koomar, and the other in that of Abdulla, and sentenced him to three months' imprisonment under each head.

It was contended on behalf of the petitioner before the High Court (1) that the Deputy Magistrate had no jurisdiction to try an offence under s. 182 upon the complaint of a private person without the previous sanction of the public servant concerned; and (2) that the Deputy Magistrate was in error in awarding two distinct punishments for one and the same offence.

Mr. R. Mittra and Baboo Bhagobati Charan Ghose for the petitioner.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows:—

Two points of law have been argued before us: *first*, that the Magistrate was not authorized by law to allow this prosecution to be instituted on the complaint of a private individual. In support of this contention the learned Counsel who appeared for the petitioner has cited a ruling of the Allahabad High Court—*Empress of India v. Radha Kishan*.¹ With due deference to the learned Judge who decided that case, we are unable to take the view which has been taken in it. The language of s. 195 clearly shows that it would be quite sufficient if either the sanction of the public servant mentioned therein were given, or a complaint is directly made by him. That being so, we are unable to agree in the proposition of law laid down in the case cited before us. This point therefore fails, but, upon the second point which has been taken before us, we think that the conviction and sentence in one of the two cases are bad. The accused person was charged with having given a false information to a public servant, and in that information, no doubt, he mentioned the names of two persons in whose houses he, the accused, was informed that stolen property belonging to Anandi Doss would be found, but the statement is one, and therefore he could be charged only with having made one false statement. He was therefore erroneously tried for two distinct offences under s. 182. We therefore set aside the conviction and sentence in the second case, *viz.*, the case which was initiated on the complaint of Sheikh Abdulla. The conviction and sentence passed by the Magistrate in the case which was instituted on the complaint of Madho Bhot, gomastah of Baboo Chunder Coomar, will stand.

K. C. M.

Conviction quashed in part.

¹ I. L. R., 5 All. 36.

1886.

POONIT
SINGH

v.

MADHO
BHOT,

13 Cal. 270.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

1886.

IN THE MATTER OF THE PETITION OF YACOOB. YACOOB *v.* ADAMSON.¹

Aug. 4.

13 Cal. 272.

Presidency Magistrate—Summary trial—Conviction in non-appealable case—High Court as a Court of Revision—Code of Criminal Procedure, ss. 370, 537.

In every case which is not appealable to the High Court, a Presidency Magistrate should state his reasons for convicting the prisoner, so that the High Court may judge as to whether there were sufficient materials before the Magistrate to support the conviction.

In a case where the accused was convicted of theft and sentenced to six months' rigorous imprisonment, the notes of the evidence taken by the Magistrate did not afford sufficient materials upon which the prisoner could be legally convicted, and the Magistrate had omitted to record his reasons for the conviction under s. 370, cl. i of the Code of Criminal Procedure.

Held, by the High Court as a Court of Revision, that the conviction and sentence must be set aside, notwithstanding the provisions of s. 537 of the Code of Criminal Procedure.

In this case the accused Sheikh Yacooab applied to the High Court by petition, under the provisions of s. 439 of the Code of Criminal Procedure, praying that a finding and sentence passed by the Presidency Magistrate in a case wherein the petitioner was charged with the theft of certain Government Currency Notes should be set aside, on the ground that there was no evidence on the record to support the conviction. The Chief Magistrate's judgment was as follows:—

"In this case Captain Adamson missed a note for Rs. 100 and some Rs. 10 notes from his cabin, to which apparently accused No. 1, Yacooab, had access, and in fact was in charge of. Nothing was heard of the property for about a fortnight, when a Rs. 100 note seems to have been changed by the second accused Rahim Bux, who told the witness Adels that he got the note from accused No. 1. The number of the note for Rs. 100 has not been satisfactorily traced, and that being so, I am of opinion that the second accused must be acquitted. As to Yacooab I have no doubt whatever that it was he who committed the theft, and the order is that he do undergo six months' rigorous imprisonment."

Mr. *H. E. Mendies* for the petitioner.

Mr. *W. C. Bonnerjee* for the Crown.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

Captain Adamson, commander of the *Queen of Scots*, lost some currency notes from the pocket of his trousers, which were in his cabin. He says that he fetched the petitioner before us, who was the steward of the ship, and some others, and sent for the police. The matter, however, proceeded no further at that time, as no sufficient evidence was obtained. The petitioner then left his service, but a fortnight afterwards, in consequence of the changing of some notes, suspicion fell upon him, and he was placed with another man before the Presidency Magistrate on trial for the same theft. In the result the Presidency Magistrate held that the stolen notes had not been satisfactorily traced, and he consequently acquitted the other person. But with regard to the petitioner, the steward, the Presidency Magistrate stated that he had "no doubt whatever that it was he who had committed the theft, and the order is that he do undergo six

¹ Criminal Revision Case, No. 305 of 1886, against the order passed by Mr. F. J. Marsden, Chief Presidency Magistrate, Calcutta, dated the 8th July 1886.

months' rigorous imprisonment." There is nothing in the notes of the evidence taken by the Magistrate on this trial on which, so far as we can see, the petitioner could have been legally convicted, or which carries the case against him one step further than when it was first investigated by the police. The order passed is not appealable, but the matter has come before us as a Court of Revision on an application made by the petitioner who is under sentence. The Code of Criminal Procedure does not provide for the manner in which evidence should be recorded by a Presidency Magistrate in a case in which the sentence or order is not appealable, but it enacts (s. 370) that, instead of recording a judgment in the manner provided for other Courts, a Presidency Magistrate shall record certain particulars, amongst which cl. i declares that he shall record a brief statement of the reasons for the conviction. In the case before us, we have no evidence at all on which the petitioner could have been convicted, and the Magistrate, in convicting him, has omitted to record any statement of the reasons for the conviction. Reference may be made to s. 537, which declares that no finding, sentence, or order passed by a Court of competent jurisdiction shall be reversed or altered on revision on account of any error, omission, or irregularity in the judgment, unless such error, omission, or irregularity, has occasioned a failure of justice. In the present case it is impossible to say what the result of this error, omission, or irregularity on the part of the Presidency Magistrate may or may not have been. As the case now stands before us, there is absolutely no evidence against the petitioner, and there is no statement of any valid reasons on which the conviction could be supported. If a conviction such as this were to be maintained, the powers of this Court as a Court of Revision could never be exercised. We cannot suppose that this was intended by the Legislature. The case of *Empress v. Panjab Singh*¹ was a case analogous to that now before us, the matter under revision there being an order passed on a summary trial in which the Magistrate had failed to comply with cl. h, s. 263, which required him to "record a brief statement of the reasons of the conviction."

In that case it was held that the Magistrate should state those reasons in such a manner that this Court on revision may judge whether there were sufficient materials before him to support the conviction. Following that case, we are of opinion that the conviction and sentence must be set aside.

P. O'K.

Conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

IN THE MATTER OF DURGA CHARAN DAS *v.* SASHI BHUSAN
GUHO AND OTHERS.²

*Criminal Procedure Code, s. 133—Public way—Nuisance—Removal of obstruction
—Fury—Majority of jury.*

When a minority of a jury appointed under the provisions of s. 133 of the Criminal Procedure Code do not act, the Magistrate cannot proceed under that section upon a report submitted by the majority.

This was a reference by the Sessions Judge of Backergunge, the terms of which were as follows:—

¹ I. L. R., 6 Cal. 579.

² Criminal Reference, No. 150 of 1886, made by J. F. Bradbury, Esq., Sessions Judge of Backergunge, dated the 23rd of July 1886.

1886.

YACOOB

v.

ADAMSON,

13 Cal. 272.

1886.

Aug. 3.

13 Cal. 275.

1886.

DURGA
CHARAN
DAS

v.

SASHI
BHUSAN
GUHO,

13 Cal. 275.

"I have the honor to submit herewith the record of the proceedings of the Magistrate of the District under Ch. X., Criminal Procedure Code, on the petition of Durga Charan Das against Sashi Bhusan Guho and others, and to recommend that, for the reasons subjoined, the final order of the Magistrate be set aside, and he be directed to proceed afresh *ab initio* according to law.

"It appears that on the 30th October 1885, Durga Charan Das of Runshi, a neighbour of the applicant for revision, presented a petition to the Magistrate, to the effect that the applicant for revision and nine others had closed a public path by means of a thorny hedge and plantain-trees planted across the same.

"On the petition is endorsed the examination of the petitioner by the Magistrate: 'The defendants have bunded my road in Soshipore, south of my 'bari'; they have cut it, and planted on it suparis and plantains, and a new fence, and pulled down a 'char' that was there. It is a frequented path leading to the Government road.' The petitioner was required to adduce evidence in seven days. On the 9th November two witnesses were examined, and the same day the Magistrate ordered—'Notice to defendants under s. 133 to clear the road, or show cause on the 18th.' On the 18th November, the applicant for revision, Sashi Bhusan Guho, entered appearance, and showed cause by a counter-petition. The notice under s. 133 of the Criminal Procedure Code seems to have been directed to the applicant for revision alone, and required him to remove the hedge or fence and other obstructions, and to restore the path or road to its former condition before the 18th November, or show cause against Durga Charan Das's petition on that day, but neither it nor the petition refers expressly to the 'char' or bamboo bridge over the trench or ditch which severed the path in two. The counter-petition of the applicant for revision denied that he had obstructed any public path or road, affirmed the falsity of the petitioner Durga Charan Das's allegations, and moved the Magistrate to appoint a jury to pronounce whether the order directed to him was reasonable and proper. The defence of the applicant for revision appears to have been throughout that what the petitioner termed a permanent public path or road was in reality a temporary private path or foot-way over the applicant's own land. The Magistrate thereupon appointed a jury, consisting of the Sub-Registrar of Backergunge foreman, Rajmohon Chackrabarti and Ramcoomar Pal nominated by the Magistrate, and Bishumbhur and Mohima Chunder Ghatak nominated by the applicant for revision, and instructed them to submit their award by the 28th November.

"The time for the submission of the award was extended by successive orders of the 28th November, the 10th December, the 21st December, the 4th January, the 18th January, the 22nd February, the 27th February, the 8th March, the 15th March, the 10th and 29th April, but to no purpose. No award could be secured, and on the 11th May the Magistrate called on the parties to move for a fresh jury. Eventually, on the 20th May, the Magistrate appointed a fresh jury consisting of the Sub-Inspector of the Backergunge police-station foreman, Mani Chunder Ganguli and Raj Kumar De nominated by the Magistrate, and Jagat Chunder Dass and Kali Nath Dutto nominated by the applicant for revision. The 2nd June was appointed for the submission of their award, and an extension to the 11th June was accorded on the 2nd.

"On the 11th or the following day was received a document bearing the signatures of the Sub-Inspector of the Backergunge police-station, Prasunna Mukherjee, Mani Chunder Ganguli, and Raj Kumar De. It states that the jurymen nominated by the applicant for revision had taken no part in the award;

that Jagat Dass had not assisted at any deliberation of the jury; and that Kali Nath Dutto had at first attended, but subsequently absented himself. The nominees of the applicant for revision have therefore submitted no award at all.

"The other three jurymen reported that there was a path used by the public along the line indicated by the petitioner over the property of the applicant for revision, that the bridge over the trench separating what had been Shumbhu Mushrif's homestead, but was at the date of the report a plantation of the petitioner's, and the homestead of the applicant for revision, was a great convenience, and that its existence prejudiced nobody. The Magistrate on the 12th June accepted the report as the award of the majority of the jury, and held that the '*char*' was a public way, the bank of the ditch across which it was thrown being used in common by inhabitants of the village who crossed by the '*char*.' '*The rest of the alleged path is a mere private matter of complainant's.* I therefore order,' he added, 'that defendant shall, within ten days, replace the '*char*,' and I make no further order. This order is under s. 139. Issue notice under s. 140.' Accordingly the applicant for revision was notified of the order, and instructed to reconstruct the bridge over the trench in ten days. The notice bore date the 16th June, and against it the applicant for revision now moves. The notice expresses that the order of the 14th November had directed the reconstruction of the bridge. In fact, that order does not allude to the bridge, but merely instructs the applicant for revision to remove all obstructions to the use of the path or road, and restore it to its pristine condition. Again, the final notice requires merely the replacement of the bridge, and not the re-opening of the obstructed path leading to the bridge.

"Of what use is the bridge if blocked completely at one end? The applicant for revision blocked the path leading to the bridge, and, the bridge being thereby rendered useless, dismantled it. Now he has been enjoined to replace the bridge, but 'the rest of the *alleged* path is a mere private matter of complainant's.' The Magistrate talks of the '*alleged* path,' but I take it that there was a path which the applicant for revision has closed. Else there would have been no bridge. I do not, however, understand the remainder of the passage last quoted. 'The rest of the *alleged* path,' says the Magistrate, 'is a mere private matter of complainant's.' What is 'the rest of the *alleged* path'? The whole of the path or road save the few cubits spanned by the bridge? And what is the meaning of the phrase 'a mere private matter of complainant's'? Does it denote the Magistrate's conviction that, as regards the rest of the path claimed, the petitioner Durga Charan Das may have an easement or right of way, but there is no public right of way? It seems susceptible of no other meaning, and yet the signification I have attached to it stultifies the final order which is limited to the reconstruction of the bridge. As I have already remarked, what is the use of a bridge blocked completely at one end? Yet the Magistrate has not enjoined the removal of the block or obstruction, to wit, the fence or hedge. The applicant for revision has been required merely to reconstruct the bridge on its original site, and make it '*purbabot*,' or as it was before.

"Before proceedings under s. 133 of the Criminal Procedure Code can be legally instituted, it is the Magistrate's duty to find upon evidence that the path or road in question is or may be lawfully used by the public. It must be a way to which the public are entitled as of right, not a way over a piece of waste land, the use of which has been suffered by the owner or tenant of the land. A permissive way may be obstructed at pleasure by the owner or tenant of the land over which it runs. In this instance the Magistrate did not find that

I. L. R., Cal. 89.

1886.

DURGA
CHARAN
DAS

V.
SASHI
BHUSAN
GUHO,

13 Cal. 275.

1886.

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GUHO,
13 Cal. 275.

the way was public before appointing the jury. The publicity of the way was not a question for the jury; and, moreover, the Magistrate is clearly of opinion that a part at least of the subject of the dispute does not concern the public. *Ergo* the appointment of a jury was irregular. *In the matter of the Petition of Chunder Nath Sen*¹ and confer *Basaruddin Buiah v. Bahara Ali*² and *Askar Mea v. Sabdar Mea*³ and *Lal Miah v. Nazir Khalashi*.⁴

"Again, it cannot be said that the verdict of three jurymen out of five, two of whom did not express any opinion, and one of whom abstained altogether from the enquiry, is the verdict or award of the majority of the jury. One of the jury having declined to act, the only course legitimately open to the Magistrate was to appoint a fresh jury—*Uma Churn Mundle v. Foshein Sheikh*⁵—or proceed under s. 141 of the Criminal Procedure Code.

"Finally, there is the order absolute, which does not consist with the original notice under s. 133 of the Criminal Procedure Code, and which, as it stands, cannot be other than infructuous. A literal compliance therewith will leave the path or road obstructed as before, and nothing but literal compliance therewith can be enforced under s. 188 of the Indian Penal Code. I think the whole proceedings should be set aside, and the Magistrate directed to proceed afresh according to law."

No one appeared on the reference.

The judgment of the High Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

The majority of the jury contemplated by s. 139 of the Code of Criminal Procedure is, in our opinion, a majority of the jurors appointed, arrived at after due deliberation amongst themselves. In the present case the majority consists of the only jurors who took the trouble to attend the meetings held. The report so submitted cannot, therefore, be regarded as a finding of the majority of the jurors under s. 139 on which the Magistrate can act. But at the same time the Magistrate is competent to act under s. 141, and pass such orders as he may think fit. And as matters now stand, we think that we may take the order before us as one so passed on the further materials supplied by the parties.

We find no valid objection to the order regarding the "char" or bamboo bridge over the ditch. The petitioner has been found to have removed it, and its removal is an obstruction to the passage hitherto enjoyed. We accordingly decline to interfere.

P. O'K.

¹ I. L. R., 5 Cal. 875; 6 C. L. R. 379.

³ I. L. R., 12 Cal. 137.

⁵ I. L. R., 11 Cal. 84.

² I. L. R., 11 Cal. 8.

⁴ I. L. R., 12 Cal. 696.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

IN THE MATTER OF KALA CHAND AND OTHERS (PETITIONERS)

v. GUDADHUR BISWAS AND OTHERS (OPPOSITE PARTIES).¹

1886.

Aug. 3.

13 Cal. 304.

Compensation—Cattle Trespass Act, 1871, ss. 20, 22—False complaint.

A complaint was made against certain persons under s. 20 of the Cattle Trespass Act of 1871, charging them with having illegally seized and detained the complainant's cattle. The Assistant Magistrate who heard the complaint found it to be false, and he ordered the complainant to pay Rs. 20 compensation to the accused, and in default to suffer simple imprisonment for 21 days. On application to the High Court,—

Held that the order was illegal, and must be set aside.

IN this case Kala Chand Sheikh and others charged Gudadhur Biswas and others, under the provisions of s. 20 of the Cattle Trespass Act, Act I. of 1871, before the Assistant Magistrate of Meherpore, with having illegally seized and detained their cattle. The complaint was investigated by the Assistant Magistrate, and found to be false. He acquitted the accused under s. 245 of the Code of Criminal Procedure. He directed that each of the complainants should pay to the accused Rs. 20, and in default of paying the fines that they should suffer simple imprisonment for 21 days (s. 250 of the Code of Criminal Procedure), and he sanctioned the prosecution of the complainants and their witnesses for instituting a false case and for perjury.

The District and Sessions Judge of Nuddea quashed that portion of the Magistrate's order granting sanction to prosecute, but he declined to interfere with that portion of the order which awarded compensation to the accused. Kala Chand Sheikh and the other complainants then presented a petition to the High Court, praying that the order of the Assistant Magistrate awarding compensation should be set aside as illegal, and made without jurisdiction, on the ground, amongst others, that charging a person falsely with illegally seizing and detaining cattle under s. 20 of the Cattle Trespass Act is not an offence.

Baboo *Jusodah Nund Pramanik* and Baboo *Doorga Doss Dutt* for the petitioners.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows :—

For the reasons given in the case of *Pitchi v. Aukappa*,² in which we concur, the award of compensation under s. 250 of the Criminal Procedure Code, ordered by the Magistrate to be paid by the petitioner in consequence of his having made a frivolous and vexatious complaint of illegal seizure of his cattle, must be set aside, and the fine, if paid, must be refunded.

P. O'K.

¹ Criminal Revision Case, No. 313 of 1886, against the order passed by *Mr. J. Crawford*, Sessions Judge of Nuddea, dated the 5th June 1886, rejecting the order of *Mr. Hewling Luson*, Assistant Magistrate of Meherpore, dated the 9th April 1886.

² 1. L. R., 9 Mad. 102.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

1886.

ABDUL WAHAB (COMPLAINANT) v. CHANDIA (ACCUSED).¹

Aug. 17.

13 Cal. 305.

Magistrate, Jurisdiction of—Powers of Second-class Magistrates—Reference to District Magistrate—Committal to Court of Session—Criminal Procedure Code, s. 239.

An Assistant Magistrate convicted a person under ss. 406 and 417 of the Penal Code, and referred the case to the District Magistrate for sentence under the provisions of s. 349 of the Code of Criminal Procedure. The District Magistrate was of opinion that the offence was one properly punishable under s. 420 of the Penal Code, and one which the Assistant Magistrate had no jurisdiction to deal with, and that therefore the reference under s. 349 was *ultra vires* and illegal. On a reference to the High Court :

Held that the Assistant Magistrate was not wholly without jurisdiction, as he was competent to commit the accused to the Court of Session, though not to hold a trial, and that the District Magistrate might, if he thought proper, commit the accused to the Court of Session.

THIS was a reference to the High Court by the District Magistrate of Patna, under the provisions of s. 438 of the Code of Criminal Procedure. The terms of the reference are as follows :—

“ This case was tried by the Assistant Magistrate of Behar, who found the accused person guilty of offences under ss. 417 and 406 of the Penal Code, and forwarded her with the proceedings in the case to the District Magistrate in order that a more severe punishment might be imposed than the Assistant Magistrate, who has the powers of a Magistrate of the second class, is empowered to inflict.

“ The charge against the accused is that she dishonestly induced the complainant Mussammat Baharun to make over to her cash and ornaments of considerable value by pretending that she could get a charm worked upon them which would have the effect of enabling the owner to rear healthy children. I think it is quite clear that, if the accused has committed any offence, it is an offence punishable under s. 420 of the Penal Code, which a Second-class Magistrate is not competent to try, the delivery of the property being of the very essence of the offence, and that the Assistant Magistrate could not give himself jurisdiction by reducing the offence to one of ordinary cheating under s. 417 of the Penal Code.

“ S. 349 of the Criminal Procedure Code only applies to cases dealt with by a Magistrate ‘having jurisdiction,’ which evidently means jurisdiction to try the case, and as the Assistant Magistrate had not such jurisdiction, his proceedings, so far as the framing of the charge and the reference made under s. 349 of the Criminal Procedure Code are concerned, were *ultra vires* and illegal.

“ Under these circumstances, I am doubtful whether I can legally deal with the case either by myself, trying the accused for an offence under s. 420 of the Penal Code, or by committing her for trial to the Court of Session, inasmuch as, according to my view, the case has not been legally brought before me for disposal. I therefore solicit the orders of the Court, and would recommend that the charge framed by the Assistant Magistrate and the final order passed by him be set aside, and that he be directed to commit the accused

¹ Criminal Reference, No. 147 of 1886, made by C. C. Quince, Esq., Magistrate of Patna, dated the 21st of July 1886.

person for trial to the Court of Session, the offence being a serious one, and being punishable with imprisonment for seven years.

"Before making this reference I gave the Assistant Magistrate the opportunity of justifying his order, but he states that he has no remarks or explanation to offer, and refers to the order itself as containing the grounds on which it was passed."

No one appeared on the reference.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was as follows :—

This case has been referred to the District Magistrate under s. 349 of the Code of Criminal Procedure by the Assistant Magistrate who exercises powers of the second class, and has found the accused guilty under ss. 406, 417 of the Penal Code, the sentence which he can pass being in his opinion inadequate. The District Magistrate is of opinion that the offence committed is under s. 420 of the Penal Code, which is an offence beyond the jurisdiction of the Assistant Magistrate to try.

S. 349 of the Code of Criminal Procedure empowers the District Magistrate to pass such judgment, sentence, or order in the case as he thinks fit, and as is "according to law." Now, although the Assistant Magistrate was not competent to hold a trial of an offence under s. 420 of the Penal Code, he was competent to hold an inquiry, and commit to the Court of Session, so that he was not entirely without jurisdiction, and could have committed the case instead of referring it to the District Magistrate. The District Magistrate is, moreover, competent, in a case of this description, to pass such order as he thinks fit, and as is according to law, and he can consequently, if he thinks proper, commit the accused to the Court of Session. We may refer the District Magistrate to the cases of *In the matter of Chinnimarigadu*¹ and *Imperatrix v. Abdulla*.²

P. O'K.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

UMER ALI (COMPLAINANT) *v.* SAFER ALI AND ANOTHER (ACCUSED).³

Criminal Procedure Code, ss. 191, 202, 203—Complaint—Magistrate, Power of—
"May take cognizance of," Meaning of.

The use of the term "may take cognizance of any offence" in s. 191 of the Criminal Procedure Code does not make it optional with a Magistrate to hear a complainant, but refers rather to the action of the Magistrate in taking cognizance of an offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant, and then can either issue summons to the accused, or order an enquiry under s. 202, or dismiss the complaint under s. 203.

THE material portion of the reference to the High Court in this case was as follows :—

"On the 2nd June the complainant presented a complaint against Safer Ali and another, charging them with offences under ss. 323 and 352 of the Penal Code before the Joint-Magistrate of Chittagong, Mr. S. J. Douglas. That Ma-

1886.

ABDUL
WAHAB

v.
CHANDIA,
13 Cal. 305.

1886.

Aug. 19.

13 Cal. 334.

¹ I. L. R., 1 Mad. 289.

² I. L. R., 4 Bom. 240.

³ Criminal Reference, No. 154 of 1886, made by F. H. Harding, Esq., Sessions Judge of Chittagong, dated the 22nd of July 1886, against the order passed by S. J. Douglas, Esq., Joint-Magistrate of Chittagong, dated the 2nd of June 1886.

1886.

UMER ALI

v.

SAFER ALI,
13 Cal. 334.

gistrate recorded an order to the following effect: 'I decline to take cognizance of this frivolous matter. Complainant seems to have freely abused the man who cuffed him.' Against this order an application was made by the complainant before the late Officiating Sessions Judge, Mr. R. H. Greaves, who called upon the Joint-Magistrate to inform him whether complainant had been examined before his complaint was dismissed. The Joint-Magistrate in his reply informed him that the complaint had not been dismissed at all, but that, under s. 191 of the Criminal Procedure Code, he had declined to take cognizance of the offences stated in the complaint, that section by the use of the words 'may take cognizance of an offence upon receiving a complaint of facts which constitute such offence' authorizing a Magistrate to use his discretion in so taking cognizance. With this view of the law the late Officiating Sessions Judge disagreed, and a further explanation was called for from the Joint-Magistrate: that explanation has since been received. The opinion of the late Officiating Sessions Judge was that the matter should be referred to the High Court, and, as I am of the same opinion as he was, I am adopting this course.

"It appears to me that s. 191 of the Criminal Procedure Code does not contemplate such a procedure as that which has been adopted by the Joint-Magistrate. It specifies the circumstances in the existence of any one of which a Magistrate may take cognizance of an offence, and in the absence of which he is precluded from taking such cognizance. The words 'take cognizance' are not defined in the Criminal Procedure Code. In the present instance the petition was received by the subordinates of the Joint-Magistrate's Court, and the stamp was punched. It appears to me that, having gone so far, the Joint-Magistrate was bound to record the examination of the complainant under s. 200, after which he could have dealt with the case under ss. 202 and 203 if he thought proper.

"The matter is one with which I am not able to deal under s. 437, for the complaint has not been dismissed under s. 203. That s. 191 was not intended to confer upon Magistrates the power of dealing with complaints in the manner adopted by the Joint-Magistrate is, I think, apparent from the fact that, whilst s. 437 gives the Court of Session power to order an enquiry into a complaint which has been dismissed under s. 203, it gives it no such power with regard to cases of which the Magistrate has refused to take cognizance. That this is an omission is very improbable, for this asserted power of refusing to take cognizance under s. 191 is even more likely to be abused than that of dismissal given under s. 203.

"The matter is one of considerable importance, and I think it desirable on this account to have an authoritative decision on the point."

No one appeared for either party on the reference.

The opinion of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

The Joint-Magistrate has taken an erroneous view of the law regarding proceedings to be taken on receipt of a complaint made under s. 191 of the Code of Criminal Procedure. He is not competent to refuse to take cognizance of an offence on receipt of a complaint of facts constituting an offence, but he is rather bound to examine the complainant. He can then proceed to issue summons on the accused, or to order an enquiry under s. 202, or to dismiss the complaint under s. 203. The use of the term "may take cognizance of any offence" does not make it optional with a Magistrate to hear the complainant. It refers rather to the action of a Magistrate in taking cognizance of an offence in either of these specified courses in which the facts, constituting an offence, may be brought to his notice. The case must be tried.

J. V. W.

APPELLATE CRIMINAL.

*Before Mr. Justice Mitter and Mr. Justice Grant.*ABDUL HAMID *v.* THE EMPRESS.¹

1886.

Sep. 7.

Forgery—Penal Code, s. 464—Intention in fabricating documents—Fraudulent and dishonest fabrication.

13 Cal. 349.

The accused, who was a copyist in the Sub-divisional Office at B, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post, and purporting to have been made by the Sub-divisional Officer of B, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-divisional Officer at B, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-divisional Officer, having some suspicion as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post-office, the accused fabricated a third document, purporting to be a letter from the Sub-divisional Officer to the post-master, asking him to stop the despatch of the demi-official letter. The accused was charged with, and convicted in the Sessions Court of, the offence of forgery, under s. 464 of the Penal Code, in respect of the three documents. *Held* the conviction was right with regard to the two first documents, but with regard to the third document it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of that section.

THE facts of this case are sufficiently stated in the judgment of the Court (MITTER and GRANT, JJ.).

Baboo *Umbica Churn Bose* for the appellant.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The learned vakeel for the appellant has not contested the finding of the Sessions Judge, but has contended that upon that finding the Sessions Judge ought not to have held that the appellant made a false document within the meaning of s. 464 of the Indian Penal Code in respect of documents X, C, and K, which formed the subject of the charges framed against the appellant. The facts of the case are these: The third clerkship in the Sub-divisional Office at Budruck having fallen vacant, an application, purporting to have been made by the appellant, who was a copyist in that office, reached the Collector of Balasore applying for the post. At the foot of this application there was an endorsement, purporting to have been made by the Sub-divisional Officer of Budruck, recommending the applicant for the post. The document marked X is the endorsement in question, and it has been found to have been falsely made by the appellant. The document marked C purports to be a letter from the Collector of Balasore to the Sub-divisional Officer at Budruck, informing the latter officer that he, the Collector, had selected the appellant for the vacant post. This is also found to have been fabricated by the appellant. A suspicion having arisen in the mind of the Sub-divisional Officer of Budruck as to the genuineness of this document, he wrote a demi-official letter to the Collector of Balasore to ascertain whether the document marked C was genuine. This letter was posted in the local post-office. The appellant, having got an inkling of this fact, fabricated a letter purporting to be written by the Sub-divisional Officer to the address of the post-master, asking him to stop the despatch of his demi-official letter. This document is marked K, and it has been also found that it was fabricated by the appellant. The appellant has been found guilty of forgery in respect of all these three documents, and has been sentenced by the Sessions Judge to three years' rigorous imprisonment, that is to say, rigor-

¹ Criminal Appeal, No. 491 of 1886, against the sentence passed by *J. B. Worgan, Esq.*, Sessions Judge of Cuttack, dated the 28th of June 1886.

1886.

ABDUL
HAMID

v.

THE
EMPRESS,
13 Cal. 349.

ous imprisonment for one year in respect of the forgery of each of these three documents. It has been found, and it is clear, that the object of the appellant in fabricating two of these documents was to obtain the vacant clerkship by deceiving the Sub-divisional Officer of Budruck and the Collector of Balasore. Upon these facts it was contended before us that, under s. 464 of the Indian Penal Code, the appellant could not be held to have made a false document in any one of the three instances mentioned above. The contention of the learned vakeel is that, although he fabricated these documents, still it cannot be said that he fabricated them either dishonestly or fraudulently within the meaning of the definitions of these two words given in ss. 24 and 25 of the Indian Penal Code.

We are of opinion that this contention is not sound as regards the documents X and C. Whether or not, under the circumstances mentioned above, the appellant may be said to have fabricated these two documents "dishonestly," it is clear to us that he fabricated them fraudulently within the meaning of the definition of that word given in the Indian Penal Code. As already remarked, his object was to obtain the vacant post in the Sub-divisional Office at Budruck. His intention, therefore, in making these two false documents was to obtain some pecuniary advantage by deceiving the Sub-divisional Officer as well as the Collector. In fabricating X his intention was to deceive the Collector of Balasore; in fabricating C his intention was to deceive the Sub-divisional Officer of Budruck. He, therefore, made these two documents falsely with a view to deceive the Collector of Balasore and the Sub-divisional Officer of Budruck respectively, and with the intention of gaining a pecuniary advantage by securing his appointment to the post which was vacant in the Sub-divisional Office of Budruck. That being so, we think that he made these documents fraudulently within the meaning of s. 25 of the Indian Penal Code. But, as regards K, we are of opinion that the contention of the learned vakeel is correct. The intention with which the appellant made this false document was evidently to screen himself from detection of the fraud which he had already committed by fabricating the documents X and C. That being the intention with which K was fabricated, it cannot be said that he made that document falsely either "dishonestly" or "fraudulently." His intention was not to cause any wrongful loss to another or wrongful gain to himself, or to derive some pecuniary advantage to himself. The conviction, therefore, as regards K must be set aside, but the convictions as regards X and C will stand. Having regard to the gravity of the offence committed by the appellant, we are of opinion that no lighter sentence than the one awarded by the Sessions Judge would meet the ends of justice. We, therefore, sentence the appellant to two years' rigorous imprisonment in respect of the forgery of X, and leave the sentence as regards C unaltered.

The result is that the cumulative sentence of three years' rigorous imprisonment awarded by the Sessions Judge will stand.

J. V. W.

VOLUME XIV.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice Macpherson, and Mr. Justice Grant.

IN THE MATTER OF THE PETITION OF F. W. GIBBONS.

Review of judgment of High Court—Criminal Procedure Code (Act X. of 1882), s. 369.

1886.

Sep. 4.

14 Cal. 42.

The verdict and judgment of a Divisional Bench of a High Court, coupled with the sentence in a criminal case, are absolutely final, and, as soon as they have been pronounced and signed by the Judges, the High Court is *functus officio*, and neither the Court itself, nor any Bench of it, has any power to revise that decision, or interfere with it in any way.

This was an application in which the petitioner prayed that the High Court would review or revise the judgment and sentence of a Division Bench of the said Court.

The petitioner's case had been tried before the Sessions Judge of the Assam Valley Districts, and on the trial the jury unanimously acquitted him of the offence with which he was charged. The Judge differed from the verdict, and consequently referred the case to the High Court, under s. 307 of the Criminal Procedure Code. The case came before a Division Bench of the Court (Mitter and Grant, JJ.), who reversed the verdict of acquittal, and convicted and sentenced the petitioner to one year's rigorous imprisonment, and a fine of Rs. 1,000, or in default to suffer six months' further imprisonment.

Subsequently, on the 31st August, Mr. *Pugh* (with him Mr. *Evans*) applied to the Chief Justice to appoint a Bench to hear an application to review such order; and, considering the importance of the case, Mr. *Pugh* asked that a special Bench, consisting of more than two Judges, might be appointed. This application was based upon a petition in which the accused prayed that the judgment and sentence of the Division Bench of the High Court might be reviewed and revised, and that he might in the *interim* be released on bail. Upon that application the Chief Justice appointed the present Bench to hear the questions raised in the petition argued, but in doing so stated that Mr. *Pugh* was to understand that, upon the application being heard, all objections, if any, would have to be considered as to whether the Bench so appointed had any jurisdiction to hear the application at all.

The application now came on for hearing.

Mr. *Pugh* and Mr. *Evans* for the petitioner.

Mr. *Pugh*.—I apply upon petition for a review or revision of the judgment or order passed by a Bench of this Court consisting of Mr. Justice Mitter and Mr. Justice Grant, and shall not read the petition further than is necessary to show your Lordships the points which I propose to raise.

PETHERAM, C.J.—The first question is, whether there is any power to review or revise that judgment, whether there is any jurisdiction or not.

Mr. *Pugh*.—I shall only go into such facts as will illustrate the points which will arise.

I. L. R., Cal. 90.

1886.

IN THE
MATTER OF
GIBBONS,
14 Cal. 42.

WILSON, J.—To my mind there is an earlier question, and that is whether this Bench, as at present constituted, can entertain the question.

Mr. *Pugh*.—There is the case of *In the matter of Abdool Sobhan*,¹ in which the late Chief Justice considered an order made by Mr. Justice Cunningham and Mr. Justice Prinsep, and in the course of that hearing the Chief Justice observed that the Original Bench had expressed their willingness to hear the case again, and it was taken up.

MITTER, J.—If I remember right, that judgment was against your contention. The Chief Justice distinctly ruled that he had no power to constitute a Bench.

Mr. *Pugh* (after reading the judgment in that case).—In applying for this review and hearing I applied for it on the grounds of the extreme gravity of the questions involved. In that case the circumstances were that the Judges declined to hear the matter themselves, which is not the case here. No doubt, in that case the late Chief Justice thought it was within his competence to order that such a Bench should sit, but I do not know how he arrived at that conclusion. There is no rule on the subject in the Code of Criminal Procedure. Supposing there had been a miscarriage of justice or any error committed, there was no rule that that should only be rectified by the Judges who passed the order, and not by a Full Bench of the Court. I contend that such a matter could be heard before any Bench, and that it is within the province of the Chief Justice to appoint a Bench of a larger number than two Judges to hear such a matter.

WILSON, J.—As I understand, the case is this : A Bench of this Court, consisting of two Judges, has duly heard and disposed of the matter, and you now ask that another Bench should be appointed to overrule their decision.

Mr. *Pugh*.—I contend that the Court has power to grant a review in a criminal matter of this nature. Since the Code of Criminal Procedure of 1861, under which this Court had no power to grant a review, considerable legislation and numerous changes in the law have taken place. In England there always existed the "writ of error" to the Court of Queen's Bench from the decisions of inferior Courts. When, however, the Court of Queen's Bench was itself in error, when the error appeared on the face of the judgment, the subject had still his remedy, and under recent legislation he is enabled to go to the Court of Appeal, the section of the Judicature Act conferring such right being in the widest terms. Here the only thing corresponding to that right is the right to ask for a review, and the tendency of legislation here between the two Acts of 1861 and 1882 shows that the intention of the Legislature has been to provide the subject with a more easy and quicker remedy.

PETHERAM, C.J.—You must go the length of saying that, if there is power to review a judgment of conviction, there is also power to review a judgment of acquittal.

Mr. *Pugh*.—Of course, I must go that length. S. 369 of the Criminal Procedure Code, in limiting the power of Courts other than a High Court to alter or review its judgment after it has been signed, by implication shows that a High Court has the power to review its judgments. I contend that that section is an enabling one, and should, in matters such as these, receive a liberal interpretation. Upon the point I rely also on s. 439.

¹ 1. L. R., 8 Cal. 63.

Mr. Pugh then proceeded to refer to an unreported case, No. 69 of 1885, *Ramdass petitioner*, in which he stated that a Bench consisting of Prinsep and Pigot, JJ., reheard a case after judgment had been signed, when he was stopped by the Chief Justice, who intimated that he must decline to look into or be guided by unreported cases.

Mr. Evans followed on the same side.

The following opinions were delivered by the Full Bench :—

PETHERAM, C.J.—I quite agree with the remark of Mr. Evans that this is a matter of very grave importance, and it was because I thought that it was a matter of very grave importance, and not because I had any doubt about the law, that I constituted this Bench for the purpose of hearing it argued, and I was all the more led to do so by the fact that I was told that a Division Bench of this Court had expressed a doubt as to whether there was not a power inherent in the Court itself to review a judgment of a Division Bench in a criminal case : and when I say, to review a judgment of a Division Bench, I mean, to review a judgment of a Division Bench by itself, because, in my opinion, every Division Bench constitutes a Court in itself for the purpose of its judgment, and every judgment of a Division Bench is a judgment of the Court ; and, speaking for myself (and as to this I wish to guard myself from expressing any opinion but my own), I do not think any difference exists between one Bench and another, so that it must be constituted of the same Judges to review a judgment of the Court, supposing it to be a judgment which is subject to review.

Speaking for myself, and, indeed, in this matter I think for the whole of the Judges constituting this Bench, I have no doubt whatever that, in cases of this kind, no power of review resides in the Court or in any Bench of the Court. This is an opinion which I have expressed before in the High Court at Allahabad [*Queen-Empress v. Durga Charan*¹], and it is an opinion which has been expressed in the High Court at Bombay [*Queen-Empress v. Fox*²], and in opposition to which, so far as I know, there is no reported case to be found.

The question arises under various sections of the Code of Criminal Procedure, and the first section that applies to the matter is s. 306.

S. 306 provides that, where an accused person has been acquitted or convicted by a jury, the Judge shall either record judgment of acquittal or pass sentence on him according to law.

So far as that section is concerned, unless there was another section that qualified it, that acquittal or conviction stands, in my opinion, exactly on the same footing as an acquittal or conviction by the verdict of a jury in England, and is final as to the guilt or innocence of the accused, so far as Courts of Justice are concerned.

Then, following upon that, comes s. 307, and that section provides that, where the Sessions Judge disagrees with the verdict of the jury, he may, if he thinks fit, submit the case to the High Court with his reasons for so disagreeing, and the High Court is then invested with this power in dealing with the case ; the High Court " may convict or acquit the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it ; and if it convicts him, may pass such sentence as might have been passed by the Court of Session."

So that, as it seems to me, the effect of s. 307, read with s. 306, is to say that, if the Judge who tries the case is dissatisfied with the verdict, and the

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IN THE
MATTER OF
GIBBONS,
14 Cal. 42.

¹ I. L. R., 7 All. 672.

² I. L. R., 10 Bom. 176.

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High Court, upon a consideration of the whole case, accepts his view, they may substitute their verdict for the verdict of the jury, and, upon that being done, may pass sentence upon him, but there is nothing whatever in these two sections to place the judgment and verdict of the High Court, under these circumstances, in any different position from that in which the verdict of the jury and the judgment of the Court would have been if it had been accepted by the Judge and he had passed sentence accordingly; and the verdict, judgment, and sentence, under s. 306, would, under such circumstances, have been final.

That being so, the question then arises whether this state of things is varied by any of the following sections, and whether those sections give, either a power of appealing from the Division Bench which heard the matter to some other Bench of this Court, or give the Court itself, or the Bench constituted in the same way, a power of revision.

The first section which is relied upon is s. 369. S. 369 states that "no Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in s. 395, or to correct a clerical error."

In my opinion, the effect of the words "other than a High Court" is precisely the same as if in place of them the legislature had at the end of the section added these words, "this section does not apply to the High Court." There is no substantive enactment in that section with reference to the High Court, and all it does is to reserve the powers which existed in the High Court before, so that they are in no degree taken away. What the powers of the High Court were before, it is unnecessary to consider; but whatever they were, they were reserved, and they were in the same position after this section was passed as they had been in before; and inasmuch as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power, and therefore it appears that this section does not help the applicant.

I should say that in the judgment of Sir Barnes Peacock in this Court,¹ which was upon the law which was in existence before, he expressly decides that, as the law then stood, no such power to review existed; and therefore that shows clearly that no such power as that existed before, and that, taken along with the construction which we have put upon the section, that it did not create any such power, shows clearly that no power of review exists in this Court, so far as that section is concerned.

The only other section relied upon is s. 439. That section opens in this way: "In the case of any proceeding the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may," *et cetera*. In my opinion, the first four lines of that section show, beyond all possibility of doubt, that the record which is referred to in that section is the record of some Court other than that of the High Court, because it is obvious that what is meant is, the record of the case which has been called up and brought before the High Court, and not the record of the case which is in the High Court itself, and which it therefore has in its possession, and which is no need to call for.

Under these circumstances, I think that neither s. 369 nor s. 439 helps the case on which the present application has been made, and that it must therefore fall back on the condition of things created by ss. 306 and 307, and, as I

¹ *Queen v. Godai Raout*, B. L. R., Sup. Vol., 436.

have said before, the verdict and judgment of a Division Bench of this Court, coupled with the sentence, are, in my opinion, absolutely final. As soon as they have been pronounced and signed by the Judges, this Court is *functus officio*, and neither the Court itself, nor any Bench of it, has any power to revise that decision, or interfere with it in any way.

MITTER, J.—I am of the same opinion. I desire only to add that the last part of s. 439 was enacted in order to meet a case of this kind. S. 266 says: "In this chapter, except in s. 307, the expression High Court means a High Court of Judicature established or to be established under the 24th and 25th Vic., ch. 104, and includes the Chief Court of the Punjab, and such other Courts as the Governor-General in Council may, by notification in the *Gazette of India*, declare to be High Courts for the purposes of this chapter."

The last part of this section empowers the Governor-General in Council to extend the procedure laid down by this chapter to the trials of cases before any Court subordinate to this Court. That is the real effect of it. It may happen that a Court subordinate to this Court may make an entry under s. 273; the procedure laid down in Ch. XXIII. of the Code having been extended to the trial of cases before that Court. The last part of s. 439 lays down that in that case this Court, although possessing revisional power over the said Court in all other respects, would not have the power of reversing or interfering with any order passed by that Court under s. 273.

As regards the question whether this Court as constituted has any jurisdiction to entertain this application, I express no opinion.

WILSON, J.—I am entirely of the same opinion on the main question. There is only one point on which I desire to add anything. The point is not really one of any practical importance, because the Court, as now constituted, does contain both the learned Judges whose judgment we have been asked to review, and therefore the decision of this Court, as at present constituted, will, by reason of their presence, be a valid and efficacious decision; but I have myself very grave doubt whether it does not derive the whole of its efficacy from the fact of those two Judges being present.

I entertain considerable doubt whether, assuming that such an application as this is one that could be entertained in law, any Division Bench of this Court could entertain it with respect to a judgment of another Division Bench, and I think the view taken by Sir Richard Garth in the *case of Abdul Sobhan*¹ tends strongly to confirm this doubt. I only say this by way of safeguard, because, as I said before, the Bench being constituted as at present, the point is not really of any practical importance.

MACPHERSON, J.—I concur with the Chief Justice.

GRANT, J.—I concur with the learned Chief Justice.

H. T. H.

Application refused.

¹ I. L. R., 8 Cal. 63.

1886.

IN THE
MATTER OF
GIBBONS,
14 Cal. 42.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

1886. KHODABUKSH MUNDUL AND OTHERS (DEFENDANTS) *v.* MONGLAI
 Sep. 8. MUNDUL AND OTHERS (PLAINTIFFS).¹

14 Cal. 60. *Criminal Procedure Code (Act X. of 1882), s. 133—Removal of Nuisance—Public way—Suit for declaration of right and confirmation of possession—Cause of action.*

On the 6th of July 1882 the Joint-Magistrate of Krishnagur, on a complaint made by A, ordered B to demolish a cow-shed which he had built some months previously, the land on which the cow-shed had been built being part of a public way. Thereupon B brought a suit against A for a declaration of his right to enjoy the land as his private property and for confirmation of possession. The plaint did not allege that B, in causing the Magistrate to initiate proceedings against A, had been actuated by malicious motives, and had acted with the intention of wrongfully injuring the plaintiff.

Held that the suit would not lie. *Mutty Ram Sahoo v. Mohi Lal Roy*² dissented from.

THE facts of this case are stated as follows in the judgment of the Court of first instance, which was delivered on the 28th of March 1883 :—

“The plaint states that the bit of land defined in the plaint, being about 21 cubits in length and 16 cubits in breadth, appertains to the jammai holding of plaintiffs; that they are in exclusive possession of the same; that in Chait 1288, they erected a cow-shed on the same without any objection being raised by any one; that on the complaint of the defendants to the effect that the land forms a part of the public way, the Joint-Magistrate of this place issued, on the 6th July last, an order requiring plaintiffs to demolish the cow-shed within 15 days; that as the land is not a part of the public way, and as the same is the private property of plaintiffs, this suit is instituted for declaration of their right to the land and confirmation of possession.

“Defendants plead that this suit being instituted virtually to set aside the order of the Criminal Court is not maintainable; that the suit cannot be heard in the absence of Government and of the landlord of the place; and that the land in suit is part of the public way. They also plead limitation.”

The following issues were framed by the Court :—

- (1.) Whether this suit is maintainable in spite of the finding of the Magistrate that the land in suit is a part of the public way?
- (2.) Whether there is a defect of the necessary parties to this suit?
- (3.) Whether this suit is barred by limitation?
- (4.) Whether the disputed land is the property of plaintiffs, and whether they were in exclusive possession of the same?

The Court of first instance decided the first issue in the plaintiffs' favour on the authority of *Mutty Ram Sahoo v. Mohi Lal Roy*.² He also found the second and third issues in the plaintiffs' favour, and in regard to the fourth issue he found that a portion of the land claimed was the property of the plaintiffs and in their exclusive possession. In respect of this portion he gave the plaintiffs a decree. Both parties appealed from this decision to the Court of

¹ Appeal from Appellate Decree, No. 770 of 1885, against the decree of Baboo *Nuffer Chandra Bhatta*, Subordinate Judge of Nuddea, dated the 19th of January 1885, reversing the decree of Baboo Uma Kant Chatterjea, Munsiff of Krishnagur, dated the 28th of March 1883.

² I. L. R., 6 Cal. 291.

the First Subordinate Judge of Nuddea, who found the fourth issue in plaintiffs' favour, and gave them a decree for all the land claimed by them. The defendants appealed to the High Court on the following grounds, amongst others,—

(1.) For that the Courts below are wrong in omitting to try the real question in the case whether the land in dispute formed a part of the public thoroughfare, and, if it was so, whether the Civil Court had jurisdiction to entertain the suit.

(2.) For that the Courts below should have held that the present suit was not maintainable for defect of necessary parties.

Baboo *Kuloda Kinkur Roy* for the appellants.

Baboo *Jugut Chunder Banerjee* for the respondents.

The judgment of the High Court (PRINSEP and BEVERLEY, JJ.) was as follows :—

On information given by the defendants the Magistrate proceeded under Ch. X. of the Code of Criminal Procedure, and directed the plaintiffs to remove a hut that they had erected on land found by him to be a public thoroughfare. The plaintiffs now sue for a declaration of their title and confirmation of their possession of the land as their private property as against these defendants.

The defendants pleaded that the suit will not lie to set aside the order of the Magistrate that the land forms part of a public thoroughfare.

Both Courts have relied on the judgment in the case of *Mutty Ram Sahoo v. Mohi Lal Roy*,¹ in which it was held that a Civil Court can, irrespective of such an order by a Magistrate, try the question whether the land, which formed the subject of that order, is private property and not a thoroughfare or public place as between the parties to such suit and those who claim under them. Field, J., one of the learned Judges who decided that case, seems to have gone even further, but White, J., limited the operation of the order of a Civil Court to the parties before it, and we cannot accept that case as an authority beyond that. But we are of opinion that the law laid down in that case is not in accordance with previous decisions on the point. Those cases were not referred to in the argument raised or in the judgments of the learned Judges.

In *Meechoo Chunder Sircar v. Ravenshaw*,² Couch, C.J., and Kemp, J., held that, the matter having been tried in the manner provided by the Code of Criminal Procedure, "the plaintiffs have had what the law gives them, and are not at liberty to have the question tried again. The consequence of that would be that there might be another order by the Magistrate, then another suit, and so on."

No doubt, in that case the question between the plaintiff and the Magistrate had been referred to a jury, who had found that the land in suit was part of a public thoroughfare, but such reference to a jury would be entirely optional with a person in the position of the plaintiffs, and because he had not applied for a jury and preferred to show cause against the Magistrate's order, the finality of that order after termination of the proceedings would be none the less binding. *Rooke v. The Peari Lall Coal Co.*³ is an authority in the

1886.

KHODABUKSH
MUNDUL
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MONGLAI
MUNDUL,
14 Cal. 60.

¹ 1 I. L. R., 6 Cal. 291.

² 11 B. L. R. 9; 19 W. R. 345.

³ 3 B. L. R. 43; 11 W. R. 434.

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MUNDUL,
14 Cal. 60.

same direction, and in *Chinta Monee Bapoolee v. Digambur Miller*,¹ it was held that there would be no cause of action against persons who cause the Magistrate to initiate proceedings unless it could be shown that they "were actuated by malicious motives and with the intention of wrongfully injuring the plaintiff."

If the orders of the lower Courts be maintained, and it be held, in accordance with the precedent cited, that as against defendants the plaintiffs had established a private right of property, and if the plaintiffs were again to erect a building on that spot, the Magistrate would not be precluded from acting as before, or even enforcing his previous order, which is still in force. If therefore a decree in the present suit is inoperative as against the Magistrate (and the decision in *Mutty Ram Sahoo v. Mohi Lal Roy* goes to that extent) the interminable procedure condemned by Couch, C.J., in *Meechoo Chunder Sircar v. Ravenshaw*, would result. But upon the authority of the case of *Chinta Monee Bapoolee v. Digambur Miller*, reported in 10 W. R. 409, no case would lie against the defendants before us. These cases are not referred to in the decision of *Mutty Ram Sahoo v. Mohi Lal Roy*, and we are therefore not embarrassed with that precedent. We also observe that the Code of Criminal Procedure, 1882, passed since that judgment was delivered, in s. 133 declares that no order duly made by a Magistrate under that section shall be called in question in any Civil Court.

The suit must therefore be dismissed with costs in all Courts, the orders of both the lower Courts being set aside.

P. O'K.

Orders set aside and suit dismissed.

CRIMINAL MOTION.

*Before Sir W. Comer Petheram, Knight, Chief Justice, and
Mr. Justice Beverley.*

IN THE MATTER OF LUCHMINARAIN, PETITIONER.²

1886.
Nov. 23.
14 Cal. 128.

Criminal Procedure Code (Act X. of 1882), ss. 234, 537—Charge of three offences of the same kind—Irregularity occasioning a failure of justice.

An accused was charged with criminal breach of trust as a public servant in respect of three separate sums of money deposited in the Savings Bank under three separate accounts.

The third of these charges related to the misappropriation of Rs. 195 composed of two separate sums of Rs. 150 and Rs. 45, alleged to have been misappropriated on the 16th and 25th November respectively. These sums the accused in his statement at the trial stated he had paid over on those dates to the depositor, and produced an account book showing entries of such payments on those dates. This statement was proved to be untrue, and the accused was convicted.

On an application to quash the conviction on the ground that the trial had been held in contravention of s. 234 of the Code of Criminal Procedure, held that the entries in the account books did not clearly show that the misappropriation of the sum of Rs. 195 took place on two dates, or consisted of two transactions, the entries having been made for the purpose of concealing the criminal breach of trust; and that under the circumstances the criminal breach of trust with regard to the Rs. 195 was really one offence, and could be included in one charge.

¹ 10 W. R. 409; S. C. 2 B. L. R., S. N., 15.

² Criminal Motion No. 450 of 1886, against the order passed by H. W. Gordon, Esq., Sessions Judge of Sarun, dated the 26th of July 1886, modifying the order passed by A. L. Clay, Esq., Officiating District Magistrate of Sarun, dated the 10th of June 1886.

Semble (per PETHERAM, C.J.).—That if a man were tried for four specific offences of the same kind at one trial, such a procedure would not be merely an irregularity which could be cured by s. 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless possibly it could be cured by some subsequent proceeding by striking out some portion of the charge.

ONE Luchminarain Doss, a savings bank clerk in the Chupra Post Office, was charged before the Officiating District Magistrate of Chupra with criminal breach of trust as a public servant in respect of three separate sums of money deposited in the savings bank under three separate accounts.

The charge sheet comprised only three counts, but the third count, which related to the misappropriation of a sum of Rs. 195, belonging to one Narain Dass, comprised two separate items of Rs. 150 and Rs. 45, alleged to have been criminally misappropriated by the accused on the 16th and 25th November 1885 respectively. It appeared from entries made in the handwriting of the accused, that he had paid the sum of Rs. 195 to the depositor on two different occasions, and this was so stated by the prisoner at the trial. The circumstances relating to the withdrawal of the sums of Rs. 150 and Rs. 45 from the deposit account of Narain Dass were so closely interwoven and connected together that, in trying the accused on a charge regarding either of these sums, it was next to impossible to adduce evidence which did not bear upon the withdrawal of the other.

The Magistrate held that the statement made by the accused as to the payment of the sum of Rs. 195 to the depositor was untrue, and, finding the accused guilty, sentenced him to an aggregate punishment of six years' rigorous imprisonment, and to pay a fine of Rs. 600, or in default to undergo 18 months' additional rigorous imprisonment.

The prisoner appealed to the Sessions Judge, who found the charges to have been clearly proved, holding that, although the third count embraced two distinct offences, and made up, with counts one and two, four separate offences, all of the same kind, yet the circumstances of the withdrawal of the two sums of Rs. 150 and Rs. 45 (composing the third count) were so interwoven together that, if the prisoner had been specifically charged with misappropriating either the Rs. 150 or the Rs. 45, the evidence for the prosecution would have been precisely the same as was taken on the third count, and that therefore the prisoner had not been prejudiced in his defence so as to cause a failure of justice, although the proceedings of the Magistrate on this point might have been irregular; he therefore declined to direct a new trial on that account, having regard to s. 537 of the Criminal Procedure Code, and to the ruling of *The Empress v. Ullom Koondoo*,¹ and dismissed the appeal. But found that the sentence passed by the Officiating District Magistrate was illegal, as he had exceeded the power conferred on him by s. 35, cl. b, of the Criminal Procedure Code; and, therefore, reduced the sentence to one of rigorous imprisonment for one year and four months, and to a fine of Rs. 200, on each of the three counts, or in default to four months' additional rigorous imprisonment, or in all to four years' rigorous imprisonment, and to a fine of Rs. 600, or in default to one year's additional rigorous imprisonment.

The prisoner applied to the High Court under the revisional sections of the Criminal Procedure Code, and obtained a rule calling upon the Crown to show cause why the order made in the case should not be set aside.

1886.

IN THE
MATTER OF
LUCHMIN-
NARAIN,
14 Cal. 128.

¹ I. L. R., 8 Cal. 635.

1886.

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MATTER OF
LUCHMI-
NARAIN,
14 Cal. 128.

The *Deputy Legal Remembrancer* (Mr. Kilby), who appeared to show cause, contended that the third count could not be split up so as to form two distinct offences.

And even supposing it to be so considered, the irregularity could be cured by s. 537 of the Code, the prisoner not having been prejudiced in his defence.

Baboo *Umbica Charan Bose*, *contra*, contended that the trial was bad in law under s. 234 of the Code of Criminal Procedure; that the offences charged against the prisoner being in respect to different sums of money belonging to different persons, he should not have been tried and convicted on one trial; and that this irregularity had materially prejudiced him in his defence; he further contended that the sentence passed was too severe.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J.—In this case, the prisoner, who was a clerk in the Post Office Savings Bank, has been charged and tried for embezzling various sums of money which were deposited by various depositors in the same bank, and the present application is really an application upon a rule which has been obtained to quash the whole proceedings, on the ground that the trial is illegal, because the prisoner has been tried for four offences of the same kind at the same trial, whereas under s. 234 of the Code of Criminal Procedure he could only be tried for three such offences.

It is clear from the terms of that section that a man can only be tried for three separate offences of the same kind at the same trial, and, speaking for myself, I think that, if a man were tried for four specific offences at one trial, it would not be merely an irregularity which could be cured by s. 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless it were cured by some subsequent proceeding by striking out some portion of the charge, and as to the propriety and legality of such a proceeding we do not at present express any opinion.

The first question is whether the prisoner was tried for more than three distinct offences. The charges in respect of which the trial took place were charges for embezzling the money of the Post-Master-General, the money having been deposited in his hands, and he being the person responsible for it. What appears to have been proved was that the prisoner was the man whose duty it was to receive deposits and make payments, and also to enter in the books of the Post Office, and also in the pass books supplied to the customers, the amounts received by the Post Office and the amounts paid out by him. In some way or other suspicion arose and enquiries were made, and as the result of those enquiries it was ascertained that this man's cash was short by a certain sum of money. Having found out that, the next thing to be done was to enquire what had become of it, and it does appear from the books kept by him that this deficiency was in respect of the accounts of three depositors. Those depositors' accounts showed that they had received particular sums of money, but, on an enquiry being made from the depositors, it was found that they had not received them, and the inference was that the cash of the prisoner being short by those amounts, and the depositors not having received them, those sums were embezzled by him.

As to two of the depositors, the entries made in the books of the prisoner were entries of sums which were alleged to have been paid by him on one particular date, but that is not made out, the fact being that, the money having been embezzled by him, the entries were made by him on that particular date

for the purpose of concealing the embezzlement, but in the case of these depositors, no question arises as to their being more than one offence, and there is no ground for suggesting that more than two offences were committed.

In respect of the third depositor, the amount was short by Rs. 195; that is the amount by which his cash would be short, and is the amount which he says he has not received. The first step to be taken in regard to that was to examine the books which were kept by him in order to see what had become of the money, and that appears in his own hand an entry which shows that he paid the money to his depositor on two different occasions, and he says so in his statement. The statement that he paid the money is proved to be untrue, and is a statement which was made to conceal the fraud and the embezzlement of the money of which he had been guilty.

Then the question arises, does the entry clearly show that the embezzlement of this sum of Rs. 195 took place on two dates, and consisted of two separate transactions, so that it was an offence on which the man would have to be charged on two charges. But the offence is an offence of embezzling the sum of Rs. 195; so far as we know, it may have been embezzled at one and the same time, and the only use of the two false entries was to make them part of the evidence in the general charge of embezzlement. Under these circumstances, I am of opinion that the embezzlement of the Rs. 195 was really one offence, and could be included in one charge; and though it covers the two entries, it is not shown that it was two offences.

Under these circumstances, I do not think it is shown that the prisoner was tried for more than three offences in one trial, and that there is any ground for saying that the trial was illegal; and therefore the rule must be discharged.

T. A. P.

Rule discharged.

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Grant.

BAIDYA NATH SINGH (PETITIONER) v. MUSPRATT AND OTHERS (OPPOSITE PARTIES).¹

Dismissal of Complaint—Report of Police Officer who is an accused person—Criminal Procedure Code (Act X. of 1882), ss. 200—203, 437.

Ss. 200 to 203 of the Criminal Procedure Code must be read together, and a Magistrate dismissing a complaint under the provisions of s. 203 on any one of the three grounds, *vis.* :—

- (1.) If he, upon the statement of the complainant, reduced to writing under s. 200, finds no offence has been committed;
- (2.) If he distrusts the statement made by the complainant; and
- (3.) If he distrusts that statement, but his distrust is not sufficiently strong to warrant him in acting upon it, except upon a further enquiry as provided for in s. 202—

must record his reasons for so doing, for, if such reasons were not recorded, it would be impossible for the High Court, exercising its revisional powers under s. 437 of the Criminal Procedure Code, to consider whether the discretion of such Magistrate has been properly exercised.

It was never contemplated that a Magistrate should call for a report from an accused person under s. 202 for the purpose of ascertaining the truth of the complaint if such accused happened to be an officer subordinate to the Magistrate.

¹ Criminal Motion, No. 376 of 1886, against the order passed by L. Hare, Esq., Officiating Magistrate of Maldah, dated the 21st of July 1886.

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Where, therefore, a complaint was made against a police-officer, and complainant's statement was duly recorded, and the Magistrate, acting under the provision of s. 202. called for a report from such police-officer, and, acting upon that report, dismissed the complaint under s. 203:

Held that he had acted illegally, and that his order, made under the last-named section, should be set aside, and the case proceeded with according to law from the time at which the complaint was made and the complainant's statement so recorded.

THE facts upon which this rule was issued were as follows: On the night of the 27th June, some unripe indigo was cut and carried off from certain land, and a charge of theft was laid against one Gopi Mohun Misser and others with regard to that indigo. In the course of investigating that case, Mr. Muspratt, Assistant Superintendent of Police, accompanied by Mr. Hemming, an indigo planter and complainant in the case against Gopi Mohun Misser, and Mr. Rice, his manager, proceeded to the Nurutunpore Indigo Factory, which belonged to the accused, where it was alleged the stolen indigo had been taken, for the purpose of enquiring into the matter. On the 5th July a complaint was preferred by one Baidya Nath Singh, a servant of Gopi Mohun Misser, against Mr. Muspratt, Mr. Hemming, and Mr. Rice, charging them with theft, criminal trespass, and assault. The complainant alleged that the three accused, accompanied by others, walked into the factory of Gopi Mohun Misser without any authority, broke open an iron chest, and took some money from it, and that they committed mischief by digging up the floor of the room, going into the cook-house and breaking the cooking pots, and spitting into the food that was being cooked. It was also alleged that some of Gopi Mohun's servants had been assaulted. After the complaint was filed, Baidya Nath Singh was examined on the same day on solemn affirmation in support of it, and he deposed to the truth of the facts contained in the complaint.

After that evidence had been taken the Magistrate recorded an order upon it to the following effect: "Forwarded to the Assistant Superintendent, who is requested to state the circumstances under which the house of Gopi Mohun Baboo was searched, if it was searched at all."

In answer to the Magistrate's request, Mr. Muspratt submitted a report, and on the 13th July the Magistrate recorded the following order: "The search complained of was clearly within the power of the police, and from the report submitted by the Assistant Superintendent, it does not appear that it was improperly conducted. A *prima facie* case of theft had been made out, of which the accounts appeared to disclose an intention on the part of the accused to use violence or force, if necessary, for the accomplishment of his purpose, and under these circumstances a search to discover if there were arms without license or even lathies in unusual number was reasonable. The complaint will be filed."

On the 16th July the complainant Baidya Nath Singh applied to the Magistrate by petition to know what orders had been passed on his complaint, and prayed that he might be allowed to pay the process-fees, and that a summons should issue against the accused and witnesses, and that the case might be tried.

On the 21st July the Magistrate recorded the following order: "The complaint does not disclose any offence having been committed. The search was in accordance with the provisions of the law, and the Assistant Superintendent was acting within his powers in making the search. As to the other parties named, it appears from the Assistant Superintendent's report that they merely accompanied him as witnesses. Complaint is dismissed."

On the 17th August the complainant moved the High Court to set aside that order under the provisions of s. 437 of the Code of Criminal Procedure, on the ground that the procedure adopted by the Magistrate was not warranted by law, and that his petition and statement, taken in support of it on solemn affirmation, clearly disclosed facts which constituted offences under the sections under which he charged the accused.

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Upon that application the present rule was issued, calling upon the Magistrate to show cause why his order dismissing the complaint should not be set aside, and why he should not proceed to hear the complaint and try the case.

The rule now came on to be heard.

Mr. M. M. Ghose and Mr. A. P. Gasper for the petitioner.

Mr. Kilby and Mr. M. P. Gasper for Government.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows :

This rule was issued on the 17th of August last upon the Magistrate to show cause why his order, dated the 21st of July last, dismissing the complaint of the petitioner who obtained this rule, should not be set aside. That order of the Magistrate came to be passed under the following circumstances. The petitioner filed a petition before the District Magistrate on the 5th of July last, complaining of certain offences having been committed by the three accused persons. He was examined on the same date, and after recording his examination, the Magistrate passed the following order on the same date : " Forwarded to the Assistant Superintendent, who is requested to state the circumstances under which the house of Gopi Mohun Baboo was searched, if it was searched at all." It may be mentioned here that the Assistant Superintendent who was requested to state the circumstances was the accused person No. 3. Upon that the Assistant Superintendent submitted his report, we are informed, on the 11th of July. Although that report is part of the record of this case, and although the record was sent for, the report has not been appended to the record that has been sent up. That the report is part of the record appears from the final order passed in this case, to which we shall refer hereafter. On that report being submitted on the 13th of July, the Magistrate recorded the following order : " The search complained of was clearly within the power of the police, and from the report submitted by the Assistant Superintendent it does not appear that it was improperly conducted. A *prima facie* case of theft had been made out, of which the accounts appeared to disclose an intention on the part of the accused to use violence or force, if necessary, for the accomplishment of his purpose ; and under these circumstances a search to discover if there were arms without license or even *lalties* in unusual number was reasonable. The complaint will be filed." Then on the 21st of July the Magistrate dismissed the complaint, and he did so apparently under s. 203 of the Criminal Procedure Code, although that section is not mentioned in the order itself. The order dismissing the complaint is to the following effect : " The complaint does not disclose any offence as having been committed. The search made was in accordance with the provisions of the law, and the Assistant Superintendent was acting within his powers in making the search. As to the other parties named, it appears from the Assistant Superintendent's report that they merely accompanied him as witnesses. Complaint is dismissed." This is the order with reference to which this rule was obtained. It was passed, as already stated, under s. 203 of the Criminal Procedure Code. That section gives very large powers to the Magistrate to dismiss a complaint without issuing a process at all against the accused persons, but certain conditions are

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laid down in the chapter in which that section occurs, and those conditions must be strictly fulfilled in making an order under s. 203. S. 200 provides that "a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing, and shall be signed by the complainant, and also by the Magistrate." Then s. 201 provides the procedure to be adopted by the Magistrate if he finds himself not competent to take cognizance of the case. S. 202 lays down that "if the Chief Presidency Magistrate, or any other Presidency Magistrate whom the Local Government may from time to time authorize in this behalf, or any Magistrate of the first or second class, sees reason to distrust the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his reasons for distrusting the truth of the complaint, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself, or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a police-officer, or by such other person, not being a Magistrate or police-officer, as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint." Then comes s. 203, which says: "The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint if, after examining the complainant, and considering the result of the investigation (if any) made under s. 202, there is, in his judgment, no sufficient ground for proceeding." Reading all these sections together, it seems to us that a Magistrate may dismiss a complaint under s. 203 on any one of these three grounds. In the first place, under s. 203, if he, upon the statement made by the complainant, reduced to writing under s. 200, finds that no offence has been committed; in the second place, if he distrusts the statement made by the complainant, he may also dismiss the complaint; and in the third place, if he distrusts the complainant's statement, but his distrust is not sufficiently strong to warrant him to act upon it, he may direct a further inquiry as provided in s. 200, and he may either conduct this inquiry himself or depute a subordinate officer to conduct it. These are the three cases in which a Magistrate has power to dismiss a complaint under s. 203, and refuse the issue of process. It is clear to us that, under s. 202, if he distrusts the statement of the complainant, he must record his reasons. In any case he is bound to record his reasons for distrusting the complaint. That appears to us to be quite reasonable. Under s. 437 of the Criminal Procedure Code this Court is vested with the power of revising the orders passed by Courts subordinate to it under s. 203, and it would be impossible for this Court to consider whether the discretion vested in the Magistrate under s. 203 had been properly exercised, unless the Magistrate recorded his reasons for dismissing the complaint under s. 203. Now, in this case it appears to us that the grounds upon which the Magistrate has dismissed the complaint are such as would warrant this Court in revising the order made by him. The first ground is, that the complaint does not disclose that any offence has been committed. We have read the statement in the complaint, and we think that, if that statement is believed, and not distrusted, there was sufficient foundation for some kind of criminal charge against the accused persons. Then the order goes on to say: "The search made was in accordance with the provisions of the law, and the Assistant Superintendent was acting within his powers in making the search. As to the other parties named, it appears from the Assistant Superintendent's report that they merely accompanied him as witnesses." The Magistrate in recording these reasons has entirely proceeded upon the report

of the Assistant Superintendent. That appears clear, because he asks for that report, and on that report being submitted on the 11th of July, he recorded the order, extracted above, on the 13th, and in his final order he refers to that report, and acts upon it. Now, it seems to us that the Magistrate acted illegally in calling for a report from the Assistant Superintendent, who in this case was one of the accused persons, and it was never contemplated that under s. 202 any report could be called for from an accused person if that accused person happened to be an officer subordinate to the Magistrate. Upon this irregularity alone we think that the order of the Magistrate refusing to entertain the complaint must be set aside. We therefore set it aside, and return the record to the Magistrate, and direct that he proceed with the case in accordance with the provisions of the law. His procedure up to the time of recording the complaint was quite regular and legal, and he must take up the case at that stage. Taking up the case at that stage, he will proceed to deal with it in accordance with the provisions of the Criminal Procedure Code.

H. T. H.

Rule made absolute.

APPELLATE CRIMINAL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

JASPATH SINGH v. QUEEN-EMPRESS.¹

Charge to jury—Criminal Procedure Code (Act X. of 1882), s. 298—Duty of Judge when the jury are uncertain as to the offence committed—Evidence disbelieved in some parts, and accepted in others.

A jury, after retiring, returned to the box, and, after unanimously finding both prisoners not guilty of the charges framed against them, stated to the Judge that they thought an offence had been committed by one of the prisoners, but were uncertain as to the section of the Penal Code applicable to his case; the Judge thereupon made over to them a copy of the Penal Code, leaving them to decide under what section the offence fell. Held that he had failed in his duty, and that he should have asked the jury what doubts they had as to the crime which had been committed, and should have explained to them the law, and informed them what offence the facts would prove against the prisoner if they believed those facts.

Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts, and to convict the prisoner thereunder.

JASPATH SINGH and Dino Nath Sen were charged under ss. 304 and 326 of the Indian Penal Code.

At the trial before the Sessions Judge, amongst a large number of witnesses for the prosecution, five spoke to the fact that Jaspath Singh struck the blow (which caused the death of one Tara Chand, deceased) at the direction of Dino Nath Sen. As to the effect of the evidence, the Judge, in charging the jury, amongst other things, said: "There are five alleged eye-witnesses of the occurrence, and the question for you to decide is, do you believe these witnesses; if you do believe them, there can be no doubt that there is ample proof against the accused; if, however, you do not believe the witnesses, and consider that the real facts have been suppressed, as suggested by the prisoner's counsel, and that there had been a mutual fight, you ought to acquit; but it is only if the real

¹ Criminal Appeal, No. 762 of 1886, against the order passed by H. Beveridge, Esq., Sessions Judge of Howrah, dated the 13th of September 1886.

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facts have been misrepresented in important matters that you would be justified in throwing over the solid body of evidence adduced."

As regards the law, the Judge charged as follows:—

"If you believe the evidence, it can hardly be doubted that the offence is one of culpable homicide; it is well known that the head is a dangerous part of the body to strike, especially with a *latti*; the man who struck the deceased must have intended to kill him, or at least knew that it was likely that he would do so; he would, therefore, be guilty under one of the clauses of s. 304. You may, however, form a different opinion, and may, if you like, find the prisoners guilty under s. 326. If you have any reasonable doubt, you must give the prisoners the benefit of that doubt."

The jury eventually acquitted both prisoners of the charges under ss. 304 and 326 of the Penal Code; but thought that Jaspath Singh had committed some offence, although they were uncertain as to the section of the Penal Code under which the offence (if any) fell; thereupon the Judge handed to the jury a copy of the Penal Code, leaving them to apply it to the case against Jaspath Singh. The jury, after retiring, returned and said they were of opinion that Jaspath Singh was guilty of an offence under s. 325 of the Penal Code.

The Judge thereupon, notwithstanding the fact that he had never questioned the jury as to the doubts which they had inferentially expressed, and had not explained the law as set out in s. 325 to them, sentenced Jaspath Singh to four years' rigorous imprisonment.

The prisoner appealed to the High Court.

Mr. *Ghose* for the appellant contended that, the jury having acquitted on the charges under ss. 304 and 326, the Judge should have accepted that verdict; that the conviction under s. 325 was unsustainable on the evidence; and that the Judge was wrong in leaving the jury to find out from the Penal Code the section under which the appellant, Jaspath Singh, was to be found guilty.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The judgment of the Court was delivered by

PETHERAM, C.J. (BEVERLEY, J., concurring).—I think that this appeal must be dismissed, and for the reason that this is a finding of the jury, with which this Court has no power to interfere; and that, if the verdict of the jury is correct, and I must take it to be correct, because, as I have just said, I have no power under the circumstances to interfere with it, the punishment which has been inflicted on the prisoner for killing this man is not too great.

The case comes before us in a way which discloses a state of things as to the mode in which trials by jury are conducted in this country that is much to be deprecated; and in what I say now I am speaking for myself alone—I do hope that Judges in explaining the law to juries in cases in which juries are to act will take more pains in explaining the sections of the Code, and not leave the Code to the juries for them to find out the meaning of it themselves.

I think that in this case there is a possibility, I will not say probability, that there has been a miscarriage of justice, and if there is, as I think there is this possibility, it arises from the fact that the Judge did not sufficiently explain the law to the jury, and my reason for thinking that there is a possibility of a miscarriage of justice in this case is, that the Judge in his charge to the jury shows that he had come to the conclusion that the evidence for the prosecution was to be taken as a whole, and that the only thing for the jury to do, if they disbelieved it as a whole, was to acquit the prisoner. The jury did not

take that course. They found a verdict which showed that they disbelieved the evidence for the prosecution in certain parts as to which they thought the witnesses were committing perjury, and they say that story is untrue ; but they accepted that evidence in other parts, and convicted one of the prisoners upon it. The charge of the Judge shows that that was unsafe, and, speaking for myself, I quite agree with him. I think it absolutely unsafe to take the story of certain witnesses which is shown to be perjured as to a portion and to accept their statements, and act upon it. Therefore, I think that, in this particular case, on the Judge's own view, there is a miscarriage of justice ; but, as I said before, I am not able to interfere on that ground, because the Code gives us no power to interfere with the verdict of a jury in cases where there is evidence to go before them, and in this case there was evidence to go before them.

Then the question is, how far that state of things arose from the fact of the law being insufficiently explained to the jury by the Judge. As the charge was originally drawn against these two men, it was a charge of inflicting injury which either amounted to homicide or grievous hurt, and there was no question before the Judge as to there being any provocation on either of those charges, and the Judge charged the jury from the point of view that they would convict on one of those charges taken simply, and practically his charge amounted to this : These are the two matters in respect of which these men are being tried, and it will be for you to say whether you believe the evidence for the prosecution. If you do, you must convict the prisoners ; but if, on the other hand, you do not believe that evidence, you must acquit them ; and the only matter before the jury was the question of these two substantive charges taken *simpliciter* without any question of mitigating circumstances. It appears, so far as the prisoner before us is concerned, that the jury came in an uncertain state of mind, and they told the Judge that they could not say under what section the offence came. Now, upon that, I think the duty of the Judge was to have asked the jury what doubt they had as to the crime which had been committed ; and if he had done that, he would have found that it was not a doubt as to whether the offence amounted to culpable homicide or grievous hurt, but a doubt under a totally different section which was not explained to them, as to whether, if this man had inflicted hurt, he did it under circumstances of grave and sudden provocation. If the Judge had asked that question he would have carried out his duty, and he would have been able to explain to the jury how it is that, in questions of this kind, the substantive offence would be affected by the qualifying clause of the next section. But he did nothing of the kind ; instead of doing that, he simply gives the Penal Code to the jury, in order that they may read it themselves, and apply it in the best way they could. In doing that, I can only say, and I must say it here, that I think that the Judge did not do his duty. I think that it is the duty of a Judge to explain the law to the jury, and to tell them what offence the facts would prove against the prisoner if they believed them, and it is then for the jury to say whether, within the definition given by the Judge, the facts as proved constitute the offence. If the Judge had done that, I do not think that the complications would have arisen which have arisen in this case, and I think this case is a good illustration to show how very important it is that Judges should not leave the Code to the jury in this kind of way for them to read and interpret it for themselves, but, as I said before, they must explain the law to the jury, and tell them, not under what section they are to convict the accused, but in some kind of popular language which they can understand of what offence they are to convict him, whether it be homicide, or grievous hurt, or any other. It is for the Judge to construe the law ; it is for the jury to find the facts, and I hope that, in future,

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Judges, in these jury-trials, will be careful not simply to leave the Code to the jury, but be at the pains to explain it themselves. For these reasons, having in mind that there was evidence of the crime of which the prisoner has been convicted, that the question of fact was for the jury, and that there was no appeal from their verdict, I think that this appeal must be dismissed.

T. A. P.

Appeal dismissed.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

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Nov. 27.

RAJA BABU (PETITIONER) *v.* MUDDUN MOHUN LALL (OPPOSITE PARTY).¹

14 Cal. 169. *Criminal Procedure Code (Act X. of 1882), s. 145—Possession—Title—Symbolical possession.*

A Magistrate, trying a case under s. 145 of the Criminal Procedure Code, in determining the question of possession, took into consideration the question of title. Held that he had a right to discuss the question of title, if in his opinion it was material upon the question of possession; and that the mere fact that he had considered and discussed the question of title would not invalidate his decision on the point of possession, provided that there was evidence before him as to who was in possession.

Semble.—In the absence of any other evidence of possession, a Magistrate would be justified in finding possession to be with a person to whom symbolical possession has been shown to have been given in execution of a decree, although possibly slight evidence would be sufficient to rebut such evidence of possession.

This was a rule obtained on the 29th October 1886 by Raja Babu and others, calling upon Muddun Mohun Lall and others to show cause why an order, dated the 21st September 1886, passed by the Deputy Magistrate of Monghyr, declaring Muddun Mohun and his party to be in possession of a certain orchard, should not be set aside.

The facts of the case were that Muddun Mohun Lall had obtained a decree against one Sital Pershad, the father of Raja Babu, for Rs. 4,000 on the 8th August 1884, and, on the 17th September 1884, had applied for execution, and attached the orchard above referred to, the sale being fixed for the 16th March 1885. The sale was postponed, and the orchard eventually sold to Muddun Mohun Lall some time in 1885; this sale was confirmed on the 16th May 1885. Sital appealed to the High Court against the order confirming the sale, but his appeal was dismissed. On the 19th January 1886, the Subordinate Judge issued an order for the delivery of the orchard to Muddun Mohun, and on the 24th January he was given symbolical possession.

On the 5th January 1886, Raja Babu put in a petition before the Magistrate, alleging that, on the 4th March 1884, he had, in execution of a decree obtained by some third party against Sital Pershad, purchased the orchard in the name of one Nursing Sahai, and he prayed that possession of the orchard might be given to him, he already having been in legal possession. This application was, however, rejected; on the 26th January Nursing Sahai applied unsuccessfully for possession on his own account.

¹ Criminal Revision, No. 461 of 1886, against the order passed by Baboo *Mokendro Nath Gupto*, Deputy Magistrate of Monghyr, dated the 21st of September 1886.

On the 25th March disturbances having taken place between the parties, the Joint-Magistrate stepped in, and required both parties to show cause why they should not be bound down to keep the peace; proceedings under s. 145 of the Criminal Procedure Code were also initiated, Raja Babu setting up the facts alleged in his petition of the 5th January—the case under s. 107 resulting in Sital Pershad, Raja Babu, and his servants being bound down to keep the peace; and the case under s. 145 resulting in Muddun Mohun Lall being declared to be in possession of the orchard. Raja Babu then moved the High Court in both cases; and the order under s. 107 was set aside as against him, the order under s. 145 being also set aside, on the ground that no evidence as to possession of the orchard had been taken on his behalf.

On the 20th June 1886, in consequence of further disturbances between the parties, the Deputy Magistrate directed the police to make enquiries, the police reporting that Raja Babu was in possession, and that Muddun Mohun Lall had attempted to dispossess him. The Deputy Magistrate, after himself visiting the spot, took up the case on the petition of Raja Babu under s. 145, and after entering into the questions as to whether the first purchase had been made benami, and as to whether symbolical possession had or had not been given by the Court peon to Muddun Mohun Lall, held on the 21st September 1886 that Muddun Mohun Lall was entitled to retain possession of the orchard.

Raja Babu then obtained the present rule calling upon Muddun Mohun to show cause why the order of the 21st September should not be set aside.

Mr. *Bonnerjee* (with him Mr. *Twidale*) appeared to show cause, stated the facts out of which the case arose, and contended that the Magistrate had sufficient evidence before him, showing who was in possession at the time of enquiry, irrespective of the other matters touched upon in his judgment to justify him in coming to the decision given.

Mr. *Woodroffe* (with him Mr. *Amir Ali*) appeared for Raja Babu in support of the rule, and contended that the Deputy Magistrate had enquired into the question as to whether the orchard had or had not been purchased benami, whereas he ought to have confined his attention to the point of actual possession; that the Deputy Magistrate had further made his order on the strength of the symbolical possession given by the Civil Court, and cited *Juggobundhu Mookerjee v. Ram Chunder Bysack*¹ as showing that symbolical possession was no possession as against third parties, and was no evidence of actual possession; that the Deputy Magistrate, in accordance with *Ambler v. Puschong*,² should have alone decided who was, at the time of the institution of the proceedings under s. 145, in possession. That all the proceedings held by the Deputy Magistrate had been vitiated by the manner in which the case had been tried, because (a) the Deputy Magistrate had in his order discussed the question of benami, and determined that no formal possession was given until after the sale to Muddun Mohun Lall, (b) because he had discussed the question as to whether possession was delivered to Muddun Mohun Lall by the Court peon; and (c) because the evidence in the enquiry showed that Raja Babu was in actual possession, the evidence on Raja Babu's side having been given by the police, whereas the evidence on the other side was that of the retainers of Muddun Mohun Lall. He further contended that, if possession was with Raja Babu from the 8th March 1884 to the 24th June 1886, the presumption of law was that possession remained in him until it was altered, but that the Magistrate had, by his order of the 21st September, found that

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MUDDUN
MOHUN LALL,
14 Cal. 169.

¹ I. L. R., 5 Cal. 584.² I. L. R., 11 Cal. 365.

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MOHUN LALL,

14 Cal. 169.

Sital Pershad was in possession ; he had therefore tried a question not in his power, and had drawn inferences from that. The learned counsel further referred to *In re Kali Kristo Thakur*.¹

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J.—This was a rule which was obtained to set aside an order, dated the 21st September in this year, declaring the possession of a particular person to some property under s. 145 of the Code of Criminal Procedure.

The Magistrate appears to have been set in motion by a police-enquiry which was held in consequence of there being a likelihood of a breach of the peace in the neighbourhood, and having been so set in motion, he proceeded to enquire, as it was his duty to do under the section, who was in possession of this property, for the purpose of maintaining him in possession until the parties could get their rights decided by a Civil Court.

This rule was obtained, so far as I recollect, upon the ground argued to-day by Mr. *Woodroffe*, that the Magistrate had failed to try the question of possession at all, and that he had confined his attention to the question of title ; and, no doubt, upon the face of his judgment, it appears that, to a great extent, he considered who was the person entitled by law to the enjoyment of this property, and it was pressed before us that he had considered that to such an extent that he had lost sight of the real question before him, and which he had a right to try, namely, who was in possession at the time, and had a right to be maintained in possession under this particular section of the Code.

That being the case, it is for us to consider whether the Magistrate had materials before him on which he was justified in coming to the conclusion which he undoubtedly came to, that the person in whose favour he has made the order was in the actual possession of this property. It is true that in arriving at that conclusion he has considered who had title, and the last authority cited by Mr. *Woodroffe* shows that, if he thought that material upon the question of possession, he had a right to consider it and to discuss it, and the mere fact that he considers and discusses it does not invalidate his decision on the question of possession, provided there is evidence as to who is in possession.

Then on the question, whether there was any evidence of possession, the evidence is, that this person whom he found to be in possession of this particular piece of property purchased it at execution, when it was put up for sale at his instance under a decree of Court after the regular forms of attachment and advertisement had been gone through. The advertisement was made in the way sales are advertised in this country, that is, the notification of the sale was stuck up in the Court-room, and the sale took place on the date fixed in the notification, and after the purchase had been made, the form was gone through of giving possession to the purchaser. This is proved. No doubt, it may be said that this is a mere symbolical possession, but in the absence of anything else, the question is whether, under such circumstances, a Judge is justified in finding possession, if he is satisfied that possession was thus taken. We think he is, even supposing there was no other evidence. When it is proved that a property was purchased at an execution-sale, and that subsequently the the peon of the Court went through the form of giving possession to the purchaser, we think that is some evidence that the purchaser took possession. It may be that the customs of the country are such that very slight evidence would

¹ I. L. R., 7 Cal. 46.

suffice to rebut that, and the Magistrate had to find on the facts whether there was evidence of the slightest character; but in this case, the Magistrate says there was other evidence, on which he comments; and upon that evidence, and the other evidence to which I have alluded, he comes to the conclusion that this man took possession under his purchase, and that he had been in possession since that date, and, having come to that conclusion, he makes an order confirming his possession.

As I said before, the only question we can consider is whether there was evidence on which the Magistrate could come to that conclusion. We think there was, and therefore his order cannot be disturbed, and consequently this rule must be discharged.

T. A. P.

Rule discharged.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

MOTEERAM (PETITIONER) v. BELASEERAM (OPPOSITE PARTY).¹

Criminal Procedure Code (Act X. of 1882), s. 370 (cl. i.)—Summary Procedure—Conviction, Reasons for.

The meaning of s. 370 (cl. i.) of Act X. of 1882 is that, where the offence found is sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons for the conviction, so as to enable the party to bring the matter up to the High Court; but in petty cases, which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly. A sentence of a fine of Rs. 10, and imprisonment in default of payment of the fine, is not a sentence of imprisonment within the meaning of the section.

In this case the accused was tried summarily before a Presidency Magistrate for an assault, and convicted, the Magistrate passing the following order: "The charge of assault is proved against the accused under s. 352 of the Penal Code. He is fined Rs. 10, or one week's rigorous imprisonment."

The prisoner obtained a rule calling upon the Magistrate to show cause, why this order should not be set aside, on the ground that, under s. 370 of the Criminal Procedure Code, the Magistrate should have given reasons for the conviction.

Mr. *Handley* in support of the rule.

Baboo *Boidonath Dutt* contra.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J.—We think that this rule must be discharged. These proceedings were held under s. 370, and the only matters which the Presidency Magistrate is bound to record are the matters provided in that section. The first question and the real question in this case is whether, in a sentence of this kind, the Magistrate was bound to record any reasons at all. The sentence is a sentence of a fine of Rs. 10, and, in default of payment of the fine, a short term of imprisonment is imposed. The question is, whether that is a sentence of imprisonment within the meaning of s. 370 (cl. i.). In our opinion

¹ Criminal Revision, No. 473 of 1886, against the order passed by Syed Ameer Hossein, Khan Bahadur, Officiating Presidency Magistrate of Calcutta, dated the 21st September 1886.

1886.

RAJA BABU

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MOHUN LALL,

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Dec. 7.

14 Cal. 174.

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14 Cal. 174.

it is not. We think that it is a sentence of a fine, and that the latter part of the sentence is a mere mode of compelling payment of the fine, and that the meaning of that section is that, where the offence was sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate was bound to record his reasons so as to enable the party to bring the matter up to this Court. But in petty cases which the Magistrate thought would be met by a fine of a few rupees, the Legislature thought that his decision ought to be recorded shortly, and if the parties wanted to bring it up, they could do so in some other form. For these reasons we think the Magistrate's order was quite sufficient under s. 370, and that the rule must be discharged.

T. A. P.

Rule discharged.

CRIMINAL REFERENCE.

1886.
Dec. 20.
14 Cal. 175.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

IN THE MATTER OF NEAZ v. MONSOR AND ANOTHER.¹

Cattle Trespass (Act I. of 1871), s. 22—Joint fine—Fine and compensation.

Proceedings under s. 22 of the Cattle Trespass Act are *quasi-civil* in their nature; a Magistrate being at liberty under that section to assess and enforce, in a summary manner, compensation for an injury for which a civil action might be brought.

An order, therefore, for the payment of a sum as fine and compensation, passed against two persons under that section, which does not specify the proportionate amount payable by each, is good.

In this case the Deputy Magistrate of Brahmanbariah found that two persons, Monsor and Dengoo, had illegally impounded 19 head of cattle belonging to the complainant, thereby causing him to pay a sum of Rs. 7-2 for the release of the cattle; the Magistrate therefore convicted them under s. 22 of Act I. of 1871 (The Cattle Trespass Act), directing them to repay the sum of Rs. 7-2 to the complainant as a fine, and also Rs. 20 as compensation; the order containing no direction as to the proportion in which the sums referred to should be paid by Monsor and Dengoo.

The Sessions Judge, considering the order to be illegal on the ground that Monsor and Dengoo had been fined jointly Rs. 27, sent up the record of the case to the High Court under s. 438 of the Criminal Procedure Code.

No one appeared at the hearing for either party.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

In this case we are of opinion that under s. 22 of Act I. of 1871 the order made by the Deputy Magistrate was a legal order. The matter in which that order was made was not a regular criminal proceeding, but a *quasi-civil* proceeding, in which a Magistrate is authorized to assess and enforce in a summary manner compensation for an injury for which a civil action might be brought. Under these circumstances, we think that, in the present case, the so-called accused are jointly and severally liable for the compensation and costs awarded, and we see no reason to interfere.

T. A. P.

Order upheld.

¹ Criminal Reference, No. 222 of 1886, made by F. W. F. Rees, Esq., Sessions Judge of Tipperah, dated the 6th of December 1886, against the order passed by Moulvi Buslood Karim, Deputy Magistrate of Brahmanbariah, dated the 18th of September 1886.

ORIGINAL CRIMINAL.

Before Mr. Justice Trevelyan.

EMPRESS OF INDIA v. KALIPROSONNO DOSS AND OTHERS.

1886.

Jan. 26.

Feb. 2.

Practice—Evidence—Prosecutors' right of reply—Witness called by Court—Tendering witnesses for cross-examination—Criminal Procedure Code (Act X. of 1882), ss. 289, 540.

14 Cal. 245.

The giving of any documentary evidence by an accused person, during the cross-examination of the witnesses for the prosecution, and before he is asked under s. 289 if he means to adduce evidence, does not give a right of reply to the prosecution. *The Queen-Empress v. Grees Chunder Banerjee*¹ followed.

In a trial before the Sessions Court, the prosecution is not bound to tender for cross-examination all witnesses called before the committing Magistrate. The Court would not call a witness on whose evidence it could not put implicit reliance.

The prisoners in this case were charged with cheating and abetment of cheating under ss. 420, and 109 and 420 of the Indian Penal Code.

THE charges were brought at the instance of one Shoshee Bhusan Bose upon the allegation that he had been induced to pay the prisoners a sum of Rs. 3,850, and to give them two promissory notes for Rs. 1,150 and a cheque for Rs. 300, upon the statement that he would be employed as the manager of their jute business at Naraingunge and Serajgunge.

The *Standing Counsel* (Mr. Phillips) and Mr. Dunne for the prosecution.

Mr. M. P. Gasper and Mr. K. N. Mitter for Kaliprosunno Doss and another.

Mr. Henderson, Mr. A. F. M. Abdur Rahman, and Mr. Panioty for the other prisoners.

During the cross-examination of the complainant Shoshee Bhusan Bose by Mr. Henderson, counsel put into the witness's hands a thanna book, containing an entry of the charge against some of the accused, which had been made at the thanna by the complainant, and which entry purported to be signed by the complainant, and sought to prove the signature of the complainant and to put in the entry as evidence for the defence. Before doing so, however, Mr. Henderson asked for a ruling of the Court as to whether, by putting in documentary evidence during the cross-examination of the witnesses for the Crown, the prosecution thereby would be entitled to the right of reply after he had addressed the jury. He referred to the decision in the case of *The Queen-Empress v. Grees Chunder Banerjee*¹ as an authority that the prosecution would not be entitled to reply, and relied on the provisions of s. 289 of the Criminal Procedure Code.

Mr. Dunne contended that the prosecution would be entitled to reply, and stated that the decision of Mr. Justice Field relied on by Mr. Henderson had not been invariably followed, and referred to an unreported case in which Mr. Justice Norris had ruled the other way.

TREVELYAN, J.—It seems to me that, having regard to the provisions of s. 289 of the Criminal Procedure Code, the putting in of documentary evidence by an accused during the hearing of the evidence for the prosecution, before he is asked whether he intends to call any evidence, does not give a right

¹ I. L. R., 10 Cal. 1024.

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14 Cal. 245.

of reply to the Crown. I am referred to the decisions of Mr. Justice Field in the case of *The Queen-Empress v. Grees Chunder Banerjee*,¹ and of Mr. Justice Norris in a case which has not been reported. The reasons for the latter decision do not appear, and I prefer to follow the decision of Mr. Justice Field above referred to, and I therefore hold that by putting in this document the accused does not give the Crown the right of reply.

After Mr. Phillips had examined a number of witnesses for the prosecution, and tendered others for cross-examination, who had been called before the Magistrate, he closed the case for the prosecution without calling Brahmo Pershad Singh, an Inspector of Police, or tendering him for cross-examination. Brahmo Pershad Singh was the Inspector of the Sukhea Street Thanna, where the original charge had been laid by the complainant, and he had been called as a witness for the prosecution before the Magistrate.

Mr. *Gasper* thereupon contended that the prosecution were bound to tender Brahmo Pershad Singh for cross-examination, or that the Court should call him so as to give the prisoners an opportunity of cross-examining him, and he referred to the case of *In the matter of The Empress v. Grish Chunder Talukdar*² as an authority in support of his contention, and also to Roscoe's Criminal Evidence, 9th Ed., p. 138. He submitted that, at all events, the witness should be called by the Court.

Mr. *Henderson* referred to s. 540 of the Criminal Procedure Code, and contended that it was clear that he was a witness of the class referred to in that section, as his evidence was essential to the just decision of the case. He also referred to the cases of *R. v. Simmonds*³ and *R. v. Bodle*.⁴

Mr. *Phillips contra*.—The prosecution are not bound to call any witness or to tender a witness called before the Magistrate for cross-examination. All that they are bound to do is to have such witnesses in attendance, so that the defence can call them if they like. The prosecution cannot be forced to put forward a witness on whose evidence no reliance can be placed.

TREVELYAN, J. (after taking time to consider the question).—I have been asked by Mr. Gasper to call Brahmo Pershad Singh as a witness so as to give the defence an opportunity of cross-examining him. Brahmo Pershad Singh was the Inspector of the Sukhea Street Thanna, and was called as a witness at the Police Court. I have been referred by Mr. Henderson to the provisions of s. 540 of the Criminal Procedure Code and to two English decisions on the subject. In a case in which there is a matter necessitating enquiry, or there is a question to be cleared up, and the witness proposed to be called is one upon whose testimony the Court could place confidence, I think I should call him, but I certainly should not call any witness on whose evidence I could not place reliance, at any rate in a case in which the prisoner is defended by counsel.

I have again read over the deposition of Brahmo Pershad Singh before the Police Magistrate, and I do not think I could put implicit reliance on his evidence. I therefore decline to call him. I do not think that the prosecution is bound to tender him for cross-examination, or do more than have him present in Court for the accused to call him or not as they may think fit.

H. T. H.

¹ 1. L. R., 10 Cal. 1024.² 1 C. & P. 84.³ 1. L. R., 5 Cal. 614.⁴ 6 C. & P. 186.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF GOLAM AHMED KAZI.¹

Penal Code (Act XLV. of 1860), s. 182—False information to the police—Charge made against no specific person—Specific Charge.

1887.
Feb. 19.
14 Cal. 314.

S. 182 of the Penal Code must be read as an entire section, and, when so read, it applies to those cases in which the police are induced, upon information supplied to them, to do or omit to do something which might affect some *third person*, and which they would not have done had they known the truth of the matter laid before them.

On the 14th December 1886, one Golam Ahmed Kazi informed the police that, whilst proceeding along a certain road at night, he was attacked and robbed of a shawl; he, however, made no mention of any particular person being implicated in the attack. On this information the police inquired into the matter, and searched the house of the mistress of Golam Ahmed Kazi, but from her evidence taken by the police on the enquiry, it transpired that the shawl in question had been given to her by Golam Ahmed Kazi some time previously, but had been lent to him by her for a short time, and that on the night of the 14th December he had worn the shawl, and had, at her request, returned it to her. Golam Ahmed Kazi was thereupon accused by the Inspector of Police of having given false information to the effect that he had been robbed of the shawl.

The Joint-Magistrate of Sealdah, before whom the case was heard, charged the accused under s. 182 of the Penal Code, and, convicting him of an offence thereunder, sentenced him to six weeks' rigorous imprisonment.

The prisoner petitioned the Sessions Judge of the 24-Pergunnahs to send for the record, and to take steps to have the conviction set aside. The Sessions Judge, however, refused to interfere, and with reference to the case of *Reg. v. Saraji Mohun*,² cited in the notes to Mr. O'Kinealy's Penal Code, p. 122, referred to by the pleader making the application, mentioned that the case was a very old one, and was not cited with approval by Mr O'Kinealy.

The prisoner thereupon moved the High Court under the revisional sections of the Criminal Procedure Code, and obtained a rule calling on the Crown to show cause why the order of the Joint-Magistrate should not be set aside.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown.

Baboo *Kishori Lal Sircar* for the prisoner contended that s. 182 did not apply, as no specific person was mentioned in the charge to the police, citing the Bombay case above referred to.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

PETHERAM, C.J.—We think that this rule must be made absolute to set aside the conviction.

The facts of the case are that a person went on one occasion and informed the police that he had been robbed in the street of a shawl, but in the state-

¹ Criminal Revision, No. 28 of 1887, against the order passed by *C. B. Garrett, Esq.*, District Judge of 24-Pergunnahs, dated 20th of January 1887, confirming the order passed by Baboo *Gopendra Krishna*, Officiating Joint-Magistrate of Sealdah, dated the 11th of January 1887.

² Unreported.

1887.
 IN THE
 MATTER OF
 THE PETITION
 OF GOLAM
 AHMED KAZI,
 14 Cal. 314.

ment which he made to the police he did not indicate any particular person or describe any person in such a way as by any possibility could be supposed to implicate any one as the person who committed the robbery. All he said was that he was robbed by a person whom he did not see, so that in the statement that he made he did not say anything to cast suspicion on any one in particular. Under these circumstances, there was no offence within the meaning of s. 182 of the Penal Code. That section provides that, if any person gives any information to a public servant with the intention of inducing him to put his powers in force to the injury or annoyance of any person, or to do or omit anything which such public servant would not have done or omitted to do if the true state of facts respecting which such information was given had been known to him, shall be punished in a certain way there specified.

As it seems to us, that section must be read as a whole; and, taken as a whole, we think it applies to those cases in which the police are induced, upon the information supplied to them, to do or omit to do something which might affect some third person, and which they would not have done if they had known the true state of things.

Upon the information which was given to these police-constables, all that they could be justified in doing was to examine the informant as to what had happened to him, and then make such enquiries as the result of that examination might render desirable, but they would have no right to interfere with any one or search any one's house, because there were no circumstances brought to their knowledge by the information which this man gave, which entitled them to suppose that any particular individual was guilty of any offence. Under the circumstances the most that the statement of the accused amounts to is, that it was untrue, and was made for the purpose of hoaxing the police. No doubt, that is a very wrong thing for any man to do. In the first place, it is wrong to tell lies, and in the second place it is extremely wrong to take up the time of Government servants by putting them to useless enquiries under circumstances of this kind; but I do not think myself that such conduct comes within the meaning of this section, or amounts to anything more than a hoax, for which no punishment is provided by the Code. Under these circumstances we cannot make a crime when it is not made one by the Code, or provide a punishment for it.

The rule will therefore be made absolute to set aside the conviction; the prisoner will be discharged.

T. A. P.

Rule absolute.

CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Norris.

1887.
 Mar. 21.
 14 Cal. 355.

QUEEN-EMPRESS *v.* CHANDU GOWALA AND ANOTHER.¹

Magistrate, Jurisdiction of—Criminal Procedure Code (Act X. of 1882), s. 349—Penal Code, Act XLV. of 1860, s. 411—Receiving stolen property.

Under s. 349 of the Criminal Procedure Code a Second-class Magistrate transmitted a case to the District Magistrate, being of opinion that a more severe punishment was deserved than he was empowered to inflict. The District Magistrate returned the record

¹ Criminal Reference, No. 51 of 1887, made by T. Smith, Esq., Sessions Judge of Gya, dated the 12th of March 1887.

to the Second-class Magistrate, directing him to commit the case to the Sessions Court. The committal directed was duly made. The High Court refused to interfere in the matter, holding that the proceedings of the Second-class Magistrate were not illegal, and that there was nothing done which took away the jurisdiction of the Second-class Magistrate to commit.

1887.

QUEEN-
EMPRESS

v.

CHANDU
GOWALA,
14 Cal. 355.

Two persons were accused before Baboo Chandra Bhusan Chakravarti, a Magistrate of the second class, of dishonestly receiving stolen property, and were found guilty; the Magistrate, there being a previous conviction against one of the accused for a like offence, considering that the case required a higher punishment than he, as Second-class Magistrate, was empowered to give, forwarded the two accused to the District Magistrate to be dealt with in accordance with s. 349 of the Criminal Procedure Code.

The District Magistrate considered that the case was a bad one, and returned the record to the Second-class Magistrate, directing him to commit the case to the Session. The accused were, therefore, charged under s. 411 of the Penal Code, and were committed to the Sessions Court for trial.

The Sessions Judge, considering that the order of the District Magistrate and the final order of commitment by the Second-class Magistrate to be illegal on the authority of the case of *Queen-Empress v. Havia Tellapa*,¹ reported the matter to the High Court, recommending that the order of commitment should be quashed, and that the District Magistrate should be ordered to dispose of the case, committing it to the Session himself should he think that the case was one for the Sessions Court, and remarking that the prisoner, against whom the previous conviction had been charged, had since died in jail.

No one appeared before the High Court, and the Court (PETHERAM, C.J., and NORRIS, J.) passed the following order:—

We do not think that what happened took away the jurisdiction of the Second-class Magistrate to commit the case to the Sessions, and as his proceedings were not illegal we decline to interfere; the Sessions Judge must proceed to try and dispose of the case.

T. A. P.

Order of committal upheld.

CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Cunningham.

QUEEN-EMPRESS v. SRICHARAN BAURI.²

1887.

Sentence—Penal Code (Act XLV. of 1860), ss. 75, 179, 511—Attempt to commit an offence—Enhancement of sentence for previous conviction—Previous conviction.

Mar. 19.

14 Cal. 357.

A person who has been convicted of the offence of theft (an offence punishable under Ch. XVII. of the Penal Code) does not, on being convicted of an *attempt* to commit the offence of theft, become liable to the enhanced punishment allowed by s. 75 of the Penal Code.

ONE Sricharan Bauri, who had, on the 7th April 1885, been convicted of an offence under s. 380 of the Penal Code, and sentenced to three months' im-

¹ I. L. R., 10 Bom. 196.² Criminal Reference, No. 43 of 1887, made by Col. W. L. Samuels, Deputy Commissioner of Manbhoon, dated the 28th of February 1887.

1887.

QUEEN-
EMPRESS
v.
SRICHARAN
BAURI,
14 Cal. 357.

prisonment, was, on the 4th February 1887, convicted of an attempt to commit theft under ss. 379 and 511 of the Penal Code.

The Deputy Magistrate, before whom the latter case was tried, in passing sentence on Sricharan, refused to take into consideration the former conviction, which had been duly proved against him, inasmuch as the offence for which he was last under trial was an *attempt* to commit an offence only, and as such did not fall within the meaning of s. 75 of the Penal Code.

The Sessions Judge referred the case to the High Court under s. 438 of the Criminal Procedure Code, with a view to the sentence being enhanced.

No one appeared for either side on the hearing of the reference.

The order of the Court (PETHERAM, C.J., and CUNNINGHAM, J.) was as follows :—

We must decline to interfere. The accused has been convicted of an attempt, and the conviction therefore does not fall strictly within the terms of s. 75 of the Penal Code.

T. A. P.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

1886.

Dec. 11.

BACHU MULLAH AND OTHERS (PETITIONERS) v. SIA RAM SINGH
AND OTHERS (OPPOSITE PARTY).¹

14 Cal. 358.

*Irregularity in criminal trial—Rioting, Counter-charges of—Cross cases taken—
Procedure Code, Act X. of 1882, s. 537—Irregularity prejudicing the accused
—"Failure of justice."*

A Magistrate, there being counter-charges of rioting and assault before him, took up and tried one of such cases, and, having heard the evidence for the prosecution, called on the counter-case, and in this latter case examined as witnesses some of the accused in the first case, eventually convicting the accused in the first case. *Held* that such a procedure constituted a grave irregularity, but that, under the circumstances of the particular case, the irregularity was cured by s. 537 of the Criminal Procedure Code.

THIS was a rule obtained by Bachu Mullah and others calling on the opposite party to show cause why the order of the Sessions Judge of Bhagulpore, confirming the order of the Deputy Magistrate of Begoo-serai, convicting Bachu and his party of rioting, and sentencing them to six months' rigorous imprisonment each, with a fine of Rs. 25, and in default to a further sentence of two months' rigorous imprisonment, should not be set aside. It appeared that originally there were cross charges of rioting and assault brought in the Deputy Magistrate's Court, the one by Bachu Mullah and his party against Sia Ram Singh and his party, and the other by Sia Ram Singh and his party against Bachu Mullah and his party, and that the Deputy Magistrate first took up and heard the case of Bachu Mullah, and without passing any order thereon called on the cross case of Sia Ram Singh, and in that case called Bachu Mullah and his party as witnesses; the Magistrate eventually, finding that the case against Bachu Mullah

¹ Criminal Motion, No. 475 of 1886, against the order passed by F. Whitmore, Esq., Sessions Judge of Bhagulpore, dated the 13th of November 1886, confirming the order of J. T. Babonau, Esq., Deputy Magistrate of Begoo-serai, dated the 22nd of September 1886.

and his party had been proved, convicted them and sentenced them as above mentioned, dismissing the case against the party of Sia Ram Singh.

Mr. *Woodroffe* showed cause.

Mr. *M. Ghose* in support of the rule.

The order of the Court (*PETHERAM, C.J., and BEVERLEY, J.*) was as follows:—

We think that this rule must be discharged, at all events so far as the conviction is concerned.

The Magistrate had tried two cases in which there were practically counter-charges of riot and assault. He has tried, first of all, one party, and, having taken the evidence for that party, he has, without giving his decision in that enquiry, proceeded to take the evidence for the other party, and in this second enquiry he has called as witnesses some of those very persons whose conduct was enquired into in the first enquiry, and as to whose guilt or innocence he was suspending his judgment.

I think that is a course which is to be deprecated to the last degree. I think it a very great pity that Magistrates should ever adopt it. There is no doubt, to my mind, that it constitutes a very great irregularity, and the reason why it is so very objectionable is that you call a man as a witness whose conduct has been enquired into, but the decision in whose case has not been pronounced, and you hear his statement of the case given before the very person who is to decide upon his guilt or innocence; and by doing that you introduce an element into the question whether or not he will tell the truth, which ought not to be there, because he has a personal interest in the enquiry; his liberty or life may be at stake on what will be the verdict in his own case, and it is not in human nature to suppose that he would, under such circumstances, give his evidence in the impartial way that it ought to be given in a Court of Justice. Therefore it seems to me that it is not only an irregularity, but an irregularity of a grave kind; and in this matter I am speaking not only for myself, but I believe for my brother *Beverley* also, and therefore I hope that in similar enquiries in future Judges and Magistrates will discontinue this irregular and highly objectionable practice. What they can do in a case of this kind is, they can try and decide it, and having decided it they can convict or acquit the accused, whose interest in the enquiry will then have come to an end, and they can then be called into the witness box and examined in the other case, and they will then be in a position to give their evidence without having any personal interest in the evidence which they are being called upon to give.

For these reasons we think this irregularity is very objectionable, and I hope that it will be discontinued; but as to whether it is such an irregularity as to lead us to set aside the conviction and order a new trial is another matter. S. 537 of the Code of Criminal Procedure provides that enquiries are not to be set aside for irregularity unless the Court comes to the conclusion that there has been a "failure of justice," and therefore before the proceedings can be set aside it must be shown that, by reason of the irregularity, the true facts have not come out, or that there is danger that they will not come out. But that is not the case here. As I said before, the reason why this irregularity is objectionable is that persons have a very strong inducement to give evidence with a colouring in their own favour. In this case they have given their evidence, and the persons who practically object are the persons whose evidence was actually given. It cannot be said that they were prejudiced by giving evidence too strongly in their own favour. The other accused were not concerned one way or the other, and therefore we think that there is no prejudice shown to the disadvantage of any

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of the accused. That being so, notwithstanding the fact that the procedure was irregular, we think that irregularity is cured by that section, and we cannot interfere with the conviction, and therefore on that ground we think that the rule must be discharged.

With reference to the sentence, however, we think that the sentence of imprisonment is sufficient without the additional fine; therefore we confirm the sentence, so far as the imprisonment is concerned, and remit the fine.

T. A. P.

Rule discharged.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Cunningham.

1887.

Mar. 16.

14 Cal. 361.

REID, MANAGER OF THE SUDDOWAH FACTORY (PETITIONER) *v.* RICHARDSON, MANAGER OF THE RAJPORE FACTORY (OPPOSITE PARTY).¹

Criminal Procedure Code (Act X. of 1882), s. 145—Order passed under s. 146 on proceedings taken under s. 145, Criminal Procedure Code—Power of Court on revision—Evidence on revision.

Where a Magistrate has passed an order under s. 145 of the Criminal Procedure Code, whereas the proper order in the case should have been one under s. 146, the High Court on revision, will make the order which the lower Court ought to have made.

Case in which the High Court on revision entered into the whole of the evidence is the case. *Raja Baboo v. Muddun Mohun Lall*² explained.

THIS case originally arose out of disputes concerning the boundaries between the lands held by the Suddowah and Rajpore Factories. After enquiry the police reported that proceedings under s. 145 of the Criminal Procedure Code were necessary, a breach of the peace being imminent.

The Magistrate thereupon passed an order, after being satisfied that a breach of the peace was likely to occur, summoning the parties to appear before him, stating that the question arising was whether a portion of certain khorray land, north of the cultivated part of a certain deara, was in possession of the Suddowah or the Rajpore Factory. After hearing the evidence on both sides he found that the Suddowah Factory had failed to prove possession of the land in dispute, and that the Rajpore Factory were in possession, and directed that they should be retained in possession until ousted by order of a competent Civil Court.

The Manager of the Suddowah Factory applied to the High Court, and obtained a rule *nisi* calling upon the Manager of the Rajpore Factory to show cause why the order of the Magistrate above referred to should not be set aside.

The grounds on which this rule was obtained and the arguments of Counsel thereon are not set out owing to the view taken by the Court at the hearing on a perusal and consideration of the entire evidence in the case, *viz.*, that the evidence of possession was extremely unsatisfactory; that an important witness as to the fact of possession had not been examined, although his examination was applied for; and that therefore a proper trial of the issue of possession had not been held; and that the parties had, by proceeding under s. 145 of the Criminal Procedure Code, endeavoured to obtain a decision as to the boundaries between their respective estates.

¹ Criminal Motion, No. 406 of 1886, made against the order passed by *W. B. Martin, Esq.*, Deputy Magistrate of Gopalgunge, dated the 3rd of July 1886.

² *I. L. R.*, 14 Cal. 169.

Mr. Woodroffe and the Officiating Standing Counsel (Mr. Bonnerjee) showed cause.

The Advocate-General (Mr. Paul) and Mr. Pugh in support of the rule.

The order of the Court (PETHERAM, C.J., and CUNNINGHAM, J.) was delivered by

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CUNNINGHAM, J.—We have considered this case at great length, and departing from the ordinary rule which the Court prescribes to itself in cases of revision, we have thought it desirable to go into the whole of the evidence in the case, with the view of putting ourselves in full possession of all the facts appearing upon it, and we have also kept in mind the circumstance, which is constantly brought before us in these cases, that, as between the two parties to the present dispute, s. 145 of the Code of Criminal Procedure is being used for a purpose wholly alien to that for which it was originally intended, and one calculated to produce, in whosoever favour it is made, very unexpected and unfair results—in fact, that a squabble about some grass is to be turned into an important judicial decision as to the boundary of two large estates. That is a state of things which we regard with great disapproval, and which it is the object of this Court to discourage as far as possible; and as we see in this case that the decision, whichever way it went, is calculated to have this effect in a very high degree, we have felt it necessary to scrutinise, with great minuteness, the legal grounds upon which the decision rests, and the adequacy of the evidence which supports the decision at which the Magistrate has arrived.

Referring to a recent case, *Raja Babu v. Muddun Mohun Lall*,¹ and to an observation made by the Chief Justice on that occasion, Mr. Bonnerjee has urged before us that we are not at liberty to decide anything except whether there was, or was not, any evidence to justify the finding of the Court below. We think it therefore desirable, before dealing with the present case, to point out the true meaning of that observation. The question before the Court then was, not such a question as we have before us now, but whether the fact of a large amount of attention having been directed by the Court below on the question of title ought to invalidate its decision. The observation made in that ruling with reference to what is the ordinary procedure of this Court in revision cases, as to findings of fact, does not, we consider, militate against the view that we have power in revision, if we think right, to consider the whole evidence.

We do not propose at present to consider in detail the whole of the evidence on which the conclusion of the Magistrate was based. With regard to the question of jurisdiction, we had, for a considerable time, some hesitation as to whether there were any grounds which would give the Magistrate jurisdiction to hold the enquiry. There was certainly, in the first instance, a complaint showing a likelihood of a dispute; upon that there was an order to the police to hold an enquiry, and the report made to the Magistrate, in compliance with that order, though it did not certainly state very categorically the grounds which would show a likelihood of such a dispute as was necessary to give the Magistrate jurisdiction under s. 145, may, we think, on the whole, be taken as sufficient to confer jurisdiction on the Magistrate under that section.

We next come to consider the evidence as to possession. Now, this evidence, though voluminous, is yet, to our minds, extremely unsatisfactory. Having given it the best consideration that we can, we cannot get over various circumstances which appeared in the course of the enquiry which make us feel

¹ I. L. R., 14 Cal. 169.

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extremely doubtful as to the justice of the conclusion at which the Magistrate has arrived, and especially with regard to the omission to examine a most material witness. We cannot, on the proceedings, as they now stand, consider that it is in any degree satisfactory, or that there has been, in any way, what we can consider a proper trial of what we think was an important issue when we have the fact before us that the witness, whose evidence we think was likely to be of a very material character, was never brought before the Court, although the first party asked to have him brought.

In these cases the tribunal trying the case is not under the necessity which a Court trying a civil case or ordinary criminal cases, is under of coming to a conclusion at all. The Legislature contemplates circumstances in which it may be desirable for such a tribunal as that of a Deputy Magistrate, presumably unacquainted with the conduct of civil proceedings, and strictly a criminal tribunal, to say that the facts of the case do not enable him to come to a conclusion, and looking at the circumstances of this case and the conflicting nature of the evidence, and the various other circumstances which were before the Magistrate, we think that the wise and proper course for him to have adopted would have been to have accepted the liberty which the Code gave him of not coming to a conclusion as to the fact of possession, and to have passed an order under s. 146, and as we have the power, in revision, to make the order which the lower Court ought to have made, we alter the order of the Magistrate from an order under s. 145 to one under s. 146 of the Code of Criminal Procedure, and direct that the property, the subject of dispute, be kept under attachment by the Magistrate until a competent Civil Court shall have determined the rights of the parties thereto or the person entitled to the possession thereof.

T. A. P.

Order varied.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF CHANDI SINGH AND OTHERS.

QUEEN-EMPRESS v. CHANDI SINGH AND OTHERS.²

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 April 2.
 14 Cal. 395.

Criminal Procedure Code (Act X. of 1882), ss. 233, 234, 537—Separate charges for distinct offences.

Five persons were charged with having committed the offence of rioting on the 5th December; four out of those persons, and one F, were charged with having committed the offence of criminal trespass on the 9th December. These two cases were taken up and tried together in one trial, and were decided by one judgment.

Held that the trial was illegal, and the defect was not cured by s. 537 of the Criminal Procedure Code.

On the 10th and 11th December two cases were sent up to the Magistrate by the Dalsing Serai Police. In the first of these, Chandi Singh, Ferangi Singh, Batoram Singh, Bachu Singh, and Bhagwan Singh, were charged under s. 147 of the Penal Code with having committed, on the 5th December, the offence of rioting on a piece of land belonging to the Mow Factory. In the second case, Ferangi Singh, Batoram Singh, Bachu Singh, and Bhagwan Singh,

¹ Criminal Motion, No. 55 of 1887, against the order passed by A. C. Brett, Esq., Sessions Judge of Tirhoot, dated the 7th of February 1887, affirming the order passed by J. C. Price, Esq., Magistrate of Durbhanga, dated the 8th of January 1887.

were charged under s. 447 of the Penal Code with committing, on the 9th December, criminal trespass on the same piece of land. These two cases were tried together in one trial by the District Magistrate of Durbhanga, and, passing one judgment in the two cases, he convicted and sentenced the accused named in the first mentioned case, each to two years' rigorous imprisonment, and further sentenced the accused in the secondly mentioned case to undergo a further imprisonment of three months for the offence committed under s. 447 of the Penal Code. The prisoners appealed to the Sessions Judge, who summarily rejected their appeal under s. 421, stating that the trial had been rightly held under s. 234 of the Criminal Procedure Code. The prisoner moved the High Court to have the conviction set aside, and obtained a rule calling upon the other side to show cause why the convictions should not be set aside.

Mr. Gregory and Baboo Ram Charan Mitter showed cause.

Mr. M. P. Gasper in support of the rule.

The order of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—We think that this rule must be made absolute, and made absolute on the legal ground alone. With reference to the merits of the case they have not been gone into, and therefore this Court is not in a position to form any judgment whatever, but the ground upon which we base our judgment is that these two charges have been tried in one trial, and that is an illegal proceeding under s. 233 of the Code of Criminal Procedure.

The charges were, first of all, a charge against five men of having committed a riot on the 5th December 1886, and against four out of the five men of having committed criminal trespass on the 9th December 1886. These two charges were tried together in one trial, and were decided by one judgment.

In our opinion, this proceeding was illegal within the terms of s. 233, and does not, as the Judge supposes, come within the terms of s. 234. The only matter which is common to both charges is that the dispute in each case arises out of the same land, but the charges are absolutely distinct, and the persons charged are not the same body of men. It is quite true that there were some of the persons common to both charges, but the second charge did not include all the persons charged under the first charge.

Under these circumstances we think that the trial was illegal, it having been a trial which is prohibited by the terms of the law as contained in s. 233, and we do not think that s. 537, which cures errors, omissions, or irregularities, is intended to cure, or does cure, an absolute illegality. For these reasons we set aside the trial and the conviction, and direct that the prisoners be discharged from custody.

T. A. P.

Rule absolute.

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FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris, and Mr. Justice Ghose.

1887.

June 4.

14 Cal. 513.

HARADHAN MAITI (APPELLANT) *v.* QUEEN-EMPRESS (RESPONDENT).¹

Forgery—Intention—Penal Code, s. 466.

Where a document is made for the purpose of being used to deceive a Court of Justice, it is made *with the intention* of being used for that purpose.

A person, therefore, who, at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence), is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document.

ONE Haradhan Maiti was charged and tried before a Court of Session, sitting with assessors, under s. 466 of the Penal Code with having committed forgery of a document purporting to have been made by a public servant in his official capacity, and under ss. 109 and 466 of the Penal Code with having abetted by conspiracy the offence of forgery.

The facts were that, in accordance with a pre-concerted plan, a sub-inspector of police sent a constable in disguise, named Maslanddeen, to the house of Haradhan, instructing him to persuade Haradhan (who was alleged to be a professional forger) to forge a certain notice purporting to issue from the office of a Deputy Collector; and that, in obedience to these instructions, Maslanddeen, taking with him an original notice addressed to one Mannu issuing from the office of a Deputy Collector, went to the house of Haradhan, and after telling him that he required the notice for the purpose of a suit then pending between himself and a ryot (there being in reality no such suit in existence), and that he wished it to run in his name, and not, as in the original, in the name of Mannu, arranged that the forged notice should be prepared and ready for delivery on the next day, and that Rs. 25 should be paid for the work. On the next day payment was made in rupees, some of which had been previously marked, and the sum paid was made over by Haradhan to his father. After this payment had been made, and before the original and forged notices were made over by Haradhan to Maslanddeen, a sub-inspector and his constables, at a signal arranged and given by Maslanddeen, appeared on the scene, and arrested Haradhan, finding both the original and forged notice on his person and the marked rupees on the person of his father; and, on a search being made in the house of Haradhan, papers, on which rough copies of the original notice appeared, were found. At the trial the prisoner produced no evidence. The Judge, concurring with the assessors, found Haradhan guilty of an offence under s. 466 of the Penal Code, and sentenced him to seven years' rigorous imprisonment.

The prisoner appealed to the High Court. The case came on before Sir Comer Petheram, C.J., and Mr. Justice Ghose, who found the facts to be as stated above, but, doubting whether the prisoner could be convicted of forgery on those facts, referred the question to a Full Bench.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown.—The receipt of money by the accused to imitate a document bearing a Munsif's seal

¹ Full Bench on Criminal Appeal, No. 192 of 1887, against the order passed by F. Cowley, Esq., Officiating Sessions Judge of Midnapore, dated the 23rd of March 1887.

and signature, and the fact that he made the document in order that it might be used to obtain a decree for the person who had paid him to make it, show that the document was a false one within the definition of s. 464 of the Penal Code, and that the making of such a document was forgery within the meaning of s. 463, inasmuch as it was made with the intent that fraud might be committed. The offence is made up of the act of making the document and the fraudulent intent. The fact that the person who paid the accused to make the document had no intention of using it fraudulently does not affect the accused; his intention was undoubtedly fraudulent, and it is only his intention that the law refers to. I submit that the law does not require that it shall be possible that a fraud can be committed where the intention is clear. In *Reg. v. Tytley*,¹ where drugs were sold to a woman in order that she might procure abortion, it was held that, although the woman was not in the condition necessary, and had no intention to use the drugs, but had only been employed by the police to trap the accused, the accused, having sold the drugs with the intent they should be so used, was guilty—*R. v. Nash*.² Maule, J., says that it is not necessary to show an intent to defraud any particular person; and in *R. v. Holden*³ and *R. v. Marcus*⁴ there was no person who could have been defrauded.

No one appeared for the prisoner.

The judgment of the Court (PETHERAM, C.J., WILSON, J., TOTTENHAM, J., NORRIS, J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—This case of Haradhan Maiti is a case in which Mr. Justice Ghose and myself had doubts as to the legality of the conviction, because we felt that a question might arise whether, upon the facts which were found, the offence of forgery had been committed. I do not think we had any doubt that the facts were correctly found by the assessors and the Judge, and that the conclusion of fact at which they arrived was correct; the only doubt we felt was whether those facts amounted to a crime.

The facts of the case are that in some town a person resided who was suspected of being a professional forger, and upon that suspicion the Sheristadar of the Judge's Court and the police set a trap to catch him, and the trap which they set for him was that they took him a notice which had been used in some suit, and asked him to prepare a notice like it, that is, to make an exact imitation of it in that form, only changing one or two names, and they told him that their object in having the imitation of the notice made was that it should be used in the proceedings in a certain case for the purpose of deceiving the Court; so that they employed him to forge, or rather to make, a document for the purpose, as he understood them, of its being used to deceive the Court.

It is perfectly clear that, if the persons who employed the prisoner to make this imitation had been persons who were parties to a real suit, and they had gone to him to prepare this document in order that they might be able to deceive the Court in that suit, and he had made the document for the purpose of its being so used, he would have been guilty of forgery. But the doubt we had was whether a person could be guilty of forging a document when the document was never intended to be used at all, and represented absolutely nothing; in other words, whether the person who was the agent of the other for the purpose of making the document could have a wicked intention when the person who employed him, the principal, had no such intention. Feeling that doubt, we

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decided that the case had better be argued before five Judges, in order that the matter might be considered and laid at rest once for all, and upon a consideration of the question we have all come to the conclusion that the facts are sufficient to sustain a conviction, and we rely upon the case of *Reg. v. Hillman*.¹ In that case the offence with which the prisoner was charged was that of supplying a noxious drug to enable a woman to procure abortion. The facts proved were that he had supplied a drug, the effect of which, if it had been taken by a woman with child, would have been to cause abortion; but that the drug was purchased by a person whose object in purchasing it was to entrap the prisoner, and there being in fact no woman with child to whom it was intended to give the drug for the purpose of procuring abortion. In that case the same question arose, namely, whether the offence of supplying a drug to obtain abortion was committed when there was, in effect, no intention to obtain abortion. In that case the judgment of the Court was given by Sir William Erle, who was then Chief Justice of the Common Pleas, and than whom no greater authority ever sat on the English Bench, and what he says is: "The question asked of us is whether the intention of any other person than the defendant is necessary to the commission of the offence made punishable under this Statute (24 and 25 Vic., c. 100, s. 59). We are all of opinion that that question should be answered in the negative. The Statute is directed against the supplying of any substance with the intention that it shall be employed in procuring abortion. The prisoner, in this case, supplied the substance, and intended that it should be employed to procure abortion. He knew of his own intention that it should be so employed, and is, therefore, within the words of the Statute, as we construe them. He is also, in our opinion, within the mischief of the Statute, and ought to be convicted."

It seems to us that that case is absolutely on all fours with the present, because Sir William Erle there says, in effect, that where the drug was supplied for the purpose of its being used to procure abortion, that is equivalent to supplying it with the intention to procure abortion. In the case before us this particular document was made for the purpose of being used to deceive the Court, and, being made for that purpose, we may, for the same reason as that on which it was held that an offence had been committed in the other case, say that it was made with the intention of being used for that purpose, and therefore we think that the offence was committed, and that the prisoner comes within the mischief of the Statute; and as we feel no doubt that the facts found were correctly found by the Judge and the assessors, we confirm the conviction, and dismiss the appeal.

T. A. P.

Appeal dismissed.

CRIMINAL REFERENCE.

*Before Mr. Justice Tottenham and Mr. Justice Ghose.*FEKOO MAHTO v. THE EMPRESS.²

1887.

April 21.

14 Cal. 539.

Confession—Confession of an accused person—Evidence, Admissibility of confession in—Question and answer—Memorandum in English by Magistrate—Criminal Procedure Code (Act X. of 1882), ss. 164, 364, and 533.

It is not necessary that the English memorandum referred to in para. 3 of s. 364 of the Criminal Procedure Code should be made in respect of confessions recorded under s. 164,

¹ 1 Leigh & Cave C. C. 343.² Criminal Reference, No. 8 of 1887, made by, and Appeal No. 163 of 1887 against the order passed by, J. Whitmore, Esq., Sessions Judge of Birbhum, dated the 17th of March 1887.

as the manner in which such a confession is to be recorded under the provisions of that section is fully set out in the first two paras. of s. 364.

A confession of an accused person was recorded before a Deputy Magistrate by one of his clerks, under the provisions of s. 164 of the Criminal Procedure Code, while the case was under investigation by the police. No English memorandum of the nature referred to in s. 364 was made by the Deputy Magistrate. A further confession was recorded by the Magistrate under the provisions of s. 364 while the case was being heard before him. Both confessions were recorded in narrative form, and the questions and answers were not taken down. At the trial before the Sessions Judge both confessions were put in evidence, and no evidence was given under the provisions of s. 533 of the Criminal Procedure Code that the accused duly made the statements recorded. The accused was convicted mainly on the strength of the confessions.

Held, upon the authority of the decision in *Titu Maya v. The Queen*,¹ that as the accused was not prejudiced by the questions and answers not being recorded, it was unnecessary for the Judge to take evidence under s. 533, and that the conviction based on the confessions must be upheld.

In this case the accused was charged with the murder of his sister and her child. The evidence against him consisted mainly of two confessions made by him—the first on the 22nd November before the Sub-divisional Magistrate, and the second on the 15th December before the Magistrate during the enquiry into the case. The first confession was recorded in Kaithi by a clerk in the presence of the Deputy Magistrate, in the form of a narrative, and without the questions being recorded, and moreover no memorandum in English was written or signed by the Magistrate, and appended to it as required by s. 364 of the Criminal Procedure Code. The second confession was recorded in the narrative form, but had the requisite memorandum. The other evidence and facts of the case are not material for the purpose of this report, the sole question being as to whether the two confessions were rightly admitted in evidence by the Sessions Judge. The accused was convicted and sentenced to death in respect of the murder of his sister, and to transportation for life for the murder of her child, and consequently the Sessions Judge referred the case to the High Court under the provisions of s. 374 of the Criminal Procedure Code. The accused also appealed.

The grounds upon which it was suggested that the two confessions were not admissible in evidence are sufficiently stated in the judgment of the High Court.

No one appeared for the appellant.

Mr. Kilby for the Crown.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

This case has been referred to this Court by the Sessions Judge of Birbhum under s. 374 of the Criminal Procedure Code for confirmation of the sentence of death passed by him on the prisoner. The prisoner has also appealed against the conviction and sentence. He has been convicted of two murders—that of his sister named Basseja, and of her child. The sentence of death has been passed in respect of the murder of Basseja, and in respect of the other murder the prisoner has been sentenced to transportation for life. He appeals against both convictions.

The case depends, we may say, mainly upon the confessions put in evidence in the Sessions Court. There were two confessions made by the prisoner before the Magistrate. The first was apparently under s. 164 of the Criminal

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¹ I. L. R., 8 Cal. 618 (note).

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Procedure Code, while the case was still under investigation by the police. This confession was made on the 22nd of November last. The other confession was made in prisoner's examination before the Magistrate during the inquiry after the case had been sent up by the police. This examination was under s. 364. The examination and the confession under s. 164 have the defect that the questions put to the prisoner were not recorded. The answers were given in narrative form. As regards the examination under s. 364 there is no other defect. In that case the Magistrate made a memorandum in English at the time the examination was recorded, and the proper certificate was signed by him. As regards the confession recorded under s. 164 we find that there was no English memorandum made by the Magistrate, but the certificate required by that section was duly recorded. Both the confessions were admitted in evidence in the Sessions Court, and the conviction is based mainly upon them. Now s. 533 provides that, "if any Court before which a confession or other statement of an accused person recorded under s. 164 or s. 364 is tendered in evidence finds that the provisions of such section have not been fully complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded." We have had some little doubt as to whether the confession recorded under s. 164 was admissible without the evidence referred to under s. 533, because there was no English memorandum made at the time that it was recorded. But upon examination of the section we think that it was not necessary that any such English memorandum should be made in respect of that confession. S. 164 provides that such confession shall be recorded and signed in the manner provided by s. 364. S. 364 sets out the manner in which examinations of accused persons should be recorded. It appears to us that the manner in which such examinations should be recorded is fully set out in the first two paragraphs of that section. The provision for an English memorandum is contained in the third paragraph. That paragraph provides that the Magistrate or Judge shall be bound "to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record." This shows that the memorandum is not itself the record of the examination. What is tendered in evidence is the examination or confession recorded in the manner provided by the first two paragraphs of s. 364. The confession of the 22nd November was recorded in the manner prescribed, excepting, as we have said, that the questions put were not committed to writing. But that this omission is not fatal where the accused is not prejudiced by it is shown by a Full Bench decision in *Titu Maya v. The Queen*, reported in a note to the case of *In the matter of the Petition of Munshi Sheikh*.¹ The case itself was decided by a Division Bench of this Court, but the note to it contains the Full Bench decision referred to by us. That being so, we do not think that it was necessary for the Judge in the present case to take evidence under s. 533 in respect of either the confession under s. 164 or the examination under s. 364. And that these confessions were substantially true we think there is no reasonable cause to doubt. The interval between the two was more than three weeks, during which time the prisoner was in custody. But on the 25th December, when examined during the inquiry, he fully confirmed the statement made by him on the previous 22nd November, and stated that it was all true. The circumstances under which the murder was discovered and suspicion fell upon the prisoner are set out in the judgment of the Sessions Court, and were such that we think it highly probable that the pri-

¹ I. L. R., 8 Cal. 616.

soner, a simple peasant, would suppose it to be useless to deny his guilt, and would make a full confession. There seems to us no reason to discredit the other evidence in the case, which evidence shows that the prisoner followed up his confession by pointing out the precise scene of the murder, and by pointing out and giving up various articles which had been in the possession of the deceased, and some of which the prisoner had concealed after her death.

In the Sessions Court the prisoner retracted his confession, and told two stories in connection with it. One was that the confession recorded was not made by him at all, and the other that it was extorted from him by torture, the torture alleged being branding with a hot iron on the arm. Neither of these stories we think can be believed. The first story that he did not make the confession is absolutely negatived by the Magistrate's certificate. As to the other story, it is simply incredible that the police sending in a prisoner to have his confession recorded should have branded him with a hot iron in such a manner that the fresh marks would be conspicuous. Besides that, this story of the torture was never told by the prisoner till he was on his trial in the Sessions Court. We find therefore no reason to doubt the truth in the main of the confessions made by the prisoner upon which his conviction is chiefly based. In addition to the confession there is evidence to show that the prisoner was the last person with whom the deceased was seen alive, and upon his trial in the Sessions Court when examined he admitted what he had at one time denied, that the deceased came to his house, and that he had seen her out of the village, the motive of her removal being the threat on the part of his caste-fellows to excommunicate him if he allowed her to continue in his house.

Finding no reason for differing from the Sessions Judge, we must confirm the sentence of death, and dismiss the appeal.

H. T. H.

Appeal dismissed, and conviction upheld.

FULL BENCH REFERENCE.

Before Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF GIRHAR NARAIN.

TUSSUDUQ HOSAIN AND OTHERS *v.* GIRHAR NARAIN AND OTHERS.¹

Legal Practitioners Act (XVIII. of 1879), s. 32, Construction of—Outsider practising as mukhtear, his liability to punishment—Mukhtears, their functions—Civil Procedure Code, s. 37.

Act XVIII. of 1879 is an amending as well as a consolidating Act, and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers, and duties of the mukhtears practising in the Subordinate Courts.

When a person other than a duly certificated and enrolled mukhtear constantly, and as a means of livelihood, performs any of the functions or powers which the rule framed by the High Court in accordance with the provisions of the Legal Practitioners Act says are the functions and powers of a mukhtear, he practises as a mukhtear, and is liable to a penalty under s. 32 of the Act.

The words "any person" in s. 32 embrace pure outsiders as well as duly qualified and enrolled mukhtears who have failed to take out their certificates.

¹ Full Bench Reference, in Rule No. 69 of 1886, on the hearing of a petition from an order passed by *J. M. Kirkwood, Esq.*, District Judge of Patna, dated 6th of October 1885.

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G N, though not a certificated mukhtear, was in the habit of appointing and instructing pleaders in the Civil Courts on account of certain persons who paid him a regular monthly salary for so doing. In a proceeding against him under the Legal Practitioners Act, G N made this statement: "I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family, and lives in a separate village."

Held that G N was neither a private servant nor a recognised agent of any of his employers within the meaning of s. 37 of the Civil Procedure Code, and was liable to a penalty under s. 32 of the Legal Practitioners Act for having practised as a mukhtear.

Held also that, having regard to the Court in which G N practised, the words in s. 32, "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court," were equivalent to the words "to a fine not exceeding Rs. 250."

ON the 2nd of October 1885, certain certificated mukhteers of Patna presented a petition to the District Judge complaining that certain persons, Girhar Narain, Bansilal, and a number of other persons, were practising as mukhteers in the Civil Courts contrary to the provisions of Act XVIII. of 1879, and the rule and direction of the High Court, contained in the *Calcutta Gazette*, Part I., page 152, February 15th, 1882, describing the functions, powers, and duties of mukhteers. Upon that petition notices were issued against the parties complained against to show cause why they should not be punished under s. 32 of Act XVIII. of 1879. The Judge confined his enquiries to the case of Girhar Narain and Bansilal as sample cases. In his answer to the Court, Girhar Narain made the following statement: "My masters are Tundon Singh of Gya, Babu Fatteh Bahadur of Gya, Suni Lal of Kachna in Patna, Chamari Singh of Panka, Mussummat Wajihun of the city, Mussummat Inderjit Koer of Subulpur, Babu Sadir Narain Singh of Bazonna, Babu Ram Sarun Singh of Rajabag, Babu Gajadhur Pershad of Barhonna, Babu Mahto of Jaipur, Gunpat Mahto of Kundar, and I cannot remember the others, but there are several, perhaps some ten in number. I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family, and lives in a separate village. I sometimes get paid by the year, and sometimes by the month. . . . I cannot remember the names of the other ten or so who employ me in the Civil Courts." . . . Bansilal also made a similar statement. It was admitted by his pleaders that Girhar Narain was in the habit of appointing pleaders and instructing them in the Civil Courts on account of his several masters. The Judge held that, although neither of the men was a qualified mukhtear, they were in the habit of practising and earning the greater part of their livelihood as mukhteers, and their duties far exceeded those of a private servant. He accordingly inflicted a fine of Rs. 5 as a nominal punishment on each of the persons under the provisions of s. 32 of the Legal Practitioners Act. Girhar Narain and Bansilal thereupon applied to the High Court (Mitter and Agnew, JJ.), and obtained separate rules on the certificated mukhteers to show cause why the orders of the Judge should not be set aside. Bansilal having died in the meantime, Girhar Narain's matter alone came up for argument before Mitter and Macpherson, JJ., who referred the case to a Full Bench with the following observation: "Having regard to the general importance of the question raised in the rule, we refer it to a Full Bench. The question for decision is whether, upon the facts admitted by the petitioner, he is liable to be punished under the provisions of s. 32 of the Legal Practitioners Act."

At the hearing before the Full Bench,—

Baboo *Saligram Singh* in support of the rule.—The District Judge had no jurisdiction. Such a case as this does not come under the Legal Practitioners Act. S. 32 affects only such persons as are eligible to practise as mukhtears. The words “authorising him to so practise in such Court or office” in s. 32 support the position. Even if the petitioner’s case came under the Legal Practitioners Act, the man has done nothing which is rendered punishable by the Act. The High Court rule simply enumerates the functions of a mukhtear. It nowhere said that by performing any of those functions a man will be considered to be practising as a mukhtear. There is no definition of “practising as a mukhtear.” The petitioner is a private servant, and a private servant or a recognised agent is not within the provisions of the Legal Practitioners Act. The Act contemplates none but legal practitioners as such—see the decision of Mitter, J., in *Kali Kumar Roy v. Nobin Chunder Chuckerbutty*,¹ also *Gujraj Singh, In re*,² *In re Kali Churn Chand*,³ *In re Fuzzle Ali*.⁴

Mr. *Woodroffe* (with him Mr. *O’Kinealy*) opposed the rule.—The petitioner is not a certificated mukhtear. He acts as a mukhtear, and shows he is no private servant. The old cases do not apply here. Those cases were under the old Act (XX. of 1865), which did not confer on the High Court the power to make rules as has now been conferred by s. 11 of the present Act. For the statutory definition of “practising as a mukhtear” one must now refer to s. 11 and the rules framed by the High Court under it. Under s. 13 a pleader becomes guilty of unprofessional conduct by receiving instruction from such a man as the petitioner. It cannot, therefore, be said that a man in the position of the petitioner may lawfully give such instructions as he has been found to have done. S. 32 of the Act is not confined to men who are eligible to practise as mukhtears. Any one who does any of the acts provided by s. 11 of the Act is within s. 32—see the marginal note. On the value of a marginal note see *Attorney-General v. The Great Eastern Railway Company*,⁵ *Venour v. Sellon*.⁶ *Claydon v. Green*⁷ does not apply here. *Kali Churn Roy v. Nobin Chunder Chuckerbutty*¹ discussed.

The judgment of the Full Bench was delivered by

NORRIS, J. (MITTER, PRINSEP, WILSON, and TOTTENHAM, JJ., concurring).—On 2nd October 1885, certain certificated mukhtears presented a petition to the District Judge of Patna, complaining that many unauthorized persons were, contrary to law, acting in Court as certificated mukhtears. The District Judge caused the persons complained against to be served with notice to show cause why they should not be punished under s. 32, Act XVIII. of 1879. On the 6th October 1885, Girhar Narain, one of the persons complained against, appeared by pleaders to show cause. The District Judge first heard what Girhar Narain’s pleaders had to say on his behalf, and then, apparently without any objection on his part, put some questions to him.

The statement of the pleaders and the examination of Girhar Narain are thus recorded by the District Judge: “It is admitted by his pleaders that Girhar Narain, a certificated revenue agent, appoints pleaders, and that he instructs them in the Civil Courts; but they say that he only does so on account

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¹ 1 L. R., 6 Cal. 585.

² 10 W. R. 355.

³ 9 B. L. R. Ap. 18.

⁴ 19 W. R. Cr. 8.

⁵ 11 Ch. Div. 465.

⁶ 2 Ch. Div. 522.

⁷ L. R., 3 C. P. 511.

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of certain persons who are his masters, and who pay him a regular monthly salary for so doing." In answer to the Court Girhar Narain states: "My masters are Tundon Singh of Gya, Babu Fatteh Bahadur of Gya, Suni Lal of Kachna in Patna, Chamari Singh of Panka, Mussummat Wajihun of the city, Mussummat Inderjit Koer of Subulpur, Babu Sadir Narain Singh of Bazonna, Babu Ram Sarun Sing of Rajabag, Babu Gajadhur Pershad of Barhonna, Babu Collector Mahto of Jaipur, Gunput Mahto of Kundar, and I cannot remember the others, but there are several, perhaps some ten in number. I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family, and lives in a separate village. I sometimes get paid by the year, and sometimes by the month. Collector Mahto pays me Rs. 10 a year; he pays me that every Assin, and has done so every year for 12 years. The business I have referred to, and the names I have given as those of my employers, refer only to those who employ me in Civil Courts. I cannot remember the names of the other ten or so who employ me in the Civil Courts, but they pay me a yearly retainer. Mussummat Gujibun gives me, for what I do for her in connection with the Civil Courts, Rs. 25 per mensem. She pays me more than any one else. Tundon Singh gives me Rs. 80 a year." Upon this admission and statement the District Judge passed judgment as follows:—

"I am of opinion that the action admitted by Girhar Narain far exceeds action as a private servant. In India pleaders and mukhtears seldom get cases out of the circle of their own recognised clients; they each have clients who habitually employ them. That is precisely the nature of the employment admitted by Girhar Narain, but he says he receives remuneration by the month or year instead of for the act. He may do this in some cases, but I doubt his doing so in all; if he does, his memory is marvellously short in not being able to mention their names, and I do not think the method of remuneration makes any real difference. When a man is so little of a private servant that he admittedly acts for at least twenty different families in different parts of this and other districts, he seems to me to be practising generally and professionally, earning a greater part of his livelihood thus as a mukhtear. This is a sample case, and I inflict the nominal fine of Rs. 5 under s. 32 of Act XVIII. of 1879, my object being not so much to punish what has already been done as to prevent similar conduct for the future."

On the 5th January 1886, Girhar Narain moved before Mitter and Agnew, JJ., for a rule calling upon the certificated mukhtears to show cause why the order of the District Judge should not be set aside on the following grounds, *viz.*: First, that it was made without jurisdiction; second, that ss. 10 and 32 of the Legal Practitioners Act, 1879, did not apply to the case; third, that the District Judge ought, upon the materials before him, to have held that the nature of the petitioner's work was not in contravention of any law or of any rule of the High Court, and as such he was guilty of no offence against the provisions of the Legal Practitioners Act; fourth, that the District Judge had misunderstood and misconceived the law in determining the case. The learned Judges granted a rule, which, on 8th December 1886, came on for hearing before Mitter and Macpherson, JJ., who made the following order, *viz.*: "Having regard to the general importance of the question raised in this rule, we refer it to a Full Bench; the question for decision which we refer is whether, upon the facts admitted by the petitioner, he is liable to be punished under the provisions of s. 32 of the Legal Practitioners Act."

The case was argued before us on the 15th April, when Baboo Saligram Singh was heard in support of the rule, and Mr. Woodroffe and Mr. O'Kinealy appeared to show cause. At the conclusion of the arguments we took time to consider our judgment. The first argument urged by the learned vakeel for the petitioner was that, assuming that Girhar Narain had practised as a mukhtear without being duly authorised so to do, yet he was not liable to punishment under the provisions of s. 32 of Act XVIII. of 1879, as that Act applied only to mukhteers who had passed the required examination, received a certificate, and had practised, after neglecting to renew the certificate, or during suspension, or after dismissal. In support of his first argument the learned vakil referred to the preamble of the Act, and pointed out that it was an Act "to consolidate and amend the law relating to *Legal Practitioners*;" to the definition of "Legal Practitioner" as given in s. 3 of the Act; to the power conferred upon the High Court by s. 6 "to make rules as to the qualifications, admission, and certificates of proper persons to be mukhteers;" to the provision of s. 7 as to the granting and renewing of certificates; and to the provisions of ss. 10 and 11: and from the language used in these sections, he argued that the Act was not applicable to a person in the position of his client, but only to "legal practitioners" as defined by the Act. The learned vakeel also laid much stress on the words of s. 32. That section enacts "that any person who practises in any Court in contravention of s. 10 shall be liable, by the order of such Court, to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court." The words "the amount of the stamp required by this Act for a certificate authorising him so to practise," it was urged, pointed clearly to the case of a person who had passed the necessary examination for a mukhtear, and was practising without a certificate, and not to an entirely unauthorised person such as the petitioner.

In the case of *Kali Kumar Roy v. Nobin Chunder Chuckerbutty*,¹ which was a case under Act XX. of 1865, which is repealed by Act XVIII. of 1879, it seems to have occurred to Mitter, J., that s. 13 of Act XX. of 1865, which corresponds to s. 32 of Act XVIII. of 1879, "applied only to such persons as were qualified and enrolled as mukhteers, but who had practised as mukhteers without obtaining their certificates." This view does not seem to have been shared by White, J., for he makes no reference to it in his judgment; and Garth, C.J., says: "The language of s. 13 does certainly seem to afford some ground for this view; and yet it would seem an absurdity that a man who is duly qualified and enrolled as a mukhtear, and who has only neglected to take out his certificate, should be subject to penalties and disabled under that section from suing for his fees, whilst a man who is neither qualified nor enrolled as a mukhtear, nor certificated, should be enabled to recover his fees, and be subject to no penalties; it is difficult to conceive that this could have been the intention of the Legislature." Whatever may be the proper construction to be put upon s. 13 of Act XX. of 1865, upon which I express no opinion, I feel no difficulty in holding that the construction sought to be put on s. 32 of Act XVIII. of 1879 is not the true one. S. 32 in distinct terms imposes a penalty on "any person" who practises in any Court in contravention of the provisions of s. 10, "which enacts that no person shall practise as a mukhtear in any Court not established by Royal Charter, unless he holds a certificate issued under s. 7, and has been enrolled in such Court, or in some Court to which it is subordinate." I am altogether unable to give the words "any person" in s. 32 the narrow construction

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sought to be placed upon them. They seem to me to embrace pure outsiders like the petitioner, as well as duly qualified and enrolled mukhtears who have failed to take out their certificates. The words in s. 32, "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court," are, I think, equivalent (in this particular case, having regard to the Court in which the petitioner practised) to the words "to a fine not exceeding Rs. 250." It is to be observed that, where the Legislature wishes to deal with the duly qualified and enrolled mukhtear, it does so in precise terms—see ss. 33 and 34 and cl. c of s. 36. The second argument of the learned vakeel was that the petitioner had not practised as a mukhtear. In support of the argument reliance was placed on the case of *In re Gujraj Singh*,¹ decided by L. S. Jackson, J.; on *In re Kali Churn Chand*;² on *In re Fuzzle Ali*;³ and on the before-mentioned case of *Kali Kumar Roy v. Nobin Chunder Chuckerbutty*.⁴ All these cases were cases under the old Act of 1865, which conferred no power on the High Court "to make rules declaring what shall be deemed to be the functions, powers, and duties of mukhtears"—such powers were first given by s. 11 of Act XVIII. of 1879. In the case of *In re Gujraj Singh*,¹ L. S. Jackson, J., says: "The Court has had frequent difficulties in answering enquiries as to what the Legislature appeared to contemplate as the functions or privileges of mukhtears under the Pleaders and Mukhtears Act," and then goes on to decide that "there is nothing in the provisions of that Act which restrains any person from coming into the presence of the Judge and supplying information to the vakeels." In *In re Kali Churn Chand*² Kemp and Glover, JJ., held that the mere writing out of a petition for a party who himself presented it in Court was not an "acting" as a mukhtear within the meaning of s. 11 of Act XX. of 1865. In *In re Fuzzle Ali*³ Phear and Ainslie, JJ., held that "acting as a mukhtear" within the meaning of s. 5 of Act XX. of 1865 meant "the doing something as the agent of the principal party which shall be recognised or taken notice of by the Court as the act of that principal, such, for instance, as filing a document." In *Kali Kumar Roy v. Nobin Chunder Chuckerbutty*,⁴ White, J., speaking for himself and Mitter, J., said: "The question then resolves itself into this, whether the looking after a regular appeal, and the giving instructions to pleaders in connection with it, are practising as a mukhtear within the meaning of the section. There is no definition in the Act of what the Legislature meant by practising as a mukhtear, but I think the meaning may be gathered from s. 11 of the Act, which enacts that 'mukhtears duly admitted and enrolled may be subject to the conditions of their certificates as to the class of Courts in which they are authorised to practise, appear, and act' (in the report the word 'plead' is evidently by mistake used for 'act') in any Civil Court, and may appear, plead, and act in any Criminal Court within the same limits. It may fairly be concluded from this that, by practising as a mukhtear in a Court, the Legislature meant, in the case of a Civil Court, appearing or acting in that Court; in the case of a Criminal Court, appearing, pleading, or acting in that Court. Did the plaintiff then appear or act in Court? I think not. These words have a well-defined and well-known meaning. To appear for a client in Court is to be present and to represent him in various stages of the litigation at which it is necessary that the client should be present in Court by himself or some representative. To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that

¹ 10 W. R. 355.² 9 B. L. R. Ap. 18.³ 19 W. R. Cr. 8.⁴ I. L. R., 6 Cal. 585.

his case may be properly laid before the Court. What the plaintiff is found to have done in the present case was not appearing or acting for the defendant in the sense in which, I think, the words must be understood, nor involved any such appearance or acting."

The Act of 1879 is, as was pointed out by Prinsep, J., in the course of the argument, an "amending" as well as a "consolidating" Act: and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers, and duties of the mukhtears practising in the Subordinate Courts," thus obviating the difficulty which had been felt by the learned Judges in the cases above cited. The High Court has accordingly framed a rule prescribing the functions, powers, and duties of mukhtears practising in the Subordinate Courts, and I am clearly of opinion that, if any person other than a duly certificated and enrolled mukhtear constantly, and as a means of livelihood, performs any of the functions or powers which the rule says are the functions or powers of a mukhtear, he practises as a mukhtear, and is liable to a penalty under s. 32. One of the functions or powers of a mukhtear practising in the Subordinate Courts is that of "appointing and instructing pleaders." This the petitioner admits he does, and that not for one person only, but for twenty; he has therefore practised as a mukhtear.

It was also argued that the petitioner was the private servant or recognised agent of his various employers, and therefore outside the provisions of the Act. No doubt, under s. 13, a pleader may take instructions from the private servant of a party or the recognised agent of such party within the meaning of the Civil Procedure Code, but there is no provision authorising a mukhtear to take such instructions, and if there were I do not think the petitioner is the private servant of any of his employers or the recognised agent of any of them within the meaning of s. 37 of the Civil Procedure Code.

I would answer the question referred to us in the affirmative.

The result will be that the rule will be discharged with costs.

K. M. C.

Rule discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

SUKAROO KOBIRAJ (APPELLANT) *v.* THE EMPRESS (RESPONDENT).¹

Causing death by a rash and negligent act—Kobiraj—Surgical operation—Unskilled medical practitioner—"Good faith"—"Accepting risk"—Penal Code (Act XLV. of 1860), ss. 304A, 88, and 52.

A kobiraj operated on a man for internal piles by cutting them out with an ordinary knife. The man died from hæmorrhage. The kobiraj was charged, under s. 304A of the Penal Code, with causing death by doing a rash and negligent act.

It was contended that, inasmuch as the prisoner had performed similar operations on previous occasions, it was not a rash act within the meaning of that section, and that, at all events, he was entitled to the benefit of s. 88 of the Penal Code, as he did the act in good faith, without any intention to cause death, and for the benefit of the patient who had accepted the risk.

¹ Criminal Appeal, No. 173 of 1887, against the order passed by J. R. Hallett, Esq., Sessions Judge of Rungpore, dated the 14th of March 1887.

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Held that, as the prisoner was admittedly uneducated in matters of surgery, and having regard to the meaning of "good faith" as defined in s. 52 of the Penal Code, he was not entitled to the benefit of s. 88.

Held, further, that s. 88 did not apply to the case, as it was not shown by the accused, on whom the burden of proving that fact lay, that the deceased knew the risk he was running in consenting to the operation, and he could not therefore be said to have accepted the risk.

Held, also, that under the circumstances the conviction under s. 304A was a proper one.

In this case the prisoner was charged with an offence under s. 304A of the Penal Code. There was no dispute about the facts. The prisoner was a kobiraj, and he operated on one Manai, a peasant, for internal piles. The operation consisted in cutting out the piles with a common clasp knife after pulling them down with an iron hook. The result of the operation was that Manai, who was an old and feeble man, bled to death. The Civil Surgeon was called and examined, and stated that the operation was a most dangerous one. In his defence the prisoner called four witnesses, two of whom stated that he had cured them of piles, and two of other diseases by the use of the knife. The District Judge, disagreeing with the assessors, convicted the accused, and sentenced him to one year's rigorous imprisonment.

The prisoner appealed.

Baboo Ishar Chunder Chuckerbutty for the appellant.

Mr. Kilby for the Crown.

The grounds upon which it was sought to show that the conviction should be set aside are sufficiently stated in the judgment of the High Court (TORTENHAM and GHOSE, JJ.), which was as follows:—

The appellant is a kobiraj who has been convicted by the Sessions Judge of Rungpore of an offence under s. 304A of the Penal Code, and has been sentenced to suffer rigorous imprisonment for one year. He caused the death of a patient by performing what is shown to be a very dangerous operation, namely, the cutting out of internal piles. He was unable to stop the consequent bleeding, and the patient died the following day. This has been held by the Sessions Judge to be a rash act within the meaning of s. 304A.

Baboo Ishar Chunder Chuckerbutty for the appellant contended before us that it was not a rash act within the meaning of that section, inasmuch as the prisoner was a kobiraj, and had previously performed surgical operations in one or two cases of the same nature, and in other cases of a different character; and that it has not been shown that he ever before caused the death of a patient. The vakeel also contended that, if, notwithstanding these considerations, the Court should still be of opinion that the act was a rash one within the meaning of s. 304A, the prisoner would nevertheless be entitled to the benefit of s. 88 of the Penal Code, because he did the act in good faith, without any intention to cause death, and for the benefit of the patient who had accepted the risk.

We are of opinion that the prisoner is not entitled to the benefit of s. 88. It is quite true that he had no intention to cause the death of the patient. Nobody accuses him of such intention. It is also true that he acted, as he thought, for the benefit of the patient. But it is very doubtful whether he can be said to have acted in good faith, regard being had to the definition of good faith in s. 52 of the Penal Code, namely, "Nothing is said to be done in good faith which is done without due care and attention." The prisoner is admittedly

uneducated in matters of surgery. He has had no regular education in matters of medicine.

It has been contended on his behalf that he had no idea that the operation that he undertook to perform, and did perform, would be attended with danger to the patient. But it was proved by expert medical evidence adduced by the prosecution that the operation which he performed was one so imminently dangerous that educated surgeons scarcely ever attempt it. They treat the complaint of internal piles in a totally different way. It seems almost impossible therefore to say that the prisoner, in experimenting in the way he did, without any knowledge of the subject, was acting in good faith within the meaning of the definition already referred to. But, apart from that, we think that s. 88 will not apply to the case, because it is not shown that the patient did indeed accept the risk which turned out to be fatal to him. A patient can hardly be said to accept a risk of which he is not aware. We think it was for the defence pleading the exception to show that the patient in the present case did accept the risk, and that consequently he was aware of it. But no attempt was made to show that the patient did know what risk he was undertaking. The evidence is only to the extent that he consented to the operation with great unwillingness, and that the only information communicated to him by the prisoner on the subject was that if he submitted to the operation he would be cured. Upon that understanding he did submit; and died. It seems, therefore, quite impossible to say that he accepted the risk of the prisoner's act.

The question then remains whether the prisoner is guilty under s. 304A. There is no doubt that by his act he caused the death of the deceased. In England he would have been indicted for manslaughter. In this country the provisions of s. 304A seem to apply to cases where there is no intention to cause death, and no knowledge that the act done in all probability would cause death. It was pleaded for the prisoner that, inasmuch as he had successfully performed similar operations on other persons, he could have no knowledge that he was likely to cause death in this case.

We are willing to accept this view of the matter; but, as I have already observed, the prisoner's ignorance only made his act the more rash. We think it is impossible to acquit him of the offence of which he has been convicted. We have no wish by this decision to deter kobirajes from legitimately exercising their profession. In many cases, no doubt, they do very successfully treat certain disorders; but we think it very important that the public, especially the poorer part of the public, who mostly have to rely upon such practitioners as kobirajes, should be protected from ignorant experiments in surgery.

We think, therefore, that the conviction must be affirmed. But we do not think it necessary for the ends of justice to sustain the severe sentence passed upon the prisoner. Similar acts by really professional men have been visited in this country with much less punishment. We think that, as this is the first case from the Mofussil with which we have had to deal, it would be sufficient to inflict the penalty of a fine instead of imprisonment.

The sentence of one year's rigorous imprisonment will, therefore, be set aside, and a fine of a hundred rupees imposed upon the prisoner. In default of payment he must suffer three months' rigorous imprisonment.

H. T. H.

Conviction upheld.

1887.

SUKAROO
KOBIRAJ
v.
THE
EMPRESS,
14 Cal. 566.

CRIMINAL REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

QUEEN-EMPRESS *v.* KARIM BUKSH.¹

1887.

June 10.

14 Cal. 633.

False charge—Penal Code, s. 211.

A false charge before the police is a false charge falling within the first portion of s. 211 of the Penal Code.

The latter portion of s. 211 of the Penal Code is confined to cases in which criminal proceedings have been instituted, and does not apply to false charges merely. *Empress of India v. Pitam Rai*² and *Empress v. Parahu*³ followed.

THE accused in this case, one Karim Buksh, a writer constable, had laid a charge of theft against a certain person before the police. The police reported the case to be false, whereupon the District Magistrate made over the case to a Deputy Magistrate for trial. On the day fixed for trial, Karim Buksh did not appear to prosecute, and the Deputy Magistrate therefore returned the record to the District Magistrate. The District Magistrate then passed an order in the case declaring it to be false, and directed that Karim Buksh should be prosecuted under s. 211 of the Penal Code. The case against Karim Buksh was then taken up, and he was convicted of an offence under s. 211 of the Penal Code, and sentenced to a fine of Rs. 50, or in default to two months' rigorous imprisonment.

The District Magistrate sent up the case to the High Court for revision, considering that the order of the Deputy Magistrate was wrong in law, inasmuch as the criminal proceedings instituted by Karim Buksh having been taken under s. 380 of the Penal Code, which carried a maximum sentence of seven years' rigorous imprisonment, the Deputy Magistrate had no alternative but to pass a sentence of imprisonment under the latter part of s. 211 of the Penal Code.

Baboo *Makunda Nath Rai* for Karim Buksh contended that the sentence of fine was legal, the case falling under the first part of s. 211 of the Penal Code; that the first part of the section dealt with criminal proceedings as well as false charges, and a sentence of fine only would be perfectly legal, although such false charges related to offences punishable with death, transportation for life, or imprisonment for seven years or upwards; that in the latter part of the section, criminal proceedings only are spoken of; that here the false charge having been made before a police-officer, no criminal proceeding was instituted in any Court; that therefore the Deputy Magistrate was quite competent to pass a sentence of fine only. See *Empress of India v. Pitam Rai*² and *Empress v. Parahu*.³

The order of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows:—

PETHERAM, C.J.—In this case we think there is no reason for the interference of the Court. This case has been referred to us by the Magistrate in order that this Court may revise the sentence of fine which has been passed on the accused on a conviction of having made a false charge before the police, because the charge which he made was a charge of an offence under s. 380 of the Indian Penal Code, the punishment for which may be seven years' rigorous

¹ Criminal Reference, No. 137 of 1887, made by C. R. Marindin, Esq., Magistrate of Dinagore, dated the 27th of May 1887, against the sentence passed by H. Thompson, Esq., Deputy Magistrate of Dinagore, dated the 10th of May 1887.

² I. L. R., 5 All. 215.

³ I. L. R., 5 All. 598.

imprisonment, and the Magistrate thinks that the sentence of fine was illegal, because, by the latter portion of s. 211 of the Indian Penal Code, the punishment must be a punishment of imprisonment, and there is no option to impose a fine only.

The facts of the case here are, that the accused made a charge before the police which he did not afterwards press before the Magistrate, and the only offence which he has committed has been that of making a false charge before the police, and not of instituting any criminal proceedings beyond that. The question which arises is, whether the offence which he has committed comes within the earlier or later portions of s. 211 of the Indian Penal Code.

The earlier portion of that section provides that "whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;" this is the first part of the section. And then the section goes on to say: "And, if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, the person instituting such criminal proceeding shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." The class of offence which is included in the last half of this section is punishable with imprisonment without option of fine; and the question is, whether the offence of which the accused has been guilty is within the latter half of the section.

Now, the latter half of the section is confined to criminal proceedings instituted on false charges, and by the earlier part of the section the distinction is drawn between criminal proceedings instituted and false charges alone. We think that we must make the same distinction, and must hold, as has been held in several cases in the Allahabad Court, though not in this Court, that the latter part of the section is confined to cases in which criminal proceedings have been instituted, and that it does not apply to false charges merely.

But, as I said before, the accused in this case did not institute any criminal proceedings in the sense of his instituting any proceedings in any Court. What he did was to make a false charge before the police, and that, it seems to us, is the kind of false charges which is dealt with in the first part of the section, and consequently that the Magistrate was entitled to inflict the punishment which is provided by that part of the section, and that he was not compelled or, indeed, empowered to inflict the punishment fixed by the latter half of the section, and therefore it was competent to him to award a fine only, if in his discretion he thought fit.

For these reasons we think that the Deputy Magistrate committed no legal error in the course he took in this case, and there is no reason for the interference of the Court.

T. A. P.

Order upheld.

1887.

QUEEN-
EMPRESS

v.

KARIM
BUKSH,
14 Cal. 633.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghosh.

1887.

June 30.

IN THE MATTER OF THE PETITION OF ISWAR CHUNDER GUHO AND OTHERS.¹

14 Cal. 653.

False evidence—Affidavit affirmed before a Deputy Magistrate—Prosecution on facts stated in an affidavit affirmed before a Deputy Magistrate—Penal Code (Act XLV. of 1860), ss. 193, 199—Declaration by law receivable as evidence—Sanction to prosecute, Order for, quashed.

A Deputy Magistrate has no power to administer an oath to a person making a declaration in the shape of an affidavit; and such person cannot, on the facts stated in such declaration, be prosecuted for committing an offence either under s. 193 or s. 199 of the Penal Code.

THIS was a rule calling upon the District Magistrate of Mymensingh to show cause why an order passed by him sanctioning a prosecution under s. 199 of the Penal Code should not be quashed.

The sanction referred to was given under the following circumstances:—

One Dherai Duffadar, a cattle-dealer, had preferred a complaint against Sarat Chunder Bhoomick and Gazi Shaik, charging them with wrongful restraint in having prevented his cattle from being taken to a certain mela. Baboo Shama Chunder Dass, a Deputy Magistrate of Jamalpur, referred the complaint to the police for investigation, and the police subsequently sent up the two accused with a report that the charge was true. On the application of Gazi Shaik the Magistrate of the District made an order transferring the case to the Court of Baboo Akhoy Coomar Bose, Deputy Magistrate of Mymensingh; but the order not having, for some reason or another, reached Baboo Shama Chunder Dass, the case was heard by him. Before, however, the case was actually entered into, one Iswar Chunder Guho, at the request of Sarat Chunder Bhoomick, drafted a petition praying Baboo Shama Chunder Dass not to proceed with the case, inasmuch as he was practically the prosecutor in the case, and an order for transfer had already been made, but that, that order not having been received, the petitioner was desirous of renewing his application for such transfer.

This petition was presented by Sarat Chunder Bhoomick, together with an affidavit affirmed before the Deputy Magistrate, which contained an allegation that the police had started the case with the assistance and under the direction of the Deputy Magistrate himself, and that the charge was false. The case was, however, proceeded with, and the accused acquitted.

Baboo Shama Chunder Dass subsequently to this applied to Mr. Glazier, the District Magistrate, for sanction to prosecute Sarat Chunder Bhoomick and Iswar Chunder Guho for giving false evidence in a stage of a judicial proceeding, the alleged false evidence being the statement contained in the affidavit of Sarat Chunder Bhoomick, charging the Deputy Magistrate with having inspired the prosecution in that case. Mr. Glazier thereupon sanctioned the prosecution of those persons, and made over the case to Moulvie Mahomed, a Deputy Magistrate of Mymensingh, for trial.

The accused applied for and obtained the rule above mentioned, calling upon Mr. Glazier, the District Magistrate of Mymensingh, to show cause why the order directing proceedings to be taken against them should not be quashed.

¹ Criminal Motion, No. 163 of 1887, against the order passed by E. G. Glasier, Esq., District Magistrate of Mymensingh, dated the 27th of April 1887.

Mr. *Monomohun Ghose* for the accused contended that *Sarat Chunder Bhoomick* had committed no offence, the Deputy Magistrate having no authority to receive an affidavit in the course of a criminal trial, nor any authority under the Criminal Procedure Code to administer an oath to a person making a declaration to an affidavit, and the accused could not, therefore, be prosecuted under s. 199 of the Penal Code; that *Iswar Chunder Guho* had merely drafted the petition; and that the proceedings held by *Baboo Shama Chunder Dass* were *coram non judice*, they being held at a time when the order for transfer was in force.

No one appeared to show cause.

The order of the Court (*PETHERAM, C. J., and GHOSE, J.*) was as follows:—

This rule was obtained to set aside certain pending proceedings taken against two persons for perjury. They have been ordered to be prosecuted, but no commitment has taken place, and the question is whether there is any evidence of their having committed perjury. What is alleged is that they have made an affidavit under the sanction of an oath or affirmation before the Deputy Magistrate, who was enquiring into the case of one of them for the purpose of intimating to him that he intended to apply under s. 526 of the Code of Criminal Procedure to have the case removed for trial to some other Court.

Upon that statement of the case the question arose whether he had power to administer an oath to a person for the purpose of swearing an affidavit, so as to make it binding upon them under s. 199 of the Indian Penal Code.

We have searched the Code, and have enquired about this matter, but we can find no power in a Deputy Magistrate to administer an oath to a person making a declaration in the shape of an affidavit.

Under these circumstances we do not see how this case can come under s. 199 of the Indian Penal Code, inasmuch as this was not a declaration which any public servant was bound or authorised by law to receive as evidence of the facts stated in it.

Under these circumstances we think that upon the admitted facts of this case these persons are not alleged to have made any affirmation or taken any oath within the meaning of the Penal Code, and therefore they are not liable to prosecution for perjury under s. 199 or s. 193. The proceedings pending before the Deputy Magistrate against *Iswar Chunder Guho* and *Sarat Chunder Bhoomick* will, therefore, be quashed.

T. A. P.

Rule absolute.

CRIMINAL MOTION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF UMESH CHANDRA KAR AND ANOTHER.¹

Public nuisance—Penal Code (Act XLV. of 1860), ss. 268, 283, 290—Obstruction on tidal navigable river.

Persons placing a bamboo stockade across a tidal navigable river for the purpose of fishing, although leaving in such stockade a narrow opening for the passage of boats, which

¹ Criminal Motion, No. 188 of 1887, against the order passed by *Baboo Bhoyrub Nath Palit*, Deputy Magistrate of Burdwan, dated the 11th of February, and confirmed on appeal by *W. Oldham, Esq.*, District Magistrate of Burdwan, dated the 4th of March 1887.

1887.

IN THE
MATTER OF
THE PETITION
OF ISWAR
CHUNDER
GUHO,
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1887.

July 9.

14 Cal. 656.

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OF UMESH
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KAR,
14 Cal. 656.

passage was, however, kept closed except on the actual passage of a boat, were charged at the instance of a sub-divisional officer with causing an obstruction under s. 283 of the Penal Code.

Held that, although it was doubtful whether s. 283 applied to the case, they had committed an offence under s. 268 of the Penal Code, and were punishable under s. 290 of that Code.

THE accused were charged at the instance of a sub-divisional officer under s. 283 of the Penal Code with causing obstruction to the public by raising a bamboo stockade for the purpose of fishing across the whole breadth of the Bharnu, a tidal navigable river, close to the ferry at Mirzapur. It was proved at the trial before the Deputy Magistrate that the stockade reached across the river from one bank to the other; that an opening four or five cubits wide near the northern bank of the river was made for the passage of boats, but this passage was kept closed by bamboos, it being opened only when necessary to allow boats to pass through, and that only at the convenience of the people using the stockade; that a light was placed on the stockade at night; that the stockade had never been used in former years; and that, although the passage was large enough for dinghies to pass freely, yet a larger cargo boat could only do so with great difficulty, and several manjhis were called, who proved that their boats had been prevented from passing freely over all parts of the river at the point. The Deputy Magistrate on the above facts held that the public were entitled to the use of the entire breadth of the river, and that the accused had, by placing this stockade across the river, caused an obstruction, and thereby committed an offence under s. 283 of the Penal Code; he therefore sentenced them to pay a fine of Rs. 25 each, or in default to undergo imprisonment for fifteen days.

The prisoners moved before a Bench of the High Court consisting of Petheram, C.J., and Ghose, J., and obtained a rule calling upon the Crown to show cause why the conviction and sentence should not be set aside on the ground that there was no evidence of injury to any particular individual, and no complaint by any one of any such injury, and that therefore no offence, under s. 283 of the Penal Code, had been committed, inasmuch as that section contemplated an injury to some particular person.

The rule came on for hearing before the Chief Justice and Mr. Justice Beverley.

Mr. O. C. Mullick and Baboo Jashoda Nundun Paramanick in support of the rule cited *Empress v. Ram Singh*¹ and *The Queen v. Khader Moidin*² as showing that it must be proved that obstruction was caused to some particular individual before a conviction could be had under s. 283.

The Deputy Legal Remembrancer (Mr. Kilby) to show cause contended that, whether or no s. 283 applied, the case fell under ss. 268 and 290 of the Penal Code.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

This rule has been obtained for the purpose of setting aside a conviction and sentence passed upon the petitioners for committing a public nuisance by obstructing a navigable river. Now, the facts which are absolutely undisputed are that there is a navigable river somewhere in Bengal across which the defendants in this case have set up a bamboo dam of some kind for the purpose of catching fish. That bamboo dam seems to extend all the way

¹ 11 C. L. R. 462.

² 1 L. R., 4 Mad. 235.

across the river, but there is a place which is opened at times, and through which boats can then proceed. This place is also kept lighted and guarded by men for the purpose of seeing that no accidents happen. The first question, and in fact the only question, is whether this is a public nuisance under s. 268 of the Indian Penal Code. I do not think there can be the slightest doubt about it myself, because, this being a navigable river, the public have a right to navigate over the whole place, and any one who interferes with the free navigation of it without any right to do so commits a public nuisance. It is admitted that this obstruction extends over the whole width of the river with the exception of a small outlet, through which boats can pass by using considerable precaution. Under these circumstances I do not feel any doubt that this is a public nuisance. Then the only other question is whether this is an offence which can be punished by fine under the Indian Penal Code. When this rule was applied for it was moved and granted upon the ground that there was no evidence of injury to any particular individual, and no complaint by any one of any such injury, and that for that reason the petitioners were not liable to be punished under s. 283, which contemplates an injury to some particular person; but, on looking further to s. 290, that section provides for cases in which there is no special punishment provided for a public nuisance, and it is clear that, when a person is guilty of a public nuisance of any kind, he may be punished under s. 290. Under these circumstances I do not think that there is the slightest doubt that this was a public nuisance under s. 268 of the Code, and as I said before, although I had some doubt whether it was punishable under s. 283, I have no doubt that it is punishable under s. 290 of the Indian Penal Code, and the fine of Rs. 25, which has been imposed in this case, is not too heavy.

We think therefore that this rule must be discharged.

T. A. P.

Rule discharged.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris, and Mr. Justice Ghose.

QUEEN-EMPRESS v. SHAM LALL.¹

False charge—Criminal Procedure Code (Act X. of 1882), s. 191—Cognizance of an offence on suspicion—Penal Code (Act XLV. of 1860), s. 211—Police-report—False charge, Prosecution for, without first enquiring into truth of original complaint.

1887.

June 20.

14 Cal. 707.

A person having laid an information before the police, the police reported the case as false; the informant then appeared before a Magistrate, asking that his case might be investigated, and his witnesses summoned. This application was refused, and the Magistrate, after perusing the police-report, passed an order directing him to be prosecuted under s. 211 of the Penal Code.

Held that the application to the Magistrate was "a complaint" within the meaning of s. 191 of the Criminal Procedure Code into which the Magistrate was bound to have enquired.

A Magistrate may take cognizance under s. 191 of the Criminal Procedure Code of an offence brought to his notice by a police-report which affords ground for a suspicion that an offence has been committed; but, as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected be tried until some

¹ Reference made by C. A. Wilkins, Esq., the Sessions Judge of Bhagulpur, under s. 438 of Act X. of 1882, dated 10th May 1887.

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person aggrieved has complained, or until he has before him a police-report on the subject based on an investigation directed to the offence to be tried, and in cases of alleged false charges until it is clear that the original charge has been either heard and dismissed or abandoned. And before the order to prosecute for the false charge is made, the person who made the original charge should be offered an opportunity of supporting it or abandoning it.

REFERENCE to the High Court by the Sessions Judge of Bhagulpur.

On the 15th March 1887, one Sham Lall gave information to the police that Muni Lal and others had looted his crops. Sham Lall claimed to hold the land on which the crops stood under a registered pottah not produced. The police investigated the matter, and, after having examined six witnesses for the informant Sham Lall, and twelve witnesses on behalf of Muni Lal and the others charged with him, came to the conclusion that the land had been sown and cultivated by Muni Lal, and that the case involved a question of title; they, therefore, returned the case in C Form as "false owing to a question of title being involved." This report was forwarded to the Magistrate on the 22nd March. On the 24th March the District Magistrate, after perusing the report, declared the charge false, and ordered a prosecution against Sham Lall for having brought a false complaint.

On the 24th or 25th March Sham Lall appeared before the District Magistrate, and asked to have his witnesses summoned, and the case tried. This application was rejected on the 31st March; on the 1st April Sham Lall made another application to the same purport, but this application was, on the 5th April, also refused.

Sham Lall then moved the Sessions Judge for an order revoking "the sanction given by the Magistrate." The Sessions Judge declined to interfere, stating that he was unable to do so, as the Magistrate's order directing the prosecution was not a "sanction" within the terms of s. 195 of the Criminal Procedure Code, inasmuch as the complaint declared to be false was made, not in any Court, but before the police; and that neither was he able to direct that the complaint should be enquired into under s. 437 of the Criminal Procedure Code, as the complaint had not been "dismissed" under s. 203 of that Code, and the accused had not been "discharged." But, being of opinion that Sham Lall should not be prosecuted before he had an opportunity of proving his complaint to be a true one, the Sessions Judge referred the case to the High Court, recommending that the order of the District Magistrate, dated the 24th March, should be set aside, and the original complaint heard.

The case came on for hearing before a Full Bench of the Court.

Mr. *L. M. Ghose* for the accused.—The order of the 24th March in its inception was bad (*a*) because the conclusion arrived at by the police, if embodied in their report, would, if true, point to an offence under ss. 182 and 499 of the Penal Code equally with one under s. 211; nor are offences under ss. 182 and 499, if judged by the punishment inflicted in respect of them, of a less serious nature than an offence under s. 211. An offence, however, under s. 182, would be only cognizable "on the previous sanction and complaint of the public servant concerned," &c., and an offence under s. 499 could only be taken cognizance of "upon a complaint made by some person aggrieved by such offence." It could not, therefore, have been the intention of the Legislature to allow a Magistrate to take cognizance of an offence of making a false charge under s. 211 except upon the fulfilment of one or other of the conditions precedent to the authority of the Magistrate to take cognizance of offences under ss. 182 and 499; and (*b*), as Sham Lall had had no opportunity of

establishing the proof of the original charge made by him, the Magistrate had no jurisdiction to direct a prosecution against Sham Lall under s. 211 of the Penal Code without first affording him such an opportunity; see *Empress v. Karimdad*,¹ which case has been followed by *Empress of India v. Radha Kishan*,² and also by *Empress v. Jamni*,³ and *The Queen-Empress v. Ganga Ram*.⁴ There is also the case of *Ramasami v. Queen-Empress*,⁵ where the case last above mentioned was distinguished; the case of *Sheikh Erad v. Nusibunnissa Bibi*⁶ is also in my favour. There are one or two cases against me, viz., *Nusibunnissa Bibi v. Sheikh Erad Ali*;⁷ that case, however, turns on the point that a lower Court cannot interfere with a sanction granted, and there was there, moreover, a quasi-judicial enquiry into the original complaint. Another case is rather against me, viz., *In re Bramanund Bhuttacharjee*,⁸ but the exact point was not determined, as there was no complaint before the Magistrate. In the case of *Gyan Chunder Roy v. Protap Chunder Dass*,⁹ Prinsep, J., makes a distinction between a sanction given under s. 470 of the Criminal Procedure Code of 1872, and the institution of proceedings by a Court of its own motion, and says that a preliminary enquiry is only necessary when the Court takes upon itself to order a prosecution. That distinction is, however, erroneous, and the expression of opinion is *obiter*. The police-report here was not one which the Magistrate could have taken cognizance of under s. 191 of the Procedure Code; under that section he could only take cognizance of an offence of which some one had complained either before him or the police, and not on his own motion. [Petheram, C.J.—Sub-s. c of s. 19 is against you; he can take cognizance on suspicion.] The Magistrate does not profess to have acted under that sub-section. Under s. 157 the police can send up their report to the Magistrate, and under s. 167 the Magistrate may take cognizance of the matter. The police-report does not terminate the proceedings, as they have to bring up the accused on bail or in custody, and the offence, of which the Magistrate may take cognizance under that section, is the offence under investigation by the police.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown.—According to the practice in force before the old Code of Criminal Procedure it was considered that, in the case of heinous offences, the complainant should always inform, in the first instance, the police. After that Code the cases show that, where proceedings have been concluded before the police, the informant can complain to the Magistrate, and the Magistrate is bound to hear the complaint. The Madras High Court have held that, before a prosecution for perjury is commenced against the informant, his original case must have been determined.

The following judgments, were delivered by the Court (PETHERAM, C.J., WILSON, J., TOTTENHAM, J., NORRIS, J., and GHOSE, J.):—

PETHERAM, C.J., after stating the facts, continued.—Upon the above facts three questions arise:—

First.—Were the applications made by Sham Lall to the Magistrate on the 24th or 25th of March and the 1st of April “complaints” within the meaning of s. 191, Criminal Procedure Code, into which the Magistrate was bound to enquire?

¹ I. L. R., 6 Cal. 496; 7 C. L. R. 467.

² I. L. R., 5 All. 36.

³ I. L. R., 5 All. 387.

⁴ I. L. R., 8 All. 38.

⁵ I. L. R., 7 Cal. 208.

⁶ I. L. R., 7 Mad. 292.

⁷ 4 C. L. R. 535.

⁸ 4 C. L. R. 413; I. L. R., 4 Cal. 869.

⁹ 8 C. L. R. 233.

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Second.—Had the Magistrate, upon the report of the police, dated 22nd March 1887, jurisdiction to make the order of March 24th, 1887? and

Third.—If he had jurisdiction to make it, did he exercise a sound judicial discretion in doing so?

I am clearly of opinion that the first question must be answered in the affirmative.

Sham Lall, on the days in question, appeared before the Magistrate, stated that the offence had been committed, and requested that it might be investigated by calling and examining his witnesses. This, it seems to me, was the only complaint he could make, and, having made it, he was entitled, as a matter of common justice, to have it enquired into by the Magistrate, and that gentleman could not avoid the responsibility of making the enquiry himself merely by accepting the conclusion of the police on the subject.

The second question is more difficult; but after a careful consideration of the sections of the Code, and of the cases¹ on the subject, I have come to the conclusion that it also must be answered in the affirmative.

The facts alleged, if they are true, might constitute an offence under s. 211, and a Magistrate may take cognizance of such an offence if it is properly brought before him; and it seems to me that, where a state of facts is brought to his notice by a police-report, which affords ground for supposing that the offence has been committed, he has jurisdiction under ss. 191 and 192 to enquire into or try the charge himself, or to send it for enquiry or trial to one of his subordinates.

My answer then to the second question is in the affirmative.

The third question must, in my opinion, be answered in the negative. As before explained, I think that, under the circumstances, the Magistrate would have the jurisdiction. But, as a matter of sound judicial discretion, I also think that in all cases in which there is a suspicion, for it can be called nothing but a suspicion, arising from circumstances which have come under the Magistrate's notice on the perusal of the report of the investigation into another charge, that some offence, of which no one has complained, has been committed, the

¹ *Queen v. Subbanna Gaundan*, 1 Mad. H. C. 30.
Bhokteram v. Heera Kolita, 1 L. R., 5 Cal. 184.
Ashrof Ali v. The Empress, 1 L. R., 5 Cal. 281.
Empress of India v. Abul Hasan, 1 L. R., 1 All. 497.
Empress of India v. Bhawani Prashad, 1 L. R., 4 All. 182.
Ramasami v. Queen-Empress, 1 L. R., 7 Mad. 292.
Gyan Chunder Roy v. Protap Chunder Das, 1 L. R., 7 Cal. 208.
Empress v. Salik Roy, 8 C. L. R. 255.
Bramanund Bhuttacharjee, In re, 8 C. L. R. 233.
Empress v. Shito Behara, 8 C. L. R. 265.
Chukradar Potti, In re, 8 C. L. R. 289.
Sakhina Bibi, In re, 8 C. L. R. 387.
Queen v. Heera Lal Ghose, 13 W. R. Cr. 37.
Syed Nissar Hossein v. Ram Golam Singh, 25 W. R. Cr. 10.
Biyogi Bhagut, In re, 4 C. L. R. 134.
Sheikh Erad Ali v. Nusibunnissa Bibi, 4 C. L. R. 534.
Russick Lall Mullick, In re, 7 C. L. R. 383.
Empress v. Karimdad, 7 C. L. R. 467.
Girdhari Mondul, In re, 1 L. R., 8 Cal. 435.
Empress of India v. Baldeo, 1 L. R., 3 All. 322.
Empress of India v. Radha Kishan, 1 L. R., 5 All. 36.
Empress v. Jamni, 1 L. R., 5 All. 387.
Queen-Empress v. Ganga Ram, 1 L. R., 8 All. 38.

Magistrate ought not to take cognizance of such offence under s. 191, and direct that the persons suspected be tried, until some person aggrieved has complained, or until he has before him a police-report on the subject, based on an investigation directed to the offence to be tried, and in cases of alleged false charges, until it is clear that the original charge has been either heard and dismissed or abandoned; and I should add that, in order to show conclusively that such a charge has been abandoned, I think that, before the order to prosecute for the false charge is made, the person who made the original charge should be offered an opportunity of supporting it or abandoning it.

In the present case, in addition to these reasons which apply to all such cases, I think that the order of the Magistrate must be set aside, because the suspicion is not justified by the police-report on which it is founded.

The Magistrate's order will accordingly be set aside.

NORRIS, J.—This case comes before us on a reference under s. 438, Criminal Procedure Code, from the Sessions Judge of Bhagulpore.

The facts are as follows: On the 15th March 1887, one Sham Lall gave information to the police that on the previous day, at about 4 A.M., three men, named Muni Lal, Ata Roy, and Luchmun Roy, had stolen growing corn of the value of Rs. 100 from his field.

In his first complaint Sham Lall named four witnesses; when the police came to make enquiry into the alleged theft on the spot, he stated that three of his witnesses had gone over to the side of the accused, and he named six fresh witnesses.

The police examined the one witness, out of the four first named, who had not gone over to the accused, and five out of the six subsequently named. One witness said: "On Monday, at 4 A.M., I went to the field, and saw that the accused had been causing the crops of my master's field to be reaped through his labourers and coolies; upon this I went to Monghyr, and gave information to my master; my master came and lodged the complaint." Another witness said: "On Tuesday I saw the accused reaping crops on the field of the complainant." The remaining witnesses deposed from hearsay, "that in this year the complainant grew barley on the field in dispute, and that the said field was the jote of Muni Lal, one of the accused." Muni Lal, in answer to the charge, said: "This field has continued in my jote since five or seven years; in this year I also made cultivation, and reaped and brought the rabi crops on Monday last; the complainant falsely alleges that in this year he made cultivation and grew crops, the reason being that I hold shikmi nukdi jote under Gokhal Kumhar, who is brother-in-law of Jhumuk Ram Kumhar, auction-purchaser, who held nukdi jote under the said Jhumuk Ram Kumhar; since two years the rent of this field has fallen due by me; Jhumuk Ram Kumhar, the zemindar, has, on the part of the real jotedar, Gokhal Kumhar, caused a suit to be instituted against me for arrears of rent; owing to the annoyance caused by the said non-payment of rent, Jhumuk Kumhar, the zemindar, has, by the advice of Gokhal Kumhar, the real jotedar, caused a pottah to be executed and registered in favour of Sham Lall Kumhar" (the complainant), "his relation, and a person of the same caste, in respect of jote land, without my knowledge, and laid this plan to eject me from the field, and now caused this false complaint to be brought by the complainant against me for taking the crops grown by me; but in this year I cultivated and grew crops on my entire field as before, and carried away the crops of the same."

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Ata Roy "pleaded his absence of concern in this field, and corroborated, according to Muni Lal's answer, that the field in suit was the jote of Muni Lal, accused." Luchmun Roy does not appear to have been examined. Twelve witnesses were examined by the police on the part of Muni Lal, one of them being one of the witnesses named by the complainant in his first complaint, and who was alleged by him to have gone over to the accused. The statement of Muni Lal and the evidence of his witnesses satisfied the police "that the complainant had not cultivated the field, that the complaint was altogether false, that the plan had been laid on the part of Jhumuk Ram Kumbar, zemindar, for dispossessing the accused of his field and for taking away this year's crops of his field, that in reality the land was cultivated and sown with crops by Muni Lal, accused;" they, therefore, forwarded a report in Form C (false case), stating in column 7, under the heading, "Particulars of the enquiry, with names of any persons accused or suspected, but not arrested." "On enquiry the charge against Muni Lal, Ata Roy, and Luchmun Roy, accused, is not proved, for in this case the question of title is involved;" and at the end of column 9, under the heading, "Course adopted by the police, and reasons of failure," they said, "The case is found false owing to question of title being involved; consequently no charge of bringing false complaint can be made." The report was sent to the Deputy Magistrate, who forwarded it to the District Magistrate, Mr. Mosley, who, on 24th March, made an order "that the complainant be prosecuted for bringing a false complaint, the occurrence being false." On the 24th or 25th of March Sham Lall applied to the District Magistrate "to have his witnesses summoned, and the case tried;" this application was rejected on 31st March. On the 1st April Sham Lall again applied to have his complaint tried; this application was rejected on 5th April; and on 7th April the charge against Sham Lall of bringing a false charge was made over by the District Magistrate to a Deputy Magistrate for enquiry or trial.

Sham Lall then petitioned the Sessions Judge "to revoke the sanction given by the District Magistrate."

The Sessions Judge, as he correctly points out in his letter of reference, cannot interfere. The District Magistrate's order for the prosecution of Sham Lall is not a "sanction" within the meaning of s. 195, Code of Criminal Procedure, for the alleged offence of bringing a false charge was not "committed in, or in relation to, any proceeding in any Court," but before the police, and no sanction to prosecute was necessary; thus there is no "sanction given by an authority subordinate" to the Sessions Judge which he can revoke. Neither can the Sessions Judge, under s. 437, Code of Criminal Procedure, "himself make or direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make further enquiry into" Sham Lall's complaint against Muni Lal and the others, for it has not been dismissed under s. 203, Code of Criminal Procedure, nor have the accused persons been discharged.

Under these circumstances the Sessions Judge has referred the case to us with a recommendation that the District Magistrate's order of 24th March should be set aside, and that he be directed to hear Sham Lall's complaint.

I am of opinion that we ought to act in accordance with the Sessions Judge's recommendation. The District Magistrate in his letter of explanation to the Sessions Judge says: "There are contradictory rulings on this subject of prosecution under ss. 182 and 211 of the Indian Penal Code, but what runs through all that I have been able to consult is that, when a man has made a complaint before a Magistrate, he must have proper opportunities to prove his

case before he can be prosecuted under the above sections ; but there was no complaint of Sham Lall's before a Magistrate in this case, for a petition to be allowed to call his original witnesses, put in after a prosecution was instituted, was not a complaint."

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I think that the view taken by the District Magistrate of Sham Lall's application or petition is erroneous. I am clearly of opinion that it was a "complaint" within the meaning of s. 191, Code of Criminal Procedure. That section authorises a Magistrate to "take cognizance of any offence upon receiving a complaint of facts which constitute such offence." This "complaint" may be by word of mouth or in writing ; no prescribed form of words is necessary ; all that is required is that facts, which *prima facie* constitute an offence, should be brought to the notice of the Magistrate by the complainant. It is clear that the question of the time when an application or petition is made to a Magistrate cannot be a circumstance to be taken into consideration in arriving at a conclusion as to whether it is a "complaint" or not.

The precise form of Sham Lall's application or petition is not before us. The District Magistrate speaks of it as "a petition to be allowed to call his original witnesses." The Sessions Judge says Sham Lall "asked to have his witnesses summoned, and the case tried." Even if the petition was, as the District Magistrate describes it, a bare application to be allowed to call the original witnesses, it must, of course, be read in connection with the police-report which was before the Magistrate, and which he says he had "carefully considered ;" and, so read, the petition could mean nothing less than a reiteration by Sham Lall of his charge to the police, and a request that such charge should be enquired into. If, as the Sessions Judge says, Sham Lall "asked to have his witnesses summoned and the case tried," it is difficult to conceive of any element wanting to constitute "a complaint."

Sham Lall's petition being, in my opinion, a complaint, it was the duty of the Magistrate to proceed with it according to law ; and it was none the less his duty so to proceed, because the charge in respect of which the complaint was made had been returned by the police as false.

I am, therefore, of opinion that Sham Lall's complaint should be enquired into and dealt with according to law.

In determining whether the District Magistrate's order for the prosecution of Sham Lall for an offence under s. 211, Indian Penal Code, should be set aside or not, two questions arise : First, had the Magistrate, under the circumstances of the case, and upon the materials before him, jurisdiction to make the order ? Second, if he had jurisdiction, has he exercised it with judicial discretion ?

I am of opinion that the first question should be answered in the affirmative. S. 191 of the Code of Criminal Procedure authorises a Magistrate "to take cognizance of any offence (a) upon receiving a complaint of facts which constitute such an offence ; (b) upon a police-report of such facts ; (c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion that such offence has been committed."

It is clear that the Magistrate in this case had such materials before him as upon a consideration of which he might "suspect" the offence had been committed.

Mr. Ghose, in arguing for the petitioner, contended that, whereas the conclusions arrived at by the police, and embodied in their report, would, if true,

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point to the commission of an offence by Sham Lall under ss. 182 and 499, Indian Penal Code, equally with one under s. 211, Indian Penal Code, and that whereas offences under ss. 182 and 499, Indian Penal Code, were, if judged by the punishment which might be inflicted in respect of them, much less serious than an offence under s. 211, Indian Penal Code; and that whereas an offence under s. 182, Indian Penal Code, could only be taken cognizance of "with the previous sanction or on the complaint of the public servant concerned, or of some public servant to whom he is subordinate;" and that whereas an offence under s. 499, Indian Penal Code, could only be taken cognizance of "upon a complaint made by some person aggrieved by such offence," it could not have been the intention of the Legislature to allow a Magistrate to take cognizance of an offence of making a false charge under s. 211, Indian Penal Code, except upon the fulfilment of one or other of the conditions precedent to the authority of the Magistrate to take cognizance of offences under ss. 182 and 499, Indian Penal Code. I am unable to give effect to this argument.

The Legislature has deliberately, under s. 195, cl. b, Code of Criminal Procedure, limited the protection of a preliminary sanction in respect of offences under s. 211, Indian Penal Code, to cases where "such offence is committed in, or in relation to, any proceeding in any Court." It is for the Legislature to decide whether the same protection should be given to persons charged under s. 211, Indian Penal Code, with making a false charge to the police, as is given to persons charged under that section, "when the offence is committed in, or in relation to, any proceeding in any Court," and to persons charged under ss. 182 and 499, Indian Penal Code.

Mr. Ghose further contended that when, as in this case, the complainant has had no opportunity of establishing the truth of his original charge, the Magistrate had no jurisdiction to take cognizance of an alleged offence under s. 211, Indian Penal Code, until the complainant has had such opportunity afforded him. I do not think this is so. I can find no provision in the Code of Criminal Procedure thus clogging the Magistrate's jurisdiction, and the reported cases do not support the argument.

The case mainly relied upon by Mr. Ghose was *Empress v. Karimdad*,¹ where Garth, C.J., in giving judgment, is reported to have said: "Whatever opinion may have been formed by the Magistrate upon the police-report as to the truth of Karimdad's complaint, when he appeared with his witnesses, and asked to be allowed to prove his case, we think that the Magistrate could not, without hearing him and his witnesses, and deciding upon the truth or falsehood of his charge, proceed to put him upon his trial under s. 211 of the Penal Code." If the learned Judge by "could not" meant "was not authorised by law," I am unable to agree with him. But if he meant, as I think a perusal of the concluding paragraph of his judgment shows that he did mean, "could not with due regard to judicial discretion," the case, so far from being an authority in Mr. Ghose's favour, is an authority against him.

I now proceed to consider whether in this particular case the Magistrate has exercised a judicial discretion in taking cognizance of the alleged offence under s. 211, Indian Penal Code, and directing a prosecution therefor. I am of opinion that he has not, and that his order must be set aside.

As already pointed out, the District Magistrate admits "that, although there are contradictory rulings on the subject of prosecutions under ss. 182 and

¹ 7 C. L. R. 467; 1 L. R., 6 Cal. 496.

211, Indian Penal Code, yet what runs through all he has been able to consult is that, when a man has made a complaint before a Magistrate, he must have proper opportunities of proving his case before he can be prosecuted under the above sections."

If for "can be prosecuted," we read "ought to be prosecuted," the District Magistrate's interpretation of the cases is quite right.

As, therefore, I have already held that Sham Lall's application or petition of the 24th March was a "complaint" within the meaning of s. 191, Code of Criminal Procedure, it is clear that upon his own view of the authorities the Magistrate's order must be set aside.

It is manifest, too, that the District Magistrate has misapprehended the nature of the police-report in this case. He says, in his letter of explanation to the Sessions Judge, "the real complaint was in the police-report, where the police complained against Sham Lall and asked for a prosecution, and after carefully considering that complaint, and moreover studying the evidence by which it was supported, I made the case over for trial." Now, the police-report was not "a complaint of facts constituting an offence" within s. 191, Code of Criminal Procedure, and so far from its "asking for a prosecution," it distinctly stated, it may be on quite insufficient grounds, "that no charge of bringing a false complaint could be laid owing to a question of title being involved."

I am also of opinion that the conclusions of the police as embodied in their report were not of such a character as to reasonably warrant the Magistrate in "suspecting" that Sham Lall had committed an offence under s. 211, Indian Penal Code.

It is not in accordance with the ordinary practice in criminal cases that Magistrates should take cognizance of non-cognizable offences except upon the complaint of the aggrieved persons, though there may be exceptional cases in which they may exercise a judicial discretion in doing so. And there is nothing in the Code of Criminal Procedure to indicate that the Legislature intended charges under s. 211, Indian Penal Code, to stand on any different footing from charges of any other non-cognizable offence.

I am also of opinion that a Magistrate should not take cognizance of an alleged offence under s. 211, Indian Penal Code, until the alleged offender has had an opportunity of substantiating the original charge, and such original charge has been disposed of in due course of law.

There is no doubt that the decided cases show that a Magistrate may take cognizance of the offence of making a false charge when the original complaint has been abandoned, but he must do so on proper materials.

The necessary ingredients to constitute a false charge under s. 211, Indian Penal Code, are three. In the first place, it must be made with intent to injure; in the second place, it must be false; and in the third place, it must be made without just or lawful ground; in other words, it must be made maliciously.

Now, it does not at all follow that because a person has charged another to the police with, say, theft, and has not applied to a Magistrate to take cognizance of the charge after the police have found it false, and in that sense has abandoned it, that he thereby admits that the charge was made with intent to injure, or that it was made maliciously. He may have made the charge, as in this case, upon the information of a third person, and during the progress of the police-investigation he may have satisfied himself that his informant was mis-

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taken, and the charge, therefore, in the sense of being untrue, false. Or again, having made the charge on his own responsibility, he may be satisfied, after the police-investigation, that it is a case of mistaken identity, or that the person whom he has charged took the article, said to have been stolen, under a *bona fide* claim of right.

Therefore it by no means follows from the failure of a person to apply to a Magistrate to take cognizance of a charge which has been found by the police to be false that there need be grounds for preferring a charge against him under s. 211, Indian Penal Code, of making a false charge.

WILSON, J.—I concur in the judgments that have been delivered.

TOTTENHAM, J.—I too concur generally in these judgments, but I am not quite satisfied that the Magistrate should be deterred from taking cognizance of offences against public justice except on the complaint of parties actually aggrieved by them.

GHOSE, J.—I concur generally in the judgments that have been delivered by the Chief Justice and Mr. Justice Norris.

T. A. P.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice Ghose, and Mr. Justice Beverley.

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QUEEN-EMPRESS v. KARTICK CHUNDER DAS.¹

Evidence, Admissibility of—Previous conviction for the purpose of increasing the evidence at the trial against accused—Evidence Act (I. of 1872), s. 54—Criminal Procedure Code (Act X. of 1882), s. 310.

Under s. 54 of the Evidence Act a previous conviction is in all cases admissible in evidence against an accused person.

On the 10th June 1887, one Kartick Chunder Das was charged under s. 411 of the Penal Code with receiving stolen goods. During the course of the trial the prosecution tendered as evidence against the accused a previous conviction, three years old, for attempting to commit the same offence. The evidence was tendered under s. 54 of the Evidence Act as tending to show guilty knowledge. The evidence was objected to, but the objection was overruled by the Magistrate, and the evidence admitted. The prisoner was subsequently convicted of the offence charged subject to a reference to the High Court on the question whether the evidence of the previous conviction was properly admitted or not.

On the reference being called on for hearing the Court (Petheram, C.J., and Beverley, J.) considered the question to be one of great importance, and without giving any opinion on the question referred decided to call a Full Bench to hear the point argued. The case then came on before a Full Bench, consisting of Petheram, C.J., Prinsep, J., Pigot, J., Ghose, J., and Beverley, J.

The *Officiating Standing Counsel* (Mr. Bonnerjee) for the Crown.—Since the Evidence Act there are only two reported cases on s. 54, *viz.*, *Roshun Doosadh v. Empress*² and *Reg. v. Parbhudas Ambaram*.³ The Bombay case

¹ Criminal Reference, No. 1 of 1887, made by C. H. Reilly, Esq., the Chief Presidency Magistrate of Calcutta, under s. 432 of the Code of Criminal Procedure.

² I. L. R., 5 Cal. 768.

³ 11 Bom. H.C. 90.

shows the difference between the two parts of s. 54. Reading ss. 2 and 5 of the Evidence Act together, it appears as if evidence may be given in criminal proceedings of previous convictions of accused persons. S. 11 shows when facts not otherwise relevant become relevant. The definition of the word "evidence" is given in s. 3. A similar section to s. 54, *viz.*, s. 19 of 34 and 35 Vic., c. 112, was in force in England before the Indian Evidence Act was passed, and that section applied to special cases. In the Calcutta case cited the Judges say evidence of bad character is relevant, but they do not say the Sessions Judge was in error in admitting the evidence, but they do say, so far as it was treated as evidence of bad character, the Judge was wrong. There is a case decided before the Evidence Act in which it was decided that a previous conviction was not admissible, *viz.*, *Queen v. Thakoordass Chootur*.¹

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[PETHERAM, C.J.—Why did the Legislature pass s. 310 of the Criminal Procedure Code? If s. 54 has the meaning you ascribe to it, the whole of any facts shut out by s. 310 might be brought in under s. 54 of the Evidence Act.] S. 310 of the Code and s. 54 of the Evidence Act must be read together.

[PETHERAM, C.J.—The provisions of s. 310 of the Criminal Procedure Code are safeguards for the protection of prisoners, and as the Code was passed in 1882, it cannot be supposed that the Evidence Act, passed in 1872, should override it.]

Taylor on Evidence, par. 345, p. 325, ed. 1885, sums up the English law on the subject. S. 54 cannot be limited to any particular cases; it must be read broadly, leaving it to the judicial officers to take care that it is made use of in a proper manner. In charges under s. 413, Penal Code, a previous conviction would be admissible. You may, under s. 14 of the Evidence Act, give evidence that an accused had other stolen property in his possession. I submit, therefore, that evidence of a previous conviction may be given at the trial in all cases, whether such previous conviction is connected or not with the offence the accused is charged with.

Mr. Garth for the accused.—The question is not one of English law, but of Indian law. But even in England, before 34 and 35 Vic., c. 112, previous convictions could not be given in evidence except for the purpose of enhancing punishment, and since that Statute they can only be given in certain cases and for particular purposes.

It is clear that, prior to the passing of the Indian Evidence Act, the English law, as it existed before 34 and 35 Vic., c. 112, prevailed in India. See *Queen v. Thakoordass Chootur*,¹ *Queen v. Gopal Thakoor*,² and *Queen v. Phoolchand*.³ If the construction of s. 54 of that Act contended for by the Crown is correct, the effect of it is to admit evidence of a previous conviction of any offence, even one of a wholly different character from that charged, and at any stage of the trial. This would have been a most radical change, going far beyond the existing law in England, and opposed to all the English authorities. Surely, if this had been intended, the change would have been mentioned in the speeches of Sir FitzJames Stephen upon the bill. But the section is never alluded to. Surely also the change would have been effected by more apt and precise words. It is submitted that s. 54 was, in reality, only intended to codify the existing law, not to alter it. Evidence of previous convictions is relevant, and was so before the passing of the Evidence Act, in criminal proceedings, but only for the purpose of enhancing punishment, and it was for this purpose only that the Legis-

¹ 7 W. R. Cr. 7.² 6 W. R. Cr. 72.³ 8 W. R. Cr. 11.

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lature intended to make it relevant by this Act. This view is supported by the authority of Mr. Norton in his treatise on the Evidence Act—see ed. 9, p. 231.

By s. 55 character includes reputation and disposition, and evidence can only be given of general reputation and disposition, and not of particular acts. It is submitted that evidence of a previous conviction could only be relevant (if at all) before conviction as a particular fact showing reputation or disposition. If so, by the express term of the Act it is inadmissible.

The Legislature have also themselves put a construction on the section—see s. 310 of the Criminal Procedure Code. All the elaborate precautions there taken would be useless if the evidence was admissible under s. 54. It might, if the argument for the Crown is correct, be first used as evidence during the trial, and after conviction be made the basis of a fresh charge against the accused for the purpose of enhancing punishment. This could never have been intended.

The construction contended for would work the grossest injustice. It is said the Court has a discretion. But the words of the section are precise and allow of no discretion, and in any case the discretion would be a dangerous one to entrust to the subordinate tribunals of the country.

The opinion of the Full Bench was delivered by

PIGOT, J. (PETHERAM, C.J., PRINSEP, GHOSE, and BEVERLEY, JJ., concurring).—The question referred to us by the Chief Presidency Magistrate is whether, upon the trial of a person charged with being in dishonest possession of stolen property, evidence can be given of a previous conviction of the accused for attempting to receive stolen property knowing it to be stolen, under ss. 511 and 411 of the Indian Penal Code. There is not, in the law of this country, any such special provision as is made by 34 and 35 Vic., c. 112, s. 19, relating to the admission in evidence against a person charged with having received stolen goods knowing them to be stolen, of a previous conviction of such person, for any offence involving fraud or dishonesty. The question, therefore, involves the determination of the construction to be put on s. 54 of the Evidence Act.

S. 54 is one of a group of ss. 52 to 55 inclusive, placed in the Act, under the heading "Character when relevant." Ss. 53 and 54 relate to criminal proceedings only; 52 and 55 to civil cases; the explanation to s. 55 relates to all four sections.

Ss. 53 and 54 and this explanation are as follows :—

S. 53 says: "In criminal proceedings the fact that the person accused is of a good character is relevant."

S. 54 says: "In criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant."

"*Explanation.*—In ss. 52, 53, 54, and 55, the word "character" includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown."

The Standing Counsel to Government contends that under s. 54 evidence may be given of a previous conviction of an accused person of any offence whatever, whether such previous offence be connected or not in any way whatever with the offence with which he is charged; that it may be given as direct evidence upon his trial, and not merely in reply to evidence of good character

offered on the part of the accused ; and, of course, that it may be given, whether or not the accused be charged under s. 75 of the Indian Penal Code.

Mr. Garth for the accused contended that the Legislature cannot possibly have contemplated so serious a change in the law of evidence in criminal cases as this construction of the section would involve ; that the section was not meant to alter but to codify the existing law, and that it cannot have been intended that evidence of a previous conviction should be given, save for the purposes of punishment under s. 75, Indian Penal Code ; and he urged that under the explanation to s. 55 evidence can be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

The question appeared to be not merely of great importance, but of much difficulty. The words of the section are express. On the other hand, we felt great difficulty in attributing to those words a meaning which might involve the admission as evidence against an accused, of proof of a conviction, the fact of which might, in many cases, have no possible bearing whatever upon the question whether he was guilty or innocent of the offence charged against him, and could, in such cases, have no effect save to produce against him a prejudice which, to use the words of an English Act to be referred to presently, would "not be consistent with a fair and impartial enquiry" as regards the subject-matter of the charge against the accused.

We doubted whether the Legislature could have omitted to advert to this danger ; and we thought it our duty to consider whether some construction could not properly be given to the section such as would avoid it.

We were the more impressed with the force of this consideration because the Legislature has, in s. 310 of the Criminal Procedure Code, expressly guarded against the possibility of a jury's being prejudiced against a prisoner while on his trial upon one charge by being made aware of his being charged under s. 75 with a previous conviction.

S. 310 is as follows :—

"In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence committed after a previous conviction for any offence, the procedure laid down in ss. 271, 286, 305, 306, and 309, shall be modified as follows :—

- (a) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge, unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence.
- (b) If he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge.
- (c) If he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly ; but, if he denies that he has been so previously convicted, or refuses to, or does not, answer such question, the jury, or the Court and the assessors (as the case may be), shall then enquire concerning such previous conviction, and in such case (where the trial is by jury) it shall not be necessary to swear the jurors again."

That section, it is true, relates only to a very limited class of cases. Still it appears to recognise, as to such cases at least, the principle that a prisoner

L. L. R., Cal. 98.

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on his trial ought not to be prejudiced by a statement of a previous conviction suffered by him. That provision appears to be taken from English Statute Law, and originally appeared in 6 and 7 Will. IV., c. iii., entitled "An Act to prevent the fact of a previous conviction being given in evidence to the jury on the case before them except when evidence to character is given."

The preamble is as follows: "Whereas by an Act passed in the seventh and eighth years of the reign of King George the 4th, intituled *An Act for further improving the Administration of Justice in Criminal Cases*, provision is made for the more exemplary punishment of offenders who shall commit any felony not punishable with death after a previous conviction for felony: And whereas since the passing of the said Act the practice has been on the trial of any person for any such subsequent felony to charge the jury to enquire at the same time concerning such previous conviction: And whereas doubts may be reasonably entertained whether such practice is consistent with a fair and impartial enquiry as regards the matter of such subsequent felony, and it is expedient that such practice should from henceforth be discontinued." Then comes the enacting part of the Act, which provides that evidence of a previous conviction shall not be given until after the finding for a subsequent felony, except where evidence of good character is given.

We felt, as we have said, that the indiscriminate admission against an accused person of any previous convictions against him would not merely operate in many cases so as to work what we should have called an unjust and unreasoning prejudice; but also that, by the construction contended for on behalf of the prosecution, a formidable novelty must be admitted into the rules of evidence applied in criminal proceedings; for in a multitude of cases the section, by this construction, renders admissible—and declares by its statutory force to be relevant—facts which, in no possible sense, save the technical statutory sense in which the word is used in the Act, could be relevant. It is not necessary to dwell on many of the innumerable examples which might be suggested. A previous conviction for bigamy would, under this construction, be relevant on a charge of theft; a previous conviction for cheating, on a charge of riot, and so on. Great, therefore, as the difficulty is of adopting any other construction of the words of the section, when taken by themselves, we might, perhaps, aided by the indication of the intention of the Legislature as disclosed in s. 310, have adopted the construction of the section laid down by a Division Bench of this Court in *Roshun Doosadh v. Empress*.¹

But we thought it right from the proceedings of the Legislative Council at the time this measure was in preparation to obtain such light as they could throw on the intention and scope of the section in question. Such a course has been more than once taken by the Courts here in recent times: and in a case of such difficulty and importance as this appeared to be we felt bound to adopt it.

The Evidence Act is, as it was intended to be, a complete Code of the Law of Evidence for British India. It received the assent of the Governor-General in Council on the 15th March 1872. It was the subject of two reports by Select Committees of that Council. In the first of these reports the subject now under consideration in dealt with. That report is published in the *Gazette of India* for June 24th, 1871, at pp. 235—242. It is signed by the then Legal Member of Council (now Mr. Justice Stephen) and by the other Members of the Committee, whose names follow: Messrs. J. Strachey, F. S.

¹ 1. L. R., 5 Cal. 768.

Chapman, F. R. Cockerell, J. F. D. Inglis, and W. Robinson. It is a report by a Committee consisting of nearly one-half of the Members of the Legislative Council, and including the Legal Member in charge of the Bill, accompanying the draft Bill as settled by them, stating at length the scope of the proposed measure, the intentions and the reasons by which they have been influenced in framing it, and so submitting both to the Council. A second report was made upon the measure in the following year by the Select Committee upon the Bill, consisting of the same gentlemen, together with Messrs. Stewart and Bullen-Smith. It does not touch on the subject-matter of this section at all.

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The first report contains at p. 239 the following unexpected paragraph : " In reference to the conduct of the parties on previous occasions we embody in three sections the existing law of England as to evidence of character, with some modifications. We include under the word " character " both reputation and disposition, and we permit evidence to be given of previous conviction against a prisoner for the purpose of prejudicing him. We do not see why he should not be prejudiced by such evidence if it is true." That is the whole paragraph. There is nothing else in the report to qualify it. It is the only passage in the report which deals with the subject now under consideration.

In the drafts of the Bill laid before the Council with the first report, the section now numbered 54 was numbered 22. It stands in the Act in exactly the same terms as in the draft referred to in the paragraph above set out.

It is impossible that we should disregard the terms of this report, when construing, in the face of the difficulties which we have adverted to, this section of the Act. We are asked to reject the most natural meaning of the words as one leading to a result manifestly unjust. We cannot disregard the fact that the Committee deputed to frame, and to advise the Legislature upon, the proposed Code, framed this section and advised its adoption to secure the result so described ; and that the Legislature, being so advised, passed the section so framed. We think we must treat it as plainly shown that the danger which, as we were disposed to hold, the Legislature must be supposed to have intended to avoid, was, in truth, the object which the Legislature sought to attain. It is stated in language plain, forcible, and concise. The Legislature lets in the evidence " for the purpose of prejudicing " the man upon his trial. It is, as is justly stated in the report, the law of England " with some modifications." The British Legislature passes an Act for the sole purpose of shielding an accused from prejudice. The Legislature in this country enacts a provision for the express purpose of prejudicing him.

Having thus ascertained that the peremptory language of the section was meant to have the full effect which the words do, no doubt, *prima facie* bear, we are relieved from the second difficulty which also oppressed us. It is, in truth, of the less consequence that the fact of previous convictions may have no possible bearing, and constitute no possible guide upon the question of the truth of the charge at trial, because it is not for that purpose that they are admitted in evidence, but for another wholly different, and for which relevancy in the ordinary sense is immaterial.

We are constrained to answer this reference by saying that previous convictions are in every case admissible. That must be the law so long as this section remains unaltered.

We own that, could we have come to any other conclusion, we should have done so ; but it is our duty to carry out the intentions of the Legislature.

T. A. P.

CRIMINAL MOTION.

*Before Mr. Justice Prinsep and Mr. Justice Pigot.*1887.
Aug. 8.IN THE MATTER OF THE PETITION OF BASUDEB SURMA GOSSAIN
AND ANOTHER.¹

14 Cal. 834.

BASUDEB SURMA GOSSAIN *v.* NAZIRUDDIN.*Criminal Procedure Code, 1882, s. 517—Order as to property as to which offence has been committed—Discharge of accused.*

On the dismissal of a charge against certain persons of criminal misappropriation of an elephant, the Magistrate, under s. 517 of the Criminal Procedure Code, ordered the elephant to be given to the Executive Engineer of the district, holding that it was the property of Government. Held that the dismissal of the charge being in fact a finding that no offence had been committed in respect of the elephant, the Magistrate's order was illegal, and must be set aside. In setting it aside the High Court held, however, following *In re Annopurna Bai*,² that they had no power to order restitution of the elephant.

THE petitioners were the Government lessees of certain Government mchals, and were charged under ss. 403 and 176 of the Penal Code, and s. 7 of Act VI. of 1879, with the criminal misappropriation of an elephant. The Extra Assistant Commissioner of Tezapore, before whom they were brought, ordered their discharge, and made an order under s. 517 of the Criminal Procedure Code that the elephant should be made over to the Executive Engineer of the district, on the ground that it was the property of Government.

The petitioners now moved the High Court under s. 439 of the Criminal Procedure Code to set this order aside.

Baboo *Ambica Churn Bose* for the petitioners.

Baboo *Ram Churn Mitter contra.*

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows :—

Two persons were brought before the Extra Assistant Commissioner, a Magistrate of the first class at Tezapore, charged with criminal misappropriation of an elephant. They were discharged. The Magistrate, however, under s. 517 of the Criminal Procedure Code, ordered the elephant to be given to the Executive Engineer, Durrung, holding that it was the property of Government, and the elephant has consequently been made over to that officer by the police. We are of opinion that the Magistrate was not competent to pass this order under s. 517 of the Criminal Procedure Code, because the elephant was not property produced before him regarding "which any offence had been committed, or which had been used for the commission of any offence," the Magistrate having held that no offence was committed regarding this animal. We, therefore, set aside this order, although we are unable to give it any effect, by ordering the restitution of the elephant. In this matter we follow the case of *In re Annopurna Bai*.² The rule is made absolute without costs.

J. V. W.

Rule made absolute.

¹ Criminal Motion, No. 22 of 1887, against the order passed by Baboo *Madhub Chunder Bordolai*, Extra Assistant Commissioner of Tezapore, dated the 22nd of December 1886.

² I. L. R., 1 Bom. 630.

CRIMINAL MOTION.

*Before Mr. Justice Prinsep and Mr. Justice Pigot.*IN THE MATTER OF THE QUEEN-EMPRESS *v.* REOLAH AND OTHERS.¹

1887.

Nov. 1.

Practice—Criminal Procedure Code (Act X. of 1882), s. 435—Revision by the High Court—Revision where lower Court has concurrent jurisdiction with High Court. 14 Cal. 387.

The High Court will not entertain an application for revision in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court save on some special ground shown, unless a previous application shall have been made to the lower Court; but in cases in which concurrent jurisdiction is not possessed by the lower Courts no such general rule exists.

THIS was an application made, on 7th October 1887, during the vacation, to set aside a conviction and sentence of the Deputy Magistrate of Giridhi, on the ground that he had heard and tried cross cases of rioting together, and had thereby prejudiced the applicants in their defence.

Before hearing the application, the Court (Mr. Justice Norris and Mr. Justice Ghose), on discovering that the applicant had not, before coming up to the High Court, applied to the Sessions Judge, and being divided in opinion as to whether the applicant was legally bound so first to apply to the Sessions Judge, directed that the application should be renewed, if necessary, before the Criminal Bench after the re-opening of the Court after the vacation.

On the 1st November 1887, the application was renewed before Mr. Justice Prinsep and Mr. Justice Pigot, who, after hearing Mr. Bell on behalf of the applicant, and after consultation with the Chief Justice and the other Judges of the Court on the point, decided that they would hear the application, intimating that the practice of the Court should be understood to be, that in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court, an application in revision will not be entertained save on some special grounds shown, unless a previous application shall have been made to the lower Court; but that in cases in which concurrent jurisdiction is not possessed by the lower Courts no such general rule exists.

T. A. P.

Application admitted.

¹ Criminal Motion, No. 309 of 1887, from an order of *J. R. Farbo, Esq.*, Deputy Magistrate of Giridhi, dated 15th September 1887.

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CRIMINAL REVISION.

*Before Mr. Justice Pigot and Mr. Justice Macpherson.*KUTUHUL SINGH AND OTHERS (PETITIONERS) *v.* UMA SINGH
AND OTHERS (OPPOSITE PARTY).¹

1887.

Aug. 9.

Criminal Procedure Code (Act X. of 1882), s. 145—Joint hearing of the case of several claimants—Possession—Number of plots, Dispute as to—Practice. 15 Cal. 31.

A Magistrate, proceeding under s. 145 of the Criminal Procedure Code, in a case in which one party (thirty-nine in number) claimed to be the tenants of 708 bighas of land belonging to one Tofuzul Hossein, and the members of the other party (seventeen in number) claimed to hold the same land in separate parcels as their maurasi jote, tried the question of possession as between the two parties in one case, notwithstanding the protest of the maurasi claimants to this mode of procedure, and decided that possession was with the party of thirty-nine, directing that they as a body should remain in possession until ousted by the order of a Civil Court.

Held that the course pursued by the Magistrate at the hearing was prejudicial to the case of the maurasi claimants; and that the form of his order was open to the objection that it would render it necessary for the party out of possession to make all the persons declared to be in possession defendants in any civil suits brought to recover possession of the land.

*Asim Mollah v. Satoo Poramanick*² distinguished.

THIS case arose out of a claim made to the possession of 708 bighas of land, of which one Tofuzul Hossein was the zemindar, the party of Uma Singh, thirty-nine in number, claiming to be tenants under Tofuzul Hossein of the land in dispute, whilst the party of Kutuhul Singh, seventeen in number, claimed to be interested in the land in dispute in various portions as their maurasi jote. On this state of facts the Magistrate, on the 11th February 1887, proceeding under s. 145 of the Criminal Procedure Code, directed the two parties to file their written statements, giving full particulars of the lands claimed by them. The members of the party of Kutuhul Singh put in separate written statements with respect to the lands held by them separately, and objected to the Magistrate trying their cases together in one case. The Magistrate, however, overruled this objection, and passed an order, dated the 23rd June 1887, to the effect that the party of Uma Singh were entitled to possession of the 708 bighas in dispute until evicted therefrom by due course of law.

The party of Kutuhul Singh obtained a rule in the High Court calling upon the party of Uma Singh to show cause why the order of the 23rd June should not be set aside on, amongst others, the following grounds, *viz.*, (a) that the order did not specify the particular portions of land of which the several members of the party of Uma Singh were declared to be in possession, an omission which disenabled the separate members of the party of Kutuhul Singh from instituting suits in the Civil Courts against the parties who had been declared to be in possession of the land; and (b) that the Magistrate should not have tried the several claims to possession of the numerous parties on each side jointly, passing one joint and indiscriminate order thereon.

¹ Criminal Revision, No. 214 of 1887, against the order passed by *A. Leeds, Esq.*, Assistant Magistrate of Barh, dated 23rd June 1887.

² 10 C. L. R. 523.

1887.

KUTUHUL
SINGH

v.

UMA SINGH,
15 Cal. 31.

Mr. M. Ghose, Mr. Abul Hossein, and Mr. C. Gregory, in showing cause, cited the case of *Asim Mollah v. Saloo Poramanick*.¹

Baboo Umbica Churn Bose in support of the rule.

The order of the Court (PIGOT and MACPHERSON, JJ.) was as follows:—

This matter before us turns upon a rule granted on the 20th July 1887, calling upon the party, in whose favour an order under s. 145 was passed, to show cause why the order of the Assistant Magistrate of the 23rd June 1887 should not be set aside. The order was one made under s. 145 of the Code of Criminal Procedure. The dispute, upon the allegation of the existence of which the Magistrate took action, arose between classes of persons, each of whom claimed to be possessed of land of which Tofuzul Hossein was the zemindar. The persons for whom Mr. M. Ghose and Mr. Gregory appear, to the number of 39 individuals, claim to be interested as tenants under that zemindar in the property with reference to which the order is made. The persons against whom the order has been made, and for whom Baboo Umbica Churn Bose appears, are Kutuhul Singh and others, being seventeen in number, persons claiming to be interested in various portions of land with reference to which the order is passed as occupancy tenants holding lands in different quantities and under interests which appear to have been acquired at different times. Under these circumstances the Magistrate, by a notice dated the 11th February, served on the 19th February of this year, instituted proceedings under s. 145.

It is unnecessary now to see how it came to pass that those proceedings were initiated under that section. The matter having been gone into in detail, and, as we are informed, after minute examination on both sides of the title to the lands in question, the Magistrate came to a finding in these words: "I therefore order that the first party are entitled to possession of the 708 bighas of Gogi Kandah, Mouzah Mokama, until evicted therefrom by due course of law, and I forbid all disturbance of such possession until such eviction." The petitioners, Kutuhul Singh and others, have obtained this rule, and they object in the first place that that order is bad, and that the investigation held which led up to it is bad, on the ground that the several claims to possession of the numerous parties on each side were jointly, or at least indiscriminately, investigated, and have been jointly or indiscriminately adjudicated upon. They raised that objection in the written statement filed by them in the proceedings so early as, I understand, the 15th April of this year, and they raised it, according to the translation of the Official Interpreter of this Court, in these words: "The case under s. 145, Code of Criminal Procedure, can by no means jointly and individually proceed unless it is shown what piece of land is claimed, by what tenants alleged by Tofuzul Hossein, proprietor. But no such fact exists on the record." We have been referred to the case of *Asim Mollah v. Saloo Poramanick*¹ as showing that an order under s. 145 may well be made, although it does compendiously order that one set of persons are in possession as against another set of persons without attempting to specify which is entitled as against which to which portion of the land in question. The circumstances of that case appear to be sufficiently different from those of the present. Here the classes of persons claiming under the same zemindar assert, in respect of different parcels of land, different and independent rights, and the contest as in respect of each parcel of land claimed by Kutuhul Singh and any one of his party is plainly as between that person and any of the persons on the other side who claim that parcel of land. We think that, apart from any question of pre-

¹ 10 C. L. R. 523.

judice arising hereafter from the form of the order, the party of the persons, who complain of the investigation being mixed up as it were, are entitled to maintain that objection on the ground that the investigation into their case might well be, and probably was, prejudiced by that course being pursued. We think that they are also entitled to object to the form of the order on the ground stated by their learned pleader, that proceedings by civil suit would, in the face of an order in this form, render necessary the making as defendants of a multitude of persons who are by the terms of the order held to be in possession of the land in question. It is suggested that we should remit the case to the Magistrate for a finding which should cure that last defect, the defect of the order by enabling him, or in truth directing him, to make 39 separate orders under s. 145 declaring the 39 claimants entitled to possession of the several parcels claimed, and, as we are told, set out in boundaries by them in their written statement. Were it possible to do that it would not cure the objections to these proceedings on the other ground. But it appears that the Magistrate, who heard the greater part of the case, is no longer Magistrate in that district. We have no means of telling further whether, if he were there, he could do more than make the compendious order which is before us, and which in effect is that these people (the party of Uma Singh) in a body are in possession of the entire land in dispute. But in any case it would be impossible now to cure the original defect of the proceedings that is pointed out in the paragraph of the written statement to which we have referred. Under these circumstances we think that the rule must be made absolute and the proceedings set aside.

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15 Cal. 31.*Rule absolute.*

CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF AHMED MAHOMED.

MAHOMED JACKARIAH & CO. v. AHMED MAHOMED.¹

1887.

Oct. 13.

15 Cal. 109.

Inspection of Documents in Criminal Case—Discovery—Power of Court to order Inspection—Criminal Procedure Code, 1882, ss. 94-99—Search-warrant, Form and Validity of.

A and T, the latter of whom was the book-keeper in the firm of Y. M. & Co., were charged, on the complaint of that firm, with cheating by having dishonestly induced them to deliver to A certain sums of money between 1882 and 1887, and with having abetted each other in the commission of the said offence. The offence charged was carried out by T omitting to make entries in the account-books of sums due by A to the firm, and by making false entries therein of payments by A. Whilst the charge was pending, the Presidency Magistrate, before whom the charge had been made, granted a search-warrant in the following terms: "To Inspector M.—Whereas A and another have been charged before me with the commission or suspected commission of the offence of cheating, and it has been made to appear to me that the production of khatta-books for the years 1882 to 1887 is essential to the inquiry now being made, or about to be made, into the said offence or suspected offence, this is to authorize and require you to search for the said property in the house of A, No. 13, Pollock Street, and, if found, to produce the same forthwith before this Court." In execution of this warrant certain books and papers found in the house of A were seized and taken possession of by the police; and of those books and papers the Magistrate, on the application of the prosecution, made an order for inspection. On a rule granted by the High Court to show cause why the order for inspection should not be set aside, it was contended that the search-warrant had been granted without proper judicial inquiry and upon

¹ Criminal Revision, No. 258 of 1887, against the order passed by Syud Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 23rd of August 1887.

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insufficient materials; that it was bad on the face of it, as it did not "specify clearly," as directed in Form VIII., Sch. V. of the Criminal Procedure Code, whose khatta-books were to be produced; and that there was nothing in the criminal law to enable a Court to make an order for inspection of documents by the prosecution in a criminal case. *Held, per* NORRIS, J., that, assuming the contention as to the search-warrant arose on the rule as granted, the warrant must be looked at as a whole, and so looked at it sufficiently clearly showed that it was the khatta-books of A which were referred to as being essential to the enquiry, and the objects of the directed search; nor was there anything to show that the warrant was issued otherwise than regularly and in due course.

Per NORRIS, J.—Though the Courts in England have constantly refused to compel discovery in criminal cases, on the ground that no man should be compelled to produce evidence to criminate himself, the Legislature in this country has authorized the production, and under certain circumstances the compulsory production, of an accused person's documents in Court. When once an accused person's documents are in the possession of the Court by virtue of the due execution of a search-warrant issued under the provisions of s. 96 of the Criminal Procedure Code, there is no distinction between such documents and those of any description found upon his person at the time of his arrest, or on his premises at the time of, or subsequent to, his arrest, and it was never doubted that the latter may be used in evidence against him. If, as laid down in the case of *Dillon v. O'Brien*,¹ the right to seize and detain property of any description in the possession of a person lawfully arrested for treason, felony, or misdemeanor, rests "upon the interest which the State has in a person justly or reasonably believed to be guilty of a crime being brought to justice, and in a prosecution once commenced being determined in due course of law," a right to inspect such property must exist, as well as a right to seize and detain it, and the proper persons to inspect it are those conducting the prosecution. It would, moreover, be unreasonable that the police or those conducting the prosecution should not have an opportunity of inspecting and examining documents, &c., found on a prisoner when arrested, or on his premises at the time of, or subsequent to, his arrest, before tendering them in evidence.

Per GHOSE, J.—The contention as to the validity of the search-warrant did not arise on the rule as granted, but *seem* that the search-warrant was bad in law, no summons under s. 94 of the Criminal Procedure Code having been, in the first instance, issued for the production of the documents, and there being no evidence to show that they would not be produced on summons only; that, although the warrant was not specific, still, inasmuch as no objection was raised to the form of the warrant before the Magistrate, and the accused had not been prejudiced by reason of the specification of the documents being somewhat indistinct, and it was clear what was really meant, the objection as to the form of the warrant should be disallowed.

Per GHOSE, J.—There is no doubt that by the criminal law of this country, as laid down in the Criminal Procedure Codes since 1861, an accused person may be compelled to furnish evidence, the production of which might have the effect of criminating him. The Magistrate has to determine, at the time when he makes an order under s. 94 of the Criminal Procedure Code, or issues a search-warrant under s. 96, whether the documents are necessary for the inquiry; but when they are brought into Court, the inspection should not rest with the Magistrate, who does not prosecute, and has no interest one way or the other in the result of the prosecution. It is reasonable that those who conduct the prosecution should have such inspection, for the production of such documents is for the purpose of using them in evidence, and this could not be done unless the prosecution had an opportunity of inspecting them. In the case of a search or seizure by the police under Ch. XIV. of the Criminal Procedure Code, the prosecutor would necessarily have an opportunity of looking at the documents and articles seized, and there is no reason why he should not have the same opportunity or privilege where, under the order of the Court, any particular document or other thing is seized under a search-warrant, and brought up to the Court. Bearing in mind the purpose for which any document or thing is seized and brought before the Court, it seems that the Legislature, while providing for the seizure and production in Court of documents, &c., intended by implication that the prosecution should, under the order of the Court, have the power to inspect them, and determine whether they should go in as evidence.

Held, per Curiam—for the reasons above given—that the Magistrate had power to allow the inspection, but such inspection must be limited to the books named in the search-warrant.

¹ 20 Irish L. R. 300.

THE petitioner and one Topun Ramchore were charged on the complaint of Jackariah Mahomed & Co., under ss. 418, 420, and 109 of the Penal Code, with having cheated the complainants by having dishonestly induced them to deliver to the petitioner certain sums of money on various specified occasions between 1882 and 1887 in Calcutta, and with having abetted each other in the commission of the said offence. The accused Topun Ramchore was the book-keeper in the complainants' firm, and the cheating was carried on, in accordance with an agreement to that effect between the two accused persons, by his omitting to make entries of sums due by the petitioner, and by making false entries of payments by him in the books of the complainants' firm.

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The charges were made before the Presidency Magistrate for the Northern Division of Calcutta, and warrants issued, and on an application made on behalf of the complainants, the Magistrate, on 20th August, issued a search-warrant for the premises No. 13, Pollock Street, the place of business of the petitioner, to search for and produce the khatta-books of the petitioner's business for the years 1882 to 1887 inclusive, as being essential to the inquiry into the above charges; and in execution of this warrant certain books and papers found in the house of the petitioner were seized and taken possession of by the police. Various applications to set aside the search-warrant were refused by the Magistrate, who eventually made an order on 23rd August for the inspection by the prosecution of the books found by the police at the petitioner's place of business, such inspection to take place in the Court-house in the presence of the petitioner and an officer of the Court.

The petitioner, after applying to the Magistrate to set aside the order for inspection, applied, on petition, to the High Court, and a rule was issued calling on the prosecutors to show cause why the order granting inspection should not be set aside, and an order made that, pending the hearing of the rule, there should be no inspection by the prosecutors of the books and papers of the accused.

The *Advocate-General* (Mr. Paul), Mr. Garth, and Mr. Adkin, appeared to show cause.

Mr. Hill, Mr. Palit, and Baboo Kally Nath Mitter, in support of the rule.

The facts of the case and the arguments are fully stated in the judgments.

The following judgments were delivered by the Court (NORRIS and GHOSH, JJ.):—

NORRIS, J.—On the 20th August Hadjee Jackariah Mahomed & Co., through Mr. Hume, their attorney, applied to the Presidency Magistrate of the Northern Division of Calcutta for warrants for the arrest of Ahmed Mahomed and Topun Ramchore on charges of cheating and abetment thereof.

In support of the application, Noor Mahomed, a member of the prosecutor's firm, was examined on solemn affirmation. His deposition was as follows:—

I am a member of Hadjee Jackariah and Co. I have been a member of that firm since 1874. I know the first defendant Ahmed Mahomed. He is a boat-owner. He has had business with us since 1879. He kept a floating account with us. The first defendant's ledger was kept by Topun Ramchore in my office. He used to make entries in the cash-book occasionally. When defendant No. 1 came to my office for money, I used to ask defendant No. 2 to look at the ledger, and say whether No. 1 had a credit balance. No. 2 always said he had credit balance. Day before yesterday No. 1 came to my office and asked for Rs. 300. We sent for his ledger,

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After examining it we found Rs. 800 on the debit side. No. 1 said, "This is not correct; I have to get money from you." We got suspicious, and examined his accounts from 1882 up to date. The result was that the first defendant had overdrawn upwards of a lac of rupees. On the 30th April 1887, the ledger, as written up by Topun, the defendant No. 2, showed a balance of nearly Rs. 5,000 in favour of the first defendant, but this was not correct. The correct account showed nearly Rs. 8,000 against him. On the 13th of May 1887 we paid him (first defendant) Rs. 1,200. This is the entry for the Rs. 1,200. On the 19th May 1887 we paid him Rs. 800. On the 20th June last we paid him Rs. 3,000 in notes. These first and third payments were made in Topun's presence. I handed over the money to Topun, and he paid them to the first defendant. I made these payments on the belief that there was a balance in his favour. If I knew that there was no balance in his favour, I would not have made any payment. Defendant No. 2 made a statement to Mr. Hume. This is it (produced and marked A).

Topun Ramchore's statement to Mr. Hume was made in answer to questions put by that gentleman. The statement, question and answer, is as follows:—

Q.—I am going to ask you some questions; you can answer them or not as you like.

A.—Whatever you ask I will give truthful answers to.

Q.—Whose servant were you?

A.—Hadjee Jackariah Mahomed & Co.'s. I was their writer.

Q.—What books did you keep?

A.—I kept the nund, the ledger, and sometimes the cash-book; the ledger for 1887 is all in my writing.

Q.—Messrs. Hadjee Jackariah Mahomed & Co. have examined the ledger for five years past, from which they have discovered that much cheating has been going on. Do you know anything about the cheating, and are you willing to tell me about it?

A.—I am willing to tell you what I know about it, and the whole truth. I know everything about it.

Q.—Very good, what you know tell me.

A.—In 1882 Ahmed Mahomed said to me, "I will give you Rs. 20 in every Rs. 100 if you will make a *goolmal* in my account with the firm, so that I can get (*saida*) more money." I agreed to this, and I commenced to make a *goolmal*.

Q.—What sort of a *goolmal*?

A.—If he took Rs. 2,000 from cash, I omitted to write it in ledger, and out of the Rs. 2,000 I will get Rs. 400 from Ahmed Mahomed at his house. I used also to do as follows (*aisa bhee kia*): If he took Rs. 2,000 from the cash, I used to credit him with this sum in the ledger. In February 13th, 1887, Ahmed Mahomed took from the cash in my presence from the hands of Noor Mahomed Rs. 1,500; this Rs. 1,500 I never entered in the khatyon, but I did in the cash-book. On the 6th March 1887 he took Rs. 1,500. I entered this in the cash-book, but not in the ledger. I did this intentionally (*sumuj ke chordia*). On the 7th April 1887 he took from cash Rs. 2,000. This amount I credited him with in the khatyon. On the 24th April 1887, he took Rs. 4,000, and I wrote in the khatyon Rs. 400. On the 10th January 1887 I credited in the khatyon Rs. 1,500 in the name of Ahmed Mahomed, but I received from him that day only Rs. 500, which I credited in cash-book. On the 30th January 1887 I received from Ahmed Mahomed Rs. 900, but in the khatyon I credited Rs. 1,900. On the 30th April I credited him with Rs. 1,000, but on that day I received nothing from him. When Ahmed Mahomed used to come for money, a man used to come with him. Ahmed Mahomed is blind for the last two years. He used to ask Noor Mahomed for money, and he, Noor Mahomed, used to ask me: "Ahmed Mahomed *ke hisab kaisa hai*;" and I used to say, "*usko juma hai*." I always used to say there was a credit, but it was not true. When

I used to be asked about the account of Ahmed Mahomed by Noor Mahomed, I used always to tell him from the khatyon. I have been falsifying the account of Ahmed Mahomed since 1882 till now (*abhee tuk*); then says, "till 30th April 1887."

Q.—According to your khatyon in what state is Ahmed Mahomed's account for 1887 on 3th April 1887, that is, from January to 30th April 1887?

A.—He has to receive a little more than Rs. 5,000; but this account is false. Hadjee Jackariah Mahomed & Co. in truth ought to receive from Ahmed Mahomed Rs. 8,500.

Since 1882 up to 30th April 1887, I have falsified Ahmed Mahomed's account to the extent of Rs. 70,000.

"At 2 P. M. to-day, I went to Hadjee Jackariah Mahomed's Office, and asked the servants for the books of 1886-1887; they said the books were upstairs. I said bring them down. They said *saheb logue* have gone out; the books (*duftur bund hai*). I asked where the *sahebs* were. By *sahebs* I mean my masters. I went upstairs and saw the books being looked at by one Tyub. He is a writer. I saw him looking at the account of Ahmed Mahomed. I then got suspicious (*humara dil mai shuk paida hua*) that whatever *goolmal* was in the account would be discovered (*khubber malum hoga*). I went to Ahmed Mahomed at his house at Nibbotollah Gully. He was asleep. I asked his wife to wake him. She did so. I went and said to him: The *saheb logue* are looking at your account; on that account (*yih subab se*) you go to them and tell them you have taken all the money, and that whatever money you have got you will give them, and ask them to forgive you. He then said to me, don't take or mention my name (*humara nam mut lo*); you take it all upon yourself (*tumara oopar sub lo*), and say you did it all, and if afterwards they do anything I will spend money to defend you (*rupia khuruch karage tumko bhachane ke waste*); you say the cash was with Noor Mahomed, and that, if you made mistakes (*bhool kya*), Noor Mahomed knows it all. I then said I will not tell all these lies. If you don't go they will be angry, and will take out warrants against us and arrest us, and then your *izzut* (respect) will not remain. He then said you go, I am getting fever, go home and lie down, and say you are not well (*tubeeat accha nahi*). I said I would not tell these lies, that I was going to the *sahebs*. I left Ahmed Mahomed; and as I was going to office I met with Hadjee Vydanah, one of my masters, in the street, and told him everything, and he took me to you (Mr. Hume). I have got Rs. 1,500 or Rs. 1,600 in notes, and Rs. 700 or 800 in jewellery left from this fraud, and if my masters will take this property I will give it up. I have received in this fraud from Ahmed Mahomed about Rs. 9,000."

After hearing the application the Magistrate granted a summons against the defendant No. 1, Ahmed Mahomed, and a warrant against defendant No. 2, Topun Ramchore.

On the same day, after grant of process against the defendants, Mr. Hume, upon the same materials upon which he had applied for warrants, applied "for a search-warrant to search the premises No. 13, Pollock Street, Calcutta, the place of business of the accused Ahmed Mahomed, for the books of his business for the years 1882 to 1887 inclusive." This application was made in the presence of Ahmed Mahomed, who happened to be in the Magistrate's Court as a complainant in a case, and the Magistrate called his attention to the fact that such application was being made.

The Magistrate's order upon this application was, "Issue search-warrant." The search-warrant was in the following terms:

To Inspector Merriman—

Whereas Ahmed Mahomed and another has been charged before me of the commission, or suspected commission, of the offence of cheating, and it has been made to appear to me that the production of khatta-books for the years 1882 to 1887 is essential to the inquiry now being made, or about to be made, into the said offence or suspected offence:

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This is to authorize and require you to search for the said property in the house of Ahmed Mahomed, No. 13, Pollock Street, and, if found, to produce the same forthwith before this Court; returning this warrant with an endorsement certifying what you have done under it immediately upon its execution.

Given under my hand and seal of the Court, dated this 20th day of August 1887.

(Sd.) SYUD AMEER HOSSEIN,
*Presidency Magistrate,
Calcutta, N. Division.*

The search-warrant was executed on the 21st August. What was done in pursuance of the search-warrant appears by an endorsement thereon, which is as follows:—

Warrant executed in the presence of the following gentleman by Inspectors Merriman and Hefferman on the 21st August 1887, *vis.*, Mr. Upton, Attorney-at-law; Mr. Manuel, Attorney-at-law; Hadjee Yusuff Mahomed; Hadjee Abdoola Dagma; Hadjee Noor Mahomed; Hadjee Abdoola Zackariah Solyman; Mohamed Moosa, and defendant Ahmed Mahomed.

The following books and papers were found at No. 13, Pollock Street:—

Room on ground floor.

1. Nine khattas, one marble paper cover book, and some loose papers.
 2. On a wooden almirah, 11 khattas, four marble paper cover books.
 3. Inside the same almirah, three khattas.
 4. On a wooden tucktapose, one khatta.
 5. On the wall, three files of papers.
 6. One wooden box, locked, containing some khattas and papers. The box after being locked is taken over by the police, and the key kept with Moosa, defendant's son.
 7. Inside a large wooden box, three small bundles of manuscript.
 8. In an adjoining godown in a wooden box with brass clamps some loose papers.
 9. In an inner godown, the door of which was locked, inside a roll of canvas, six khattas.
- At this stage Hadjee Adam, Hadjee Osman arrived.
10. In a wooden chest on a table, one khatta and four press copy letter books.
 11. Upstairs bed room. In an almirah, glass panes, two envelopes containing manuscript.
 12. On the top of a box, nine khattas and 1 torn khatta.
 13. On the top of another almirah, four small khattas.
 14. Three files of papers.
 15. On an iron safe, eight English bound books.
 16. On the top of another almirah, one khatta and one bundle of papers.
 17. Inside a Bombay carved almirah, six small khattas. In the drawer thereof, two khattas, one bundle of papers. In another drawer thereof, one bundle of papers.
 18. In a wooden almirah, a bundle of letters.
 19. One wooden box, locked, containing papers, the key with Hadjee Mahomed Yusuff.
 20. Inside the small iron safe opened by Hadjee Yusuff Mahomed, 3 G. C. notes of Rs. 100 each, $\frac{R}{91}$ 26200, 26199, 26198, *not taken*. One Bengali document on Re. 1 stamp-paper, which is kept inside wooden box No. 19.

21. In a glass case adjoining, two small khattas and two letters.

At this stage Baboo Mohendro Nath Dutt, pleader for defendant, came in. In the adjoining room Hadjee Ahmed Ismail here comes with the keys of the two safes.

The one in this room is opened; only jewellery found. In the large safe opened in the first room nothing found except some title deeds, &c., *not taken*.

22. In the office-room, in a tiled shed outside the house, a large chest full of books.

23. In the upper shed, over the coach-house, two khatta-books, one file of old papers, one account-book.

All the above are contained in three wooden boxes and two gunny bags which were sealed by defendant's people before taken away by the police.

On 22nd August, Mr. Pittar, an attorney, appeared before the Magistrate on behalf of Ahmed Mahomed, and applied that the warrant might be set aside, and that the prosecutors might not be allowed to inspect the books found by the police on the premises No. 13, Pollock Street, on the previous day. Mr. Hume opposed the application, and it was refused.

On Mr. Hume's application the Magistrate ordered that the prosecutors should have inspection of the books on notice to the accused Ahmed Mahomed.

On the same day the following notice was served upon Ahmed Mahomed:—

Take notice that we, on behalf of the prosecutors above-named, purpose to-morrow, Tuesday, the 23rd day of August instant, at 12 o'clock at noon, with the permission of the Magistrate of the Northern Division of Calcutta, and in company with a member of prosecutors' firm, to inspect in the Court of the said Magistrate the several books and documents, now lying there and belonging to you. This notice is given you in order that you may, if so advised, attend at the said inspection either personally or by solicitor or some other representative.

On 23rd August, Mr. Wheeler, an attorney, appeared before the Magistrate on behalf of Ahmed Mahomed, and applied to have the search-warrant set aside; the Magistrate refused the application. Mr. Wheeler then applied for a postponement of the inspection of the books for four days to allow him to get complete instructions; but the Magistrate declined to grant a longer postponement than 24 hours, and directed the inspection to take place at the Court-house in the presence of the accused or his agent, and an officer of the Court, on the following day. On 24th August Mr. Chatterjee, counsel for the accused, applied to the Magistrate to set aside the search-warrant, which he refused to do, and directed that the inspection should take place in the Court-house, in the presence of Ahmed Mahomed or his agent, and an officer of the Court. The inspection of the books thereupon commenced in the Magistrate's office, in the presence of a pleader on behalf of Ahmed Mahomed, of Mr. Hume, of Noor Mahomed, and of two officers of the Court.

During the progress of the inspection an account of Topun Ramchore with Ahmed Mahomed was discovered in the books for the year 1882, showing payments of various sums of money by Ahmed Mahomed to Topun Ramchore amounting to Rs. 4,158; and certain entries in one of the khatta-books were initialled by Mr. Hume, who brought the fact of the alleged discovery to the notice of Ahmed Mahomed's pleader, and requested him to go and see the book, which the pleader declined to do, saying, "What is the use of my going."

On the 25th August Mr. Bonnerjee applied to us for a rule calling upon the prosecutors to show cause why the order granting the search-warrant and

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the order granting inspection of the books should not be set aside. We took time to consider whether we should grant a rule, and intimated that, in the meantime, the inspection should not be proceeded with.

On 29th August we granted a rule, "to show cause why the Magistrate's order of 23rd August, granting inspection of all books, papers, and documents found by the police at the premises of the accused Ahmed Mahomed, and seized and brought away by them to his Court, should not be set aside, and such other order made on the premises as to this Court may seem meet."

The rule was argued before us on the 7th, 8th, and 9th September; Mr. Hill and Mr. Palit appearing in support of it; the Advocate-General and Mr. Garth showing cause.

Mr. Hill's first argument was that the issue of a search-warrant by a Magistrate is a judicial act; that before he can have "reason to believe" within the meaning of s. 96 of the Criminal Procedure Code, he must be satisfied by judicial inquiry; and he urged that this warrant had been granted without a proper judicial inquiry, and upon insufficient materials.

In support of the first branch of his argument, he cited a passage from 2 Hale's P. C. 15, and *Queen v. Hossein Ali Chowdhry*.¹

I agree with Mr. Hill that the issue of a search-warrant is a judicial act, and that it ought only to be issued after judicial inquiry, and upon proper materials. But, assuming the point taken by the learned counsel to be open to him upon argument of the rule as granted, upon which I entertain the gravest doubt, I can see nothing to lead me to the conclusion that this search-warrant has been issued without a judicial inquiry or upon improper materials.

Mr. Hill's second objection was that the warrant was bad on the face of it. Here again I must say that I have considerable doubt whether this point is open to argument upon this rule. But, assuming that it is, I am of opinion that the warrant is good.

Mr. Hill argued that, by virtue of s. 554 of the Criminal Procedure Code, the forms in Sch. V. are to be taken as integral parts of the Act; that, therefore, the words "specify clearly" in Form VIII. of Sch. V. are an integral part of the Act, and that the recital in the warrant, "that the production of *khatta-books for the years 1882 to 1887* is essential to the enquiry now being made or about to be made," was not a clear specification. No doubt, it would have been better if the warrant had recited "that the production of the *khatta-books* of the said Ahmed Mahomed for the years 1882 to 1887 is essential."

But I think that the warrant must be looked at as a whole.

It recites that a charge has been made against Ahmed Mahomed, that the production of *khatta-books* for the years 1882 to 1887 is essential to the inquiry, and then it authorizes the officer to whom it is directed "to search for the said property in the house of Ahmed Mahomed" (it would have been better if it had said "the said Ahmed Mahomed"), "No. 13, Pollock Street." I think the warrant sufficiently clearly shows that it was the accused's *khatta-books* for the years 1882 to 1887 that had been made to appear to be essential to the inquiry, and that it was those *khatta-books* which the officer to whom the warrant was directed was to search for. In support of his argument, Mr. Hill referred to *Entick v. Carrington*.² The facts of this case are so familiar to every lawyer and every student of the constitutional history of England, that it

¹ 8 W. R. Cr. 74.

² 19 Howell's State Trials 1030.

would be affectation and waste of time to give even the briefest outline of them. The case decided, amongst other things, that *general* warrants were bad. The warrant in this case is not a *general* warrant; but, as I have already pointed out, a warrant to search for and seize certain specified documents.

Mr. Hill's next argument was that there was no power under the Criminal Procedure Code to issue a search-warrant for documents at all. Again, calling in aid the provisions of s. 554 of the Criminal Procedure Code, and reiterating the argument that by virtue thereof Form VIII. in Sch. V. was an integral part of the Act, he contended that a document was not "a thing."

Now, assuming that the forms in Sch. V. of the Criminal Procedure Code are by virtue of s. 554 of that Code to be taken as integral parts of the Act (a very large assumption I think), they clearly cannot over-ride and render nugatory the enabling sections.

S. 94 of the Criminal Procedure Code, so far as is material to this case, says: "Whenever any Court considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, inquiry, trial, or other proceeding under this Code by or before such Court, such Court may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons." S. 96 of the Criminal Procedure Code says, so far as is material to this argument: "When any Court has reason to believe that a person to whom a summons under s. 94 has been or might be addressed will not, or would not, produce the document or other thing as required by such summons, it may issue a search-warrant, and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained." The words of s. 94 are of the widest possible character. Any person in whose possession or power a document or other thing, which the Court considers necessary or desirable for the purposes of any investigation, inquiry, or trial, is, may be summoned to produce it. The words of s. 96 are equally wide. Any person to whom a summons under s. 94 has been or might be addressed, and who, the Court has reason to believe, will not or would not produce the document or other thing, is liable to have his premises searched; searched for what? Surely for the document or other thing which the Court has reason to believe he will not or would not produce. The whole object of s. 96 would be frustrated if we were to hold that, because Form VIII., Sch. V., says, "specify the thing clearly" and not "specify the document or other thing clearly," there was no authority to issue a search-warrant for a document. I do not think it would serve any useful purpose to consider, as Mr. Hill invited us to do, whether a search-warrant for documents in the premises of an accused person could be lawfully issued in England. The judgment in the Court of Common Pleas as delivered by Lord Camden in *Entick v. Carrington*¹ is no doubt a great, almost an overwhelming, authority against the legality of such a proceeding; and it may be that the issue of a search-warrant in the case of *Reg. v. Colucci*² was illegal; see the note of Mr. Graves, the learned author of Russell on Crimes, at p. 433 of Vol. III., 5th Edition.

The judgment of Lord Camden was based upon the fact "that there was no written law giving any Magistrate powers to issue a search-warrant for papers." The absence of such statutory authority, which continues, as far as I know, up

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¹ 19 Howell's State Trials 1030.

² 3 F. and F. 103.

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to the present time, is no doubt the reason for Mr. Graves' query. Amongst the many astonishing legislative enactments of this country, there is one authorizing under certain circumstances the issue of a search-warrant for documents not only in the premises of an accused person, but also in the premises of any other person in the world, using the word "world" in a somewhat restricted sense.

I don't think I do Mr. Hill's able and exhaustive argument any serious injustice when I say that the points to which I have alluded were in the nature of preliminary skirmishes, attacks upon his enemies' outpost, preparatory to the real combat which was waged upon the right claimed by the prosecution to inspect the books.

Mr. Hill urged that any right on the part of the prosecution to inspect these books must depend upon the statutory law of the land. S. 5 of the Criminal Procedure Code, he pointed out, enacts that "all offences under the Indian Penal Code shall be inquired into and tried according to the provisions hereinafter contained;" and if, he said, the Criminal Procedure Code is silent, as the Advocate-General admitted it is as to any right of inspection of documents seized under a search-warrant, they cannot be inspected, at any rate not by the prosecution.

It was urged that the only object of ss. 94 and 96 of the Criminal Procedure Code was to procure the production of documents. It was pointed out that the heading of the chapter in which these sections find a place is, "Of process to compel the production of documents and for the discovery of persons wrongfully confined;" that in A& X. of 1875, which contains in ss. 86 and 87 provisions similar to those in ss. 94 and 96 of the Criminal Procedure Code, the chapter in which those sections are to be found is headed, "Of securing attendance of witnesses and production of documents;" that in A& IV. of 1877, which in ss. 144 and 145 also contains provisions similar to those of ss. 94 and 96 of the present Code, the chapter in which those sections occur is headed, "Of evidence," and the sub-division of the chapter containing ss. 144 to 147 is headed, "Of securing documentary evidence."

It was admitted by the Advocate-General, as contended for by Mr. Hill, that the word "inspect" in cl. 3 of s. 96 of the Criminal Procedure Code applies only to locality or place, not to "document or other thing." A reference to s. 97 of the Criminal Procedure Code shows that this view is correct.

Mr. Hill then entered into an elaborate history of the law of discovery. He pointed out that at common law there was no right to discovery in civil cases; he traced the action of the Courts of Equity in aiding discovery in civil actions, and stated the main principles upon which those Courts acted in granting discovery to be three in number, *viz.*, 1st, that the documents sought to be discovered should be specifically mentioned; 2nd, that discovery should only be granted as against the parties to a suit; 3rd, that it should only be granted in aid of civil rights; and he cited authorities to show that these were the principles upon which Courts of Equity had acted. These principles, he contended, found legislative sanction in the statute law of this country. The first principle was embodied in s. 163 of the Civil Procedure Code; the second in the provisions of Ch. X. of the Civil Procedure Code; and the third in s. 132 of the Evidence A&. Having traced the history of discovery in relation to civil actions, Mr. Hill pointed out that there were no provisions in the Criminal Procedure Code similar to those contained in Ch. X. of the Civil Procedure Code, and this he said was because the common law with regard to discovery had never been modified by statute with reference to criminal cases; nor had the second of the three principles upon which Courts of Equity acted in aid of the common law ever been applied to

criminal cases. There was, urged Mr. Hill, no right of discovery at all in criminal cases. In support of this proposition the following authorities were cited, *viz.*, Bacon's Abridgment, vol. 2, page 286, title "Evidence;" ³ Russell on Crimes, page 433 (5th Ed.); *Reg. v. Mead*; ¹ *Rex v. Purnell*; ² *Rex v. Cornelius*; ³ *Road. Haldane v. Harvey*; ⁴ *Rex v. Justices of Buckingham*; ⁵ and *Rex v. Earl of Cadogan*.⁶ I have examined all these authorities, and no doubt they establish very clearly the proposition that the English Courts, from an early date down to the year 1828, have constantly refused to compel discovery in criminal cases.

With great respect to the learned counsel, I must take leave to say that this argument, able and captivating as it was, is beside the mark. The Legislature in this country has authorized the production, and, under certain circumstances, the compulsory production, of an accused person's documents in Court. The question is—what are the rights of the prosecution with regard to them now they are in Court? Mr. Hill's answer to the question, which I put to him during the course of the argument, is this: They may, upon the chance that a certain entry in one of the books will support their case, call for the entry and examine it, and, if they do this, they must put it in, whether it tells for them or against them. If this is so, the prosecution would be in a worse position than a plaintiff in a civil suit, for though a party calling for a document which he has given the other party notice to produce is bound, if the document is produced and inspected, to put it in if required to do so, yet as a matter of practice notice to a party to produce documents is not given unless the party giving it has obtained a knowledge of their contents, either from answers to interrogatories, or by inspection before trial, or from some private source.

When once an accused person's documents are in the possession of the Court by virtue of the due execution of a search-warrant issued under the provisions of s. 96 of the Criminal Procedure Code, I can see no distinction between such documents and those of any description found upon his person at the time of his arrest, or on his premises at the time of, or subsequent to, his arrest. I asked Mr. Hill in the course of the argument if he could point to any distinction, and he admitted that he could not. Nor can I see any distinction between such documents and any other things found upon a prisoner when arrested, or upon his premises at the time of or after his arrest. That documents or other things found upon a prisoner at the time of his arrest, or upon his premises at the time of, or subsequent to, his arrest, may be used in evidence against him if material to the issue, is too plain for argument. The books are full of reports of cases where this has been done; it is a matter of daily occurrence at every Criminal Assize, at every Quarter Sessions.

Now, can it be argued with any show of reason that the police, or the solicitor for the prosecution, are not to have an opportunity of inspecting and examining documents or other things found upon a prisoner when arrested, or upon his premises at the time of, or subsequent to, his arrest, before tendering them as evidence? A man is charged with burglary. The evidence shows that he was found in a counting-house where there was a safe, that the windows of the counting-house had been forced open, and the safe unlocked. Upon the prisoner, when arrested, or at his premises at the time of, or subsequent to, his arrest, are found house-breaking instruments and a bunch of keys; the prosecution allege that the window was forced open with one of the house-breaking instru-

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¹ 2 Ld. Raym 927.² 1 Wilson 239.³ 2 Str. 1210.⁴ 4 Burrows 2484.⁵ 8 B. & C. 375.⁶ 5 B. & Ald. 902.

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ments, and the safe opened with one of the keys ; must they produce the frame of the window before the Court and the house-breaking instruments, call for the latter one by one, and see if either of them fits the mark in the wooden frame ? Must they produce the safe and the keys, call for the latter one by one, and try each separately to see if it fits the lock of the safe ? If this is the law, it is consistently and persistently broken every day ; and if it is the law one would expect to find some trace of an expression of opinion by some Judge that it is so ; and we should expect to find that amongst the thousands of learned counsel who have defended prisoners an objection was taken, that the police had no right to ascertain, before they came to Court, whether any of the house-breaking instruments fitted the window frame, or whether any one of the keys fitted the lock, or, in other words, that the police had no right to inspect the house-breaking instruments or the keys. I might multiply illustrations, but I will take a reported case. In *Reg. v. Bernard*,¹ which was a trial under a special commission before Lord Campbell, C.J., Pollock, C.B., Erle and Crowder, JJ., a sergeant of police stated that, after the prisoner was in custody, he had searched a room at his residence, and there found a letter from one Allsop, which he had handed to the Solicitor for the Treasury ; the Attorney-General, Sir Fitz Roy Kelly, proposed to have the letter read, and this before any evidence had been given to connect Allsop with the prisoner. Now, can it be conceived that the letter had not been read by the Solicitor to the Treasury when he was preparing his briefs and by the Attorney-General before he proposed to have it read ? How else could they have known whether or not it was relevant to the enquiry ? The prisoner was defended by Mr. Edwin James, Q.C., Mr. Simon, Mr. Hawkins (now Mr. Justice Hawkins), Mr. Sleight, Mr. Brewer, and Mr. Scobell ; they objected to the admission of the letter, not upon the ground that the Court or the Treasury had no right to its custody, or to inspect it, but upon the ground that, the charge against the prisoner being one of murder, the principle upon which, upon a charge of treason, documents found after the arrest have been held admissible did not apply. Admitting that the letter was shown to have been in the prisoner's possession, there was no evidence, beyond the receipt of the letter, which was a passive act, to connect him with the writer. The Court was unanimously of opinion that the letter was admissible, "not on the ground that the writer of the letter was a co-conspirator with the prisoner, but on the ground that it was found in the prisoner's possession, and that its contents were relevant to the present enquiry."

If I am right in holding that documents and other things seized upon the premises of an accused person by virtue of a search-warrant issued under s. 96 of the Criminal Procedure Code stand upon precisely the same footing as documents and other things found in his possession upon a lawful arrest for an offence under the Indian Penal Code, which, as I have already pointed out, is not denied by Mr. Hill, and which, I think, is the case, it seems to me to follow as a matter of course that there must be a right of inspection.

The question of the legality of the seizure of chattels, including documents in the possession of persons charged with an offence, was considered very lately in the case of *Dillon v. O'Brien*.² The facts of that case were as follows : The plaintiff was engaged in carrying out the notorious "Plan of the campaign" (the *modus operandi* of which I need not describe), which was admitted to amount to a conspiracy at common law. Whilst so engaged, he was arrested upon a warrant, and certain bank-notes, gold and silver coins, paper books, paper documents, and writings then in his possession, were seized. The plaintiff brought

¹ 1 F. and F. 240.

² 20 Irish L. R. 300.

an action of trover in respect of the chattels seized: the defendant justified getting out the warrant for the arrest of the plaintiff, and justified the seizure of the chattels "for the purpose of producing the same as evidence on the prosecution of the plaintiff," averring that the same was and are material and necessary evidence in the said prosecution; the plaintiff demurred, and the demurrer was argued before Palles, C.B., Dowse, B., and Andrews, J. In delivering the judgment of the Court, Palles, C.B., says:—

I, therefore, treat it as clear and beyond doubt that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime; and I take the only real question upon this defence as being whether this right extends to cases of misdemeanour.

Although no case has been cited (nor have I myself found any) in which the right has (in reference to misdemeanours) been judicially decided to exist, or any text-book which draws the distinction here attempted to be taken, the circumstances of one case at least, *vis.*, that so much relied on for the plaintiff [*Entick v. Carrington*¹], were such that, if there was any trace of such a distinction, it could hardly fail to have been referred to either at the Bar or by the Bench. The absence, however, of express or direct authority entitles the defendants to have the matter determined on principle.

For this purpose I must first ascertain the reason of the rule as applicable to felony. The characteristic by which felony is distinguished from misdemeanour is that at common law the goods of the felon were forfeited upon conviction. The only right, however, to these goods which the books mention as being in the Crown before conviction, by reason of the possible future conviction, is that of taking (and detaining them for a reasonable time) *for the purpose of making an inventory*. Such a right has nothing in common with that of taking for the purpose of evidence. Forfeiture in felony, therefore, cannot be the origin of the right. To what then is it to be referred? Its purpose and object, *vis.*, to produce in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. On the existence of this interest in the State many of the most important principles of our jurisprudence depend. It is this which renders illegal an agreement to compromise a prosecution, whether for felony or (with one possible exception, *Keir v. Leeman*²) for misdemeanour. It is this, too, which prevents even a malicious prosecution against an innocent person constituting a cause of action if there be reasonable and probable cause for its institution. The paramount nature of this interest is well illustrated by the power which, for the purpose of enforcing it, the law gives to the officer in whose custody a person charged with a crime lawfully is. There is no doubt that he may kill his prisoner in case of resistance if he cannot otherwise secure his custody; and this as well when the charge is misdemeanour as felony. But the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the obstruction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture.

If material evidences of crime are in the possession of a third party, production can be enforced by the Crown by *subpoena duces tecum*. But no such writ can be effective in the case of the person charged.

It appears to me to be clear that this must be the origin of the right in felony, and that, being derived from the common law, it ought, *primâ facie* at least, to be

¹ 19 Howell's State Trials 1029.

² 9 Q. B. 371.

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deemed to exist in all cases in which that interest of the State exists, and cannot (at least without express authority) be so confined as to be inapplicable in cases of custodies of such value in the eyes of the law as to justify, for their preservation, the taking of life.

Let me, however, assume for a moment that the rule does not extend to misdemeanours, and see whether the results which necessarily would flow from this distinction would be those reasonable ones which usually are found to spring from the application of rules having their origin in the common law. All attempts to commit felonies are, at common law, misdemeanours only, and therefore inflicting a mortal wound was, at common law, until the actual death of the victim, no more than a misdemeanour; and if we are to confine the rule in question to felonies, we must face this absurdity, that in cases of murder, by firing at, wounding, or poison, the right of the constable to take the instrument of the crime and the evidence of guilt would depend, not upon the commission of the act which results in death, but upon the victim having actually ceased to breathe. All reason is against such an implication; and I can be no party to it unless coerced by authority.

This brings me to the only case relied on by the plaintiff—*Entick v. Carrington*.¹ The question there was as to the legality of a warrant, not only to seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was a reasonable and probable cause for believing him to be guilty, nor that a crime had, in fact, been committed by any one, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or any one else. The nature of the question there is shown by the statement of Lord Camden,¹ that, "if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Lord Camden takes pains to show that the word "papers" in the warrant could not, in point of law, be restrained to libellous papers only; and he adds: "All the papers and books, without exception, if the warrant be executed according to its tenor, must be seized and carried away, for it is observable that nothing is left either to the discretion or to the humanity of the officer." It was, of course, decided that that warrant was illegal; but the case as a decision is not in point here. The right here claimed is not to take all the plaintiff's papers, but those only which are evidence of his guilt; and the claim is based, not as in *Entick v. Carrington*,¹ upon a warrant issued upon mere suspicion, but upon an allegation of actual guilt and a lawful apprehension of the guilty person. If (by the law as then understood) the right to seize evidences of guilt in the possession of the person charged was confined to cases of treason and felony, the judgment would have been rested on that simple ground; the care which was taken to show that the warrant embraced all papers would have been thrown away, and the entire of the elaborate judgment of Lord Camden would have been unnecessary. For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension as distinguished from general warrants to seize all papers.

In this country there is no distinction between felony and misdemeanour. Now, if the right to seize and detain property of any description in the possession of a person lawfully arrested for treason, felony, or misdemeanour, rests "upon the interest which the State has on a person guilty or reasonably believed to be guilty of a crime being brought to justice, and on a prosecution, once commenced, being determined in due course of law," how can such interest be protected unless there is a right to inspect as well as to seize and detain? The latter would be almost useless without the former. Mr. Hill ad-

¹ 19 Howell's State Trials, at pp. 1063, 1064.

mitted that, though there was no express legislative enactment authorising him to do so, the Magistrate might inspect these books, but he said he could not delegate his authority.

Now, the Magistrate is not conducting the prosecution; it is no part of his duty to suggest or dictate what evidence shall be put in.

I am fully conscious of the dangers to which Mr. Hill and Mr. Palit alluded as possibly resulting from this view of the law. I admit that, if the right of inspection claimed here exists, it exists equally with regard to the books of third parties. There is nothing, except the discretion of the Magistrate, to prevent the seizure of the books of any merchant or banker in this city. There is nothing except the discretion of an officer in charge of a police-station to prevent the seizure of the books and plant of an indigo-concern in the mofussil.

But, as Maule, J., said in the well-known bigamy case, "that is no business of mine." All I have to do is to interpret the law of this country to the best of my ability.

If the dangers to which attention was called are real, and I think they are not only real but forcible, the Legislature must be invoked to remove them.

I am of opinion that the Magistrate had a right to allow inspection of these books, and that consequently this rule should be discharged; but the inspection must be limited to the books named in the search-warrant.

GHOSE, J.—This rule arises out of an order made by the Presiding Magistrate of the Northern Division of Calcutta on the 23rd August last, granting inspection of all the books and papers found in the premises of one Ahmed Mahomed, and seized and brought up by the police under a search-warrant issued by the said Magistrate on the 20th idem. The circumstances of the case are shortly as follow:—

On the 20th August last Mr. Hume, on behalf of the firm of Messrs. Jackariah & Co., laid an information before the Magistrate against two individuals, Ahmed Mahomed and Topun Ramchore, charging them with the offence of cheating in a large sum of money; and in support of the application that Mr. Hume made, one Noor Mahomed, a member of the aforesaid firm, was examined, and a statement made before Mr. Hume by Topun Ramchore on the previous day, *i. e.*, on the 19th idem, was produced before the Magistrate. The evidence of Noor Mahomed was shortly to the effect that both the accused had cheated the Company in the sum of about a lac of rupees between the years 1882 to 1887; and the statement of Topun Ramchore was that he entered into a conspiracy with Ahmed Mahomed in defrauding the Company in the manner in which they did. The Magistrate, upon the materials that were laid before him, ordered a summons to issue against Ahmed Mahomed, and a warrant of arrest against the other accused, Topun Ramchore. Later on the same day, it would appear that an application for a search-warrant was applied for on behalf of the prosecutor for the purpose of searching the premises of Ahmed Mahomed, No. 13, Pollock Street, for the books of his business from 1882 to 1887. The order that was passed upon this application was, that a search-warrant do issue; and, in accordance with this order, a warrant was drawn up in the form prescribed by No. 8, Sch. V. of the Criminal Procedure Code. The warrant was as follows:—(Reads warrant; see *ante*, p. 789, 790.¹)

The police on the authority of this warrant went to the premises, No. 13, Pollock Street, and seized, not only certain khatta-books found on the premises,

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¹ See p. 785 of this handbook.

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but also various other papers as detailed in the return of the police ; and in due course forwarded the same to the Court of the Magistrate. It also appears that, subsequent to the issue of the order of the 20th of August for a search-warrant, several applications were made on behalf of Ahmed Mahomed for the purpose of withdrawing the said order, but they were refused ; and on the 23rd of August the order, which is the subject-matter of this rule, was made by the Magistrate, *viz.*, granting to the prosecutor inspection of the books and papers found in the house of the accused and brought up by the police.

The application that was made to us on behalf of Ahmed Mahomed questioned the legality of the order granting a search-warrant, as also that of the order granting inspection of the books and papers, but the rule that was granted was, rightly or wrongly, confined to the order of inspection. This rule has now been heard before us, and discussed at considerable length, and with great ability, by the learned counsel on either side.

Mr. Hill on behalf of Ahmed Mahomed, in the first place, contended that there were no materials whatever before the Magistrate, properly so called, upon which he could grant, under s. 96 of the Criminal Procedure Code, the order for a search-warrant. If the matter was open before us, speaking for myself, I should be inclined to hold that the said order of the Magistrate was bad in law, for it would appear that no summons under s. 94 of the Criminal Procedure Code was in the first instance issued upon Ahmed Mahomed for the production of any particular documents ; and there was nothing to indicate upon the evidence of Noor Mahomed that there was any reason to believe that the said documents would not be produced upon summons being served. And as regards the statements made before Mr. Hume by Topun Ramchore, I need hardly say that they were no evidence whatever against Ahmed Mahomed ; and besides there was also nothing even upon those statements to justify the grant of a search-warrant. Search-warrants are judicial acts, and must be granted upon proper materials. But, as I have already said, the matter is not open before us, and the order itself having been executed, and the books and papers having been brought up before the Magistrate, the question does not now really arise.

The next point that was raised by Mr. Hill was that the warrant that was issued was bad, because it was not specific, but too wide and general in its character. As to this matter it seems to me that, although it would have been desirable, nay proper, for the Magistrate to specify the books of what particular business, and whose books were to be brought up, still there can be no doubt what the warrant really meant ; and it does not appear that any such objection as is now raised was raised before the Magistrate. I think that the accused has not been prejudiced by reason of the specification of the documents required to be seized being somewhat indistinct ; and on this ground, and also on the ground that upon the rule as granted the matter is not properly open before us, I agree with my learned colleague in disallowing the objection.

The next matter that was urged by Mr. Hill was that in granting an order for a search-warrant, and also in granting inspection of all the documents brought up, the Magistrate has in effect compelled the defendant to make a discovery as against himself in aid of the criminal prosecution. He contended, quoting many authorities, that in England no man could be compelled to produce evidence so as to criminate himself, and that discovery was only granted in equity in aid of civil rights, and never in aid of a criminal prosecution ; and he argued that the law in this country ought to be administered in the same way as in England.

There can, I think, be no doubt, upon the authorities which have been laid before us, that in England the law is as it has been contended for; but it seems that the law in this country is not the same. With a view to see how the law which we have to administer stands, it may be necessary shortly to refer to the history of the legislation on the subject, and, in doing so, it is not necessary to refer back further than the year 1861. In that year an Act, No. XXV. of 1861, was passed. S. 114 of that Act ran as follows:—

When a Magistrate shall consider that the production of anything is essential to the conduct of an enquiry into an offence known or suspected to have been committed, he may grant his warrant to search for such thing, and it shall be lawful for the officer charged with the execution of such warrant to search for such thing in any house or place within the jurisdiction of such Magistrate. In such case the Magistrate may specify in his warrant the house or place or part thereof to which only the search shall extend.

It will be observed that the Legislature used the expressions “anything” and “such thing;” the word “document” was not specifically mentioned.

This Act was amended in some respects by Act VIII. of 1869, but, so far as the particular matter now before us for consideration is concerned, the law remained the same as in 1861. The next Act upon the subject is Act X. of 1872, by which the law regulating the procedure of the Courts of Criminal Judicature other than the High Courts and the Presidency-towns and the Courts of Police Magistrates was consolidated and amended, and the portions of this Act which ought here to be referred to are ss. 365 to 367 and Ch. XXVII.

S. 365 ran as follows: “Whenever an officer in charge of a police-station, or any Court, considers that the production of any document is necessary or desirable for the purposes of any investigation or judicial proceeding, such officer or Court may issue a summons to the party in whose keeping such document is believed to be, requiring him to attend and produce such document at the time and place stated in the summons.”

S. 366: “If there appears reason to believe that the person to whom the summons is addressed will not produce it as directed in the summons, such officer or Court may issue a search-warrant for the document in the first instance.”

S. 367: “Any Court may, if it thinks fit, impound any document produced before it, or may, at the conclusion of the proceedings, order such document to be returned to the person who produced it.”

It is not necessary to refer in detail to the several sections in Ch. XXVII. It is sufficient to say that the law upon the matter of that chapter, as it existed in 1869, was somewhat amplified.

On referring to ss. 365 to 367, it will, however, be observed that in 1872, for the first time, special provisions were made for the production of documents by a party either by summons or by search-warrant; and this was perhaps thought necessary by reason of a decision of the High Court of Calcutta in *Queen v. Hossein Ali Chowdhry*¹ as to the right construction to be put upon s. 114 of Act XXV. of 1861, and as to the powers conferred thereby upon the Court and police-officers in respect of searching for documents or any other thing. The party might be, as it is obvious, either the accused himself or a third party, and the Legislature in 1872 thought it right to lay it down in clear terms that any party might be compelled to produce documents for the purpose of any investigation or judicial proceeding.

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It may be useful here to refer to some extent to the proceedings of the Legislative Council upon the Criminal Procedure Bill of 1872.

It would appear from the speech of Mr. Fitz James Stephen that was made on the occasion (*vide* pp. 393, 394, Vol. XI. of the Proceedings of the Legislative Council of India) that he did not quite agree with several of the provisions of the Bill; and as to the modifications upon the then existing system which had been made by the Select Committee, he referred, for the reasons thereof, to his colleagues, and specially to the then Lieutenant-Governor of Bengal. The Lieutenant-Governor in his speech in pages 409 and 410 then, amongst other matters, said as follows:—

The criminal law was, as the Honourable Member had said, a law of overwhelming importance in this country; he meant not only the law for the administration of criminal justice, but the executive administration as carried on through the Magistrates. The prevailing ideas on the subject of criminal law had been somewhat affected by the English law; and the departures from the rules of the English law which the Committee recommended were founded on this ground, that many of the prominent parts of the English law were based on political considerations, the object of those familiar rules of criminal law being not to bring the criminal to justice but to protect the people from a tyrannical Government, and the functions of juries of the people having been for many centuries principally directed to the protection of the interests of the people. Not only were those provisions now unnecessary in England, but they were especially out of place in a country where it was not pretended that the subject enjoyed that liberty which was the birthright of an Englishman, and it was not intended to introduce rules into the criminal law which were designed with the object of securing the liberties of the people. That being so, His Honour thought they might fairly get rid of some of the rules, the object of which was to secure for the people that jealous protection which the English law gave to the accused. It seemed to him that they were not bound to protect the criminal according to any Code of fair play, but that their object should be to get at the truth, and anything which would tend to elicit the truth was regarded by the Committee to be desirable for the interests of the accused if he was innocent, for those of the public if he was guilty. That being so, he would say that he had no sympathy whatever for some of those things which his Honourable friend Mr. Stephen had called superstitions. For instance, His Honour did not see why they should not get a man to criminate himself if they could; why they should not do all which they could to get the truth from him; why they should not cross-question him, and adopt every other means, short of absolute torture, to get at the truth. They had already done a good deal in the direction of clearing away English prejudices, and the Committee proposed to make further concessions to common sense in the present Bill, &c., &c., &c.

It is obvious, upon a consideration of the observations which I have just quoted, that the Legislature was quite sensible to the many important differences that existed between the English law and the law which existed in this country, and which was then being enacted.

One of the matters of difference which must have, as I may assume, occurred to them was as to the compelling of an accused person furnishing or producing evidence as against himself; and, according to the speech of the then Lieutenant-Governor, they thought that the same protection, which an accused in England was entitled to receive, need not be extended to an accused in this country; and that "they were not bound to protect the criminal according to any Code of fair play, but their object should be to get at the truth;" and that they "did not see why they should not get a man to criminate himself if they could." And I further observe, with reference to the particular matter now before us, that the Select Committee in their supplementary report, dated the 12th March 1872, evidently referring to ss. 365 to 367 of the Bill, said that

they had made "the necessary provision for securing documentary evidence and for impounding such documents as the Court thinks fit." The words "*securing* documentary evidence," read by the light of the remarks of the then Lieutenant-Governor, are to my mind significant as showing the intention of the Legislature.

Whether the policy which influenced the action of the Legislature in 1872 was right or not, it is not for me to say. But it is clear that they intended that an accused person might be compelled to furnish evidence, the production of which might have the effect of criminating him.

The other Acts that may be referred to upon the same subject are Act X. of 1875 (the High Courts' Criminal Procedure Act), ss. 79-86; and Act IV. of 1877 (the Presidency Magistrates Act), ss. 144-147; wherein the law was practically the same as in the Act of 1872.

We then come to the present Criminal Procedure Code, Act X. of 1882, whereby the previous laws in the Mofussil and in the Presidency-towns were consolidated and amended; and, so far as the particular matter before us is concerned, the law will be found in ss. 94 to 99.

S. 94 runs as follows: "Whenever any Court, or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police-station, considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, enquiry, trial, or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order.

"Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he cause such document or thing to be produced instead of attending personally to produce the same.

"Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, ss. 123 and 124, or to apply to a letter, post-card, telegram, or other document in the custody of the Postal or Telegraph Authority."

S. 96 says: "Where any Court has reason to believe that a person to whom a summons or order under s. 94 or a requisition under s. 95, paragraph 1, has been or might be addressed, will not or would not produce the document or other thing as required by such summons or requisition"—

"Or where such document or other thing is not known to the Court to be in the possession of any person—

"Or where the Court considers that the purposes of any enquiry, trial, or other proceeding under this Code, will be served by a general search or inspection—

"It may issue a search-warrant, and the person to whom such warrant is directed may search or inspect in accordance therewith and the provisions hereinafter contained."

"Nothing herein contained shall authorize any Magistrate, other than a District Magistrate or Chief Presidency Magistrate, to grant a warrant to search for a document in the custody of the Postal or Telegraph Authorities."

It will be observed that the law, so far as the immediate subject before us is concerned, is practically the same as it was in 1872; and there can, I think, be no doubt that the Legislature intended, as I have already observed, that an accused person might be compelled to produce evidence against himself; and reading the above sections with Sch. V., No. VIII. of the Criminal Proce-

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Code, the only safeguards, as far as I can see, which the Legislature provides, are : 1st, that the documents called for, or in regard to which a search-warrant is issued, must be distinctly specified ; 2nd, that the documents are necessary for the purpose of the enquiry ; and, 3rd, that while granting a search-warrant, the Magistrate must exercise his judicial discretion, and that he should not make such an order unless the materials before him justify him in so doing.

The documents, when seized, are, as indicated in No. VIII. of the schedule, to be brought before the Court ; and then arises the question, when they are so brought before the Court, whether the Magistrate may grant to the prosecutor the liberty to inspect them. According to a strict reading of the sections themselves, referred to above, there is no power given even to the Court to inspect them ; but it would be simply idle to say that the Court would not have that power. Then, again, the production of such documents is, as the learned Advocate-General has justly argued, for the purpose of their being used as evidence in the cause ; and one fails to see how it is possible that this should be done unless the prosecutor has an opportunity of inspecting them. It was contended by Mr. Hill that the Magistrate, and the Magistrate alone, has the power to inspect, and that he is bound to determine by examination made by himself or through an interpreter as to the bearing or relevancy of any particular document. But it is obvious that the Magistrate does not prosecute the case, and he has no interest, one way or the other, in the result of the prosecution ; and he cannot be expected to know and decide for himself whether any particular document is to go in as evidence.

Whether the documents are necessary for the enquiry is a matter which must be determined by the Magistrate at the time when he makes an order under s. 94, or issues a search-warrant under s. 96 ; and therefore it seems to me that, when they are brought before the Court under an order duly made, the Magistrate would have the power to allow the prosecutor the inspection thereof. They stand, when they are brought to Court, precisely in the same position, as my learned brother has so forcibly pointed out, as documents or things found either upon the person of a prisoner at the time of his arrest, or at his house upon a search made by the police, and afterwards forwarded to the Court. On referring to Ch. XIV. of the Criminal Procedure Code, which deals with the power and duties of the police, it would appear that under s. 165 the police are authorized to search for any document or thing necessary for the investigation of a case ; and then s. 170 provides that, if upon an investigation under that chapter there is sufficient evidence against an accused, he shall forward him to the Magistrate with any weapon or other articles which may be necessary to produce before him, and shall require the complainant, if any, and all persons acquainted with the circumstances of the case, to appear before the Magistrate, prosecute, and give evidence in the matter of the charge. When, therefore, upon search, a police-officer finds any documents which he thinks necessary for the investigation of the case, he has to forward the same to the Court ; and this he does evidently under s. 170 ; and he requires the complainant to appear before the Magistrate and prosecute the case. Now, it is obvious that, in the very nature of things, the prosecutor would have an opportunity of looking at the documents thus seized ; and it is difficult to conceive that, if in the case of a search and seizure by the police, the prosecutor necessarily inspects the documents or article seized, the Legislature intended that he should not have the same opportunity or privilege when under the order of the Court any particular document or other thing is seized under a search-warrant and brought up to the Court.

Mr. Hill, as also Mr. Palit, contended before us that the privilege claimed for the prosecution in this case is not enjoyed by a party to a suit in a civil case when his adversary or a witness in the cause produces a document in Court; that whereas, in the case of a witness, he may object to the production of a document called for from him, and in the case of a party to a suit, if his adversary inspects the document, the latter is bound to put it in as evidence; but that in the case of a criminal trial or enquiry the prosecutor would, if the contention of the learned Advocate-General was right, be entitled to inspect a document without even being compelled to put it in as evidence. They also called attention to the fact that both the Criminal Procedure Bill and the Civil Procedure Bill passed through the Legislative Council about the same time, and that it was hard to believe that the Legislature could have meant to give to a prosecutor such extraordinary privileges which they denied to a party to a civil suit. It is indeed true that the power of inspection is not in distinct terms given in the Criminal Procedure Code to a prosecutor. In fact, the Code is silent upon the matter, whereas the Civil Procedure Code clearly makes provision for such inspection under certain circumstances. If, however, the argument of the learned Counsel for the petitioner were carried to its legitimate extent, it must come to this, and indeed they did contend for that position, that a prosecutor in a criminal case can, under no circumstances, be permitted to inspect a document or thing produced by the police, unless it be at the trial *after* such document or thing is put in evidence. But even as to this, *viz.*, as to its being put in evidence at the trial, the Code is silent; in fact, it stops short with saying that the documents or things, when seized by the police, are to be brought up to Court. Then, again, who is to put the documents or things in evidence? That the Legislature intended that the Magistrate should conduct the case for the prosecution, and have the responsibility of determining by inspection as to whether any document is to go in as evidence, is a proposition which seems to me almost impossible to accept. If this is a correct view, and if we bear in mind the true purpose for which any document or thing is seized and brought up to Court, one cannot help thinking that the Legislature, while providing for the seizure and production in Court of documents, intended by implication that the prosecutor should, under the orders of the Court, have the power to inspect and determine whether they should go in as evidence.

It was further contended by Mr. Hill that all that the prosecutor in this case might have called for were the particular entries in the books of the accused, and when they were brought into Court they could be put in as evidence at the trial, and that *then* the prosecutor would have the liberty of inspecting them. But it seems to me that it would be simply impossible for a prosecutor in a case like this to give the precise dates of the entries in the books of the accused without inspection beforehand.

There is one other matter which I think it right to mention here. It is this, that the order of the Court was to search for and bring up the khatta-books of the defendants' business from 1882 to 1887. The police evidently exceeded their authority, and seized not only certain khatta-books, but also various other papers. I think that those other papers are not properly before the Court; and it follows that no inspection can be had in respect to them. While, therefore, I agree with my learned colleague in holding that the order granting inspection in the circumstances of this case cannot be set aside, I think that the inspection should be confined to the documents covered by the warrant of the 21st August last.

J. V. W.

Rule discharged.

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CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

1887.

Aug. 29.

IN THE MATTER OF THE PETITION OF ABDUL HOSSEIN; QUEEN-EMPRESS
v. ABDUL HOSSEIN.¹

15 Cal. 194. *Police Act (V. of 1861), s. 29—Power to make rules under Act V. of 1861—District Superintendent of Police, Power of—A rule or regulation and a lawful order distinguished.*

There is no express power given by Act V. of 1861 to any officer save the Inspector-General of Police to make rules; therefore the violation of a general rule alleged to have been made by a District Superintendent of Police to the effect that constables are to be within the lines at a particular time or at roll-call is not punishable under s. 29 of the Act.

Semble.—The violation of a special order made by a District Superintendent of Police requiring the presence of an officer or of certain officers within the police lines, and issued expressly to him or each of them, would come within s. 29 of the Act as being not "a rule or regulation," but a "lawful order," made by a competent authority, and relating to the duties of the officer or officers.

ABDUL HOSSEIN, a police-constable, was sentenced by the District Magistrate of Dinagore to six weeks' rigorous imprisonment for disobedience of orders under s. 29 of Act V. of 1861. The order alleged to have been disobeyed was to the effect that "constables are to be within the lines at 9 P.M." The Sessions Judge was of opinion that there was no satisfactory evidence to show that to be absent from the lines after 9 o'clock was against rules, and further that, in order to render the prisoner punishable under s. 29 of the Act, it would be necessary to prove that the offence fell under s. 12 of the Act. The Sessions Judge, therefore, referred the case to the High Court under s. 438 of the Criminal Procedure Code with the view that the conviction and sentence should be set aside.

Baboo *Ram Charan Miller* appeared in support of the conviction.

No one appeared for the prisoner.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

This is a case reported under s. 438 of the Criminal Procedure Code by the Sessions Judge of Dinagore, who has also, under that section, suspended the sentence, and let the petitioner out on bail.

Petitioner, a police-constable, was tried summarily by the District Magistrate of Dinagore, convicted of the offence of disobedience of orders, and sentenced under s. 29 of the Police Act, V. of 1861, to six weeks' rigorous imprisonment. The Sessions Judge is of opinion that the conviction of the Magistrate is bad in law.

The petitioner was sent up to the Magistrate for punishment by the District Superintendent with a memo. which is attached to the record, and runs as follows: "246 W. C. Abdul Hossein is again reported for absence from roll-call on the night of the 4th May, and says he went to eat at his house and fell asleep. In D. O. 385 he was fined ten days' pay for this very offence, and has been warned not to leave his lines." "His disobedience of orders is wilful and a defiance of my authority. I forward his case to the Magistrate for ex-

¹ Criminal Reference, No. 199 of 1887, made by *C. A. Kelly, Esq.*, Sessions Judge of Dinagore, dated the 21st of July 1887, against the order passed by *C. R. Marindin, Esq.*, District Magistrate of Dinagore, dated the 13th of May 1887.

emplary punishment under s. 29, Act V." The prisoner was charged with disobedience to orders.

The Magistrate's decision is: "It is satisfactorily proved that the accused was absent from the lines after 9 o'clock on the night in question, which is against rules." The evidence as to rules is that of the line sub-inspector, who says that "the orders are that constables are to be within the lines at 9 P.M." The evidence against the accused was, first, a former punishment for absence from 9 o'clock roll-call; second, that of Debiram that accused was absent from the 12 o'clock roll-call; third, Bital proved the absentee roll-call. "I call out the names. The havildar said such and such are not present, and I wrote his name down. Eighteen constables were absent. The havildar stood the file of men there. I was in a hut with a light;" fourth, Ramlal said: "Abdul Hossein was absent from roll-call on May 4th at midnight. I was helping the havildar to take the roll-call. Bital was calling over the names. He was sitting by a door with a lantern. Bital was with me when we looked for the men who did not answer. Bital marked down the absentees after they were called out and did not answer." That is the evidence for the prosecution. Some evidence was given for the accused which the Magistrate apparently did not believe. The Sessions Judge thinks, first, that there is no satisfactory evidence that the accused was as a fact out of the lines at 12 o'clock; second, that there is no evidence that to be absent from the lines after 9 o'clock is against rules, except the statement of the line sub-inspector set out above; third, that there is nothing to show by whom the rule, if it exists, was made; and fourth, he thinks that no rule the violation of which is punishable under s. 29 of the Police Act can be made, save by the Inspector-General, under s. 12 of the Act.

We think the first three grounds for reversing the conviction are sufficient. If the rule be that the officers must be and remain within the lines after 9 P.M., there is no evidence that the accused violated it, for there is no proof that he was searched for, and was, as a fact, absent from the lines. If there be a rule that the officers must attend roll-call at midnight, or at any other hour at which the roll is called, no evidence of the existence of such a rule was given. It is to be observed that it was for absence from roll-call apparently that the accused was sent up; and it was to his not having attended roll-call that the evidence was directed. We think the Sessions Judge well advised in pointing out, as he does, the distinction between a judicial and a departmental punishment. Rigorous imprisonment is no light punishment, and the law or rule, for the violation of which it is imposed, as well as the fact of such violation, ought to be clearly proved in order to warrant the infliction of it. The law requires proof before depriving the subject of his liberty, and is not satisfied by probabilities alone. Probably, or perhaps, there was a rule known to the accused requiring him to be in the lines at 9 P.M., or perhaps at the time when the roll was called, on the occasion in question. Probably or possibly he disobeyed it. It may even be the case that, if there was such a rule, it was one made by a competent authority. But there is no proof of it, or that it was notified to accused, or that, if it was, he violated it. The only fact established in the case is that he did not answer to his name at 12 o'clock roll-call; and there is not a tittle of evidence to show that he was bound to do so. There is no evidence properly so-called of any rule whatever.

The fourth point mentioned by the Sessions Judge is of importance. He holds that, had it been proved that a rule requiring presence in the lines, or at roll-call, had been made by the District Superintendent, a violation of that rule would not have been punishable under s. 29 of the Act. There is no express

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power given by the Act to any officer, save the Inspector-General of Police, to make rules; he can do so under s. 12 for, amongst other purposes, "preventing abuse or neglect of duty." Such rules must be made subject to the approval of the Local Government. It was argued before us that the District Superintendent has power under s. 4 which gives him the administration of the police throughout the district, which, it is to be observed, is under the general control of the Magistrate. It is not necessary to determine the question in this case; but the matter is of such consequence that we think it right to state the inclination of our opinion, which is that a general rule of the nature suggested, but not proved in the present case, made by a District Superintendent, would not come under the Act, but that probably a special order requiring the presence of an officer or of certain officers within the police lines, issued expressly to him or each of them, would come under s. 29 as being not a "rule or regulation," but a "lawful order," made by competent authority, and relating to the duties of the officer, one of which is to be at hand when required for service. A rule made under the Act, officers are bound to know and to obey. An order to bind an officer must be given to him, and to make him punishable for not carrying it out the fact of its having been given to him must be proved. Any instance of failure to enforce discipline in the police is much to be regretted, only the more necessary is it that regulations or individual orders be so framed, and so promulgated or issued, that the violation of them can be legally punished under the Act. We set aside the conviction and sentence.

K. M. C.

Conviction set aside.

CRIMINAL REFERENCE.

*Before Mr. Justice Prinsep and Mr. Justice Pigot.*QUEEN-EMPRESS v. ITWARI SAHO.¹

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Verdict of Jury—Sessions Judge, Opinion of—Criminal Procedure Code, s. 307—High Court, Power of.

In the exercise of its powers under s. 307 of the Code of Criminal Procedure, the High Court will form and act upon its own view of what the evidence in its judgment proves; but, in doing so, the opinion of the Sessions Judge, no less than the verdict of the jury, is entitled to its proper weight.

Reg. v. Khandera Bajirav; ² *Empress v. Mukhun Kumar*; ³ *The Empress v. Dhunum Kasee*; ⁴ *Queen-Empress v. Mania Dayal*; ⁵ *The Queen v. Ram Churn Ghose*; ⁶ *The Queen v. Sham Bagdi*; ⁷ *The Queen v. Hurro Manjhee*; ⁸ *The Queen v. Wusir Mundul*; ⁹ *The Queen v. Nobin Chunder Banerjee*, ¹⁰ referred to.

ITWARI SAHO was placed on his trial in June 1887 before the Court of Session at Patna, charged with having in April 1885 sold as genuine to Lalla Sahu a forged Government Currency note No. $\frac{P}{39}26150$ for Rs 50. Some three

¹ Criminal Reference, No. 8 of 1887, made by T. M. Kirkwood, Esq., Sessions Judge of Patna, dated the 20th of June 1887.

² I. L. R., 1 Bom. 10.

³ I. C. L. R. 275.

⁴ I. L. R., 9 Cal. 53.

⁵ I. L. R., 10 Bom. 497.

⁶ 20 W. R. Cr. 33.

⁷ 13 B. L. R. Ap. 19; 20 W. R. Cr. 73.

⁸ 14 B. L. R. Ap. 2; 21 W. R. Cr. 4.

⁹ 25 W. R. Cr. 25.

¹⁰ 13 B. L. R. Ap. 20; 20 W. R. Cr. 70.

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months after the alleged date of sale, it was discovered in the Bank of Bengal at Lucknow that the note was a forgery. On enquiry, the note was traced by means of the endorsements upon it to a merchant of Rajapore in the district of Banda, to whom it had been sent by Lalla Sahu in payment of a current account for cotton bought. It was alleged that the note, when it passed into the hands of Lalla Sahu, bore the following endorsements: (1) Note sold by Sanichar Saho Teli to Lakha Saho; (2) note sold by Lakha Saho to Damri Saho and Sanichar Saho; (3) note sold by Damri Ram, Sanichar Ram, Suris of Bardari, to Lall Ram. The first two were said to form one entry, but none of the entries bore any date. On further investigation it was found that there was an entry in Lalla Saho's book under the heading "Account with Nowrattan Das Dwarika Prosad of Rajapore, Sambut 1941," to the following effect: "Rs. 140, second day of the first part of Bysakh, Rs. 50 note purchased from Damri, Sanichar, Itwari, Suris of Bardari, one note No. 26,150, small number 39, Rs. 90, nine notes." Itwari was then searched for, but not found, and not until March 1887 was arrested by the chowkidar of Luckhiserai at Kugra, eight miles from that place. Itwari Saho, it was discovered, had two brothers, Damri and Sanichar. By these, jointly with him, a business in the name of Damri Ram Sanichar Ram was carried on in Behar, in Bardari Bazar, where they had a place of business, and also in Luckhiserai. Itwari was the only one of the three who could write, and was in the habit of writing for the firm in the business carried on by them. He was chiefly in Luckhiserai, where the principal place of business was; but he travelled about from place to place in the transaction of business. At the trial the prisoner was defended by two vakeels. He called no witnesses. He simply denied the sale, and said he had been separate from his brothers for three years. Upon the conclusion of the evidence and argument, the Sessions Judge explained the case to the jury, a body of five, who, after retiring for half an hour, returned, and, in answer to questions put by the Judge, the foreman stated, (1) they were unanimous that the note was forged; (2) three found it not proved that the prisoner sold the note, not proved that the second endorsement on the note was written by him, two found that he did sell the note and wrote the endorsement; (3) three found it not proved that he absconded, two found it proved that he did; (4) four found that the first endorsement was written by the same hand as the second, one found the contrary. The two who found the prisoner did sell the note had come to no finding whether he did so knowing it to be forged, and the jury was then desired to retire—the two who found prisoner had sold the note, to find whether he did so knowing it to be forged, and as to all the jury for a finding whether the sale to Damri Sanichar stated in the first endorsement took place. In answer, the foreman said: "Only one, myself, finds it proved that accused, when he sold the note, knew it to be forged." They all found that the sales stated in the first endorsement never took place. The findings amounted to an acquittal by the majority, and the Sessions Judge, disagreeing with the verdict, submitted the case to the High Court under s. 307 of the Code of Criminal Procedure.

Mr. C. Gregory for Itwari Saho.

Baboo Ram Churn Miller for the Crown.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

This case comes before us under the provisions of s. 307, Criminal Procedure Code. The charge against the prisoner was that, on April 1st, 1885, he, at Naga Serai, Behar, dishonestly sold as genuine a forged valuable security which purported to be a currency note for Rs. 50 issued on behalf of the Government of India, which he knew or had reason to believe to be a forged document, and

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thereby committed an offence against ss. 467-471, Indian Penal Code. The prisoner was committed for trial on March 31st, 1887. He was tried at the Patna Sessions on the 16th, 17th, and 18th June 1887. There was no question seriously raised as to the fact that the note, which the prisoner was charged with having dishonestly sold, was a forgery. The jury unanimously found that it was, and the appearance of the exhibit leaves no doubt of this. The questions raised in the case were: (1) whether the prisoner sold the note as alleged; and (2) whether he did so knowing, or having reason to believe, it to be forged. The findings of the jury, to which we shall presently refer in detail, amount, in effect, to an acquittal by a majority.

The prisoner has two brothers, Damri and Sanichar. By them, jointly with him, a business in the name of Damri Ram Sanichar Ram was carried on in Behar in Bardari Bazar where they had a place of business, and also in Luckhisera. The prisoner was the only one of the three who could write. It is in evidence that he habitually wrote for the firm in the business carried on by them. He frequented Behar, where he was well-known. He was chiefly in Luckhisera, where their principal place of business was, but he travelled about from place to place in the transaction of business. Lakhaprosad or Lallaprosad, the principal witness for the prosecution, is a cotton-seller in Behar. He deposes to having purchased the forged note from the prisoner. He says he has known the prisoner for 10 or 15 years. He had never before this occasion purchased notes from him, but had done so from his brother Damri Ram. He says prisoner came to his house, which is about a mile from his (Lakha's) shop and near to the prisoner's house in Behar, and offered him the note for sale; that he agreed to buy it, and asked prisoner to endorse it, but as he had no ink in his house, he took him to the house of Bandu (witness No. 4); that Bandu had no pen and ink, whereupon they went to Tita Ram's (witness No. 5), and that the prisoner endorsed the note at that place in the presence of Tita Ram, Monohar Dass, and Dipu Halwai (witnesses Nos. 6 and 7). He says he then paid prisoner the Rs. 50, took the note, and went to his shop, meeting on the way, while prisoner was still with him, Uzir Makouri (witness No. 8), who, he says, was told then of the purchase, and who in his evidence says that he then saw the note, and the endorsements on it, in the street. Lakhaprosad says he never saw prisoner after this. The endorsement (Exhibit X) said to have been made by prisoner on this occasion is as follows: "They are 'note' sold by Damri Ram, Sanichar Ram, Tari of Bardari, to Lall Ram." There is no date to it. The witness says that at the time of the sale there was already on the note the endorsement (Ex. W.), which is written on it, and which is as follows: "Note sold by Sanichar Saho Teli to Lakha Saho, note sold by Lakha Saho to Damri Saho and Sanichar Saho." This is all one entry (as the translator calls it), and there is no date to it. As to this endorsement, the jury, upon the evidence, have unanimously found that the note was never in Lakha Saho's possession, and that Sanichar Teli never sold it. There can be no doubt that W is a forgery.

Witnesses Nos. 5 and 8 corroborate Lalla as to W's having been already on the note when the sale took place, and also as to the fact of X having been written by prisoner, and, as to the latter, No. 7 does the same. But No. 5, Tita Ram, in his evidence mistook W for X, and identified W as the endorsement written by prisoner, and the evidence of all the witnesses, Nos. 4 to 7, who depose to having witnessed the sale, and of No. 8, who saw the note in the street, is open to damaging comment, as showing a recollection, strangely minute and precise, of circumstances which occurred long ago, and which there was no reason for their committing to memory.

The witness Lakhaprosad says that, on the purchase of the note, he at once despatched it in a registered cover to his servant, Tara Ram, to Rajapore in Zilla Banda, with other notes of Rs. 10 each, amounting in all to Rs. 140. Tara Ram stays at Rajapore at the place of business of one Nowrattan, with whom Lakha has dealings. Lakhaprosad says that at the time he despatched the notes he made an entry (Exhibit H in the case) in his book. It is as follows: On a page headed "Account with Nowrattan Das, Dwarikaprosad of Rajapore, Sambat 1941, Rs. 140, second day of the first part of Baisakh, Rs. 50 note purchased from Damri, Sanichar, Itwari, Suris of Bardari, one note No. 26150, small number 39, Rs. 90, nine notes." He says the object of that entry was to show what notes he despatched to that firm in payment of any purchases. The note bears an endorsement (Exhibit Y in the case): "Lall Pershad by the pen of Tara Ram." There is no date to it. The endorsement is in Tara Ram's handwriting. It is followed by an endorsement in these words: "Signed by Nowrattan Ram, Dwarikaprosad by the pen of Ramnarain Gomastha," no date. There is no proof as to the handwriting of this entry. With reference to the date of Exhibit H second day of the first part of Baisakh, Lakhaprosad says this would be 1942. The entry comes after entries for Chait 1941. That would be on or about 1st April 1885. A number of entries of purchase of notes follow this entry. The first is 11th Baisakh. All, save one, record the number of the notes purchased as H does.

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The note was found to be forged, and in July 1885 the police visited Lakhaprosad's shop in Behar. He showed them Exhibit X in his book, went with them to the thannah, was there shown the note, and said he had sent it to Rajapore; that he had bought of Damri, Sanichar, and Itwari (the prisoner), and that Itwari was the person who actually sold it. Search was then made for Itwari, but he was not found until March last, when he was arrested by the chowkidar of Luckhisera, at Kugra, eight miles from that place.

The evidence as to the fact of the sale by the prisoner is that of the witnesses we have above referred to, Lakhaprosad, and witnesses Nos. 4, 5, 6, 7, and 8, who corroborate him; Nos. 5, 6, and 7, depose to having seen prisoner endorse the note: No. 8, Uzir Saho, who met Lakha and prisoner in the street, says he then saw the endorsement. He says, too, that he knows prisoner's writing well, and that X is in his handwriting. There was contradictory evidence as to whether W was in prisoner's hand or not.

As to guilty knowledge, the fact, if proved, that W, the forged endorsement, to prisoner's firm, was on the note when he sold it, would be conclusive if unexplained. A part of the case for the prosecution was that prisoner had absconded when it became known in Behar that the note had been found to be forged. This was about three or four months after the sale by him is said to have taken place. His absconding under these circumstances, and keeping or being out of the way until arrested one and three-quarter year afterwards, would strengthen, if unexplained, the presumption of guilty knowledge. The prisoner was defended by two vakeels. He called no witnesses. He simply denied the sale, and said he had been separate from his brothers for three years.

The case was, we think, explained to the jury in a satisfactory manner by the Sessions Judge. The jury, after retiring for half an hour, returned, and in answer to questions put by the Court, the foreman stated: They were unanimous the note was forged. Three found it not proved that prisoner sold the note; not proved that X was written by him. Two found that he did sell the note and wrote X when he sold it. Three found it not proved that he absconded; two found it proved that he did. Four found that W was written by the same

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hand as X; one found the contrary. The two who found prisoner did sell the note had come to no finding whether he did so knowing it to be forged. They were then desired to retire; the two, who found prisoner had sold the note, to find whether he did so, knowing it to be forged; and as to all the jury, for a finding whether the sale to Damri Sanichar stated in W took place. In answer the foreman said: "Only one, myself, finds it proved that accused when he sold the note knew it to be forged." They all found that the sales stated in W never took place. These findings amount to an acquittal by a majority. With this the Judge wholly disagrees, and submits the case under s. 307.

It is argued for the accused that the verdict cannot be set aside unless it can be shown to be perverse and manifestly wrong, and that, as there are certainly infirmities in the evidence for the prosecution in the present case, the jury cannot be said to have been perverse in rejecting the whole case made against the prisoner. *The Empress v. Dhunum Kasee*,¹ *Queen-Empress v. Mania Dayal*,² and *Solomon v. Bitton*,³ were cited by the pleader for the accused. The vakeel for the prosecution relied on *Empress v. Mukhun Kumar*⁴ amongst others. *The Empress v. Dhunum Kasee*¹ and *Queen-Empress v. Mania Dayal*² were cases in which the Court did not disagree with the verdict. In each case, the Court, on the whole, approved of the verdict. They are not authorities for the position that the Court, although disagreeing with the verdict, will not set it aside unless it appears to be perverse. In *Reg. v. Khanderav Bajirav*,⁵ West, J., says, referring to s. 263 of the former Code of Criminal Procedure: * * * "The whole case is opened up, * * * the functions of both Judge and jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England." That very learned Judge adds: "Notwithstanding this difference, however, * * * we still desire to be guided, as far as may be, by the analogies of the English law. It is a well recognized principle that the Courts in England will not set aside the verdict of a jury unless it be perverse or patently wrong, or may have been induced by the error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers." We think that the argument founded on these words may be pressed too far. No doubt, the manner in which English Courts deal with the verdict of a jury in civil cases, as for instance *Belcher v. Prittie*,⁶ must always, to some extent, assist the Courts in this country in the exercise of the duty imposed upon them by law of considering under s. 307, in criminal cases, the verdict of a jury here: a body similar in some respects to the jury in England, and intended, so far as can be, to discharge similar functions. But we think the degree of influence to be given to this consideration must depend in some measure upon the closeness of the analogy which may exist between the nature and functions of the English and of the Indian tribunals. Apart from the circumstance that the English law on this subject relates to civil, and the Indian to criminal, cases, exclusively, the analogy is not always a close analogy. The unanimous verdict of a jury of twelve is, in respect of weight, a different thing from the decision by a majority, or even from the unanimous decision of a body of five or seven or nine. The Indian Courts are expressly made Courts of Appeal on facts; the function of the English Courts in this branch of the law go no higher, in cases where verdicts are set aside, than the ordering of a new trial. The present Lord Chan-

¹ 1 L. R., 9 Cal. 53.² 1 L. R., 10 Bom. 497.³ L. R., 8 Q. B. D. 176.⁴ 1 C. L. R. 275.⁵ 1 L. R., 1 Bom. 13.⁶ 10 Bing. 408.

cellor says in the last case decided in the House of Lords on this subject—*Metropolitan Railway Co. v. Wright*:¹ “If a Court not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all, can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves.” We refer to this passage, because it marks in vigorous language, in the early portion of it, the distinction between the two classes of tribunals to which the English and the Indian Courts do, in this matter respectively, belong: and perhaps in the latter indicates that Courts which have to decide on facts can hardly abstain from examining all the evidence and forming their own view of it. The case in which these observations were made seems rather to modify the terms of the old English rule as stated in *Reg. v. Khanderav Bajirav*.² The word “perverse” is no longer approved. Lord FitzGerald in *The Metropolitan Railway Co. v. Wright*³ says: “If my recollection does not mislead me, we have departed in this House in several instances from the old rule which introduced the element of ‘perversity,’ and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust. The question, thus, for your Lordship’s consideration is whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust.” Lord Herschell, L. C., says: “The verdict ought not to be disturbed unless it was one which a jury viewing the whole of the evidence reasonably could not properly find.” A rule which should apply by analogy to the consideration of cases under s. 307, the principles laid down by the Lords, would seem somewhat less peremptory and confined than one framed upon the terms of the older cases. But we own that we should find it difficult, apart from any authority in this Court, to hold (at any rate as to s. 307) that any rule founded upon such an analogy should be adopted in restriction of the exercise of the discretion of the Courts. There is an essential difference between the functions of the Courts in the two cases. The English Court has no power of finding on facts in any case; that is a power expressly given to, or rather imposed upon, the Indian. A complete analogy between the two will arise, if the latter refuses to exercise that power. In *Reg. v. Khanderav Bajirav*² it is to be observed that the language of the Court is very carefully guarded, more so than that which has been (at least in the head-notes of cases) subsequently used,—“we desire to be guided, as far as may be, by the analogies of English law,” “we adhere generally to this principle;” and later on “it is our duty to satisfy ourselves that the verdict is proper or at least sustainable.

In *Mukhun Kumar*³ four cases are referred to by Markby, J., in his judgment—*The Queen v. Ram Churn Ghose*,⁴ *The Queen v. Sham Bagdi*,⁵ *The Queen v. Haroo Manjhee*,⁶ *The Queen v. Wuzir Mundul*.⁷ There was one not referred to by him—*The Queen v. Nobin Chunder Banerjee*.⁸ In the first and fifth of these cases, the verdict of the jury was set aside. In the second and third, in which there does not appear from the short reports to have been argument in Court, the verdict was sustained. In the fourth, *Wuzir Mundul’s case*, the Court expressly agreed with the jury, and sustained the verdict. In these cases the learned Judges expressed substantially the same view, which, to

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use the words of the last case, *Wuzir Mundul's*, is that "the verdict of a jury should not be interfered with, except where there is a gross and unmistakable miscarriage of justice." Markby, J., while agreeing generally with the opinions expressed by the learned Judges in these cases, points out that, "we cannot lay down any fixed rules for the exercise of" the "discretion" of the Court. Chief Justice Garth in his judgment dissented from the view taken in *Wuzir Mundul's case*. He states his opinion as follows: "In the consideration of this case two questions have suggested themselves to my learned brothers and myself, which appeared to be of very general importance. First, how far this Court is justified, in a case referred under s. 263 of the Criminal Procedure Code, in convicting a prisoner contrary to the express and unexplained finding of a jury; and, secondly, whether this Court has power under that section to order a new trial. With regard to the first of these questions, it appears to me that by that section the Legislature intended to vest in the High Courts a very large discretion; and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled. The verdict of a jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried and of hearing the witnesses examined, ought always, in my opinion, to command its proper weight; and the more unanimous their verdict may be, and the less likely to have been induced or influenced by prejudice or error, the more entitled it should be to our respect and consideration. But there may be many occasions where, as it seems to me, little or no weight should be attached to their verdict; as, for instance, where, out of a jury of five, three are of one way of thinking, and two of another, and the presiding Judge agrees with the minority; or where it is manifest, from the conduct of the jury or otherwise, that their minds have been influenced by a prejudice which has prevented them from forming a correct judgment. In the exercise, therefore, of my own discretion in cases coming before us under this section, I should not go so far as to hold with Mr. Justice Macpherson and Mr. Justice Morris in *Wuzir Mundul's case*¹ 'that the verdict of a jury should not be interfered with except where there is a gross and unmistakable miscarriage of justice.' Nor, on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence, without giving to the verdict of the jury its proper weight. Each case in my view of the section should depend on its own circumstances." We agree in thinking that this passage states, as closely as it would be safe to do, the sort of weight which should be given to the verdict of a jury in a case referred under s. 307; and would but add to what is said by the Chief Justice this further consideration that, having regard to the terms of the section, the opinion of the Judge, who has had, as well as the jury, an opportunity of observing the witnesses, and has also had an opportunity of watching the whole course of the trial, must have due weight given to it.

In *Mukhun Kumar's case* the Court set aside an acquittal, convicted of murder, and sentenced the accused to be hanged. It was in every way a decision which must be supposed to have been present to the mind of the Legislature when the new Code of Criminal Procedure was passed. There is no indication, however, in that Code of any intention that the discretion of the Court should be limited in the manner approved of in some of the older cases, and disapproved of in *Mukhun Kumar's case*; and we think that the Legislature must have intended that the powers conferred by s. 307 should be fully—as they must, no doubt, be cautiously—exercised. We have referred to a large

¹ 25 W. R. Cr. 25.

number of unreported cases under s. 263 of the Code of 1872 subsequent to 1878, and under s. 307 of the present Code of 1882, the latest being in February of this year before Petheram, C.J., and Cunningham, J., with the result that the Judges have not expressed themselves so as to limit the exercise of the discretion of the Court in each case coming before it.

We have given in this case full weight to the verdict, and to the opinion of the Judge and the reasons given by him for it; and we now state our opinion. Upon the cardinal point in the case, namely, the sale by prisoner, the Judge and two jurors hold it proved. The three other jurors say it is not proved. We think the latter are wrong. We have considered the evidence with care, and we think their view can only be justified by attributing an excessive weight to those unfavourable comments to which, to a certain extent, the evidence for the prosecution is open. Tita Ram's evidence, no doubt, is discredited. The evidence of Monohur and of Wuzir, as well as that of Tita Ram, is suspiciously minute. But in this country it is not always safe wholly to discard evidence, a part of which may be open to suspicion. It may be that the details given by the witnesses for the prosecution of the circumstances of the sale are suggested to them by one who remembers the transaction better than they can do. But it is not unlikely, if the sale did take place, that they should have some sort of recollection of it. The "goolmal" about the note occurred not very long—about three or four months after the alleged sale—and caused much stir in Behar. We cannot see any good reason for wholly rejecting these witnesses, though we should not rely on their evidence alone. But without it, we think, the case against the prisoner is supported by strong evidence. The names of Damri and Sanichar were certainly on the note when it was sent by Lalla to Rajapore in the district of Banda. There can be only one conjecture, and it would be only a conjecture, suggested as a reason for doubting this part of the case, namely, that Lalla himself is guilty. But this, apart from anything else, is negatived by his acts at the time. He puts the note in circulation in his own name, through his servant in Rajapore. He records the number of the note in his book. We have examined the entry H closely; we have heard it criticised in argument. We see no reason to doubt its genuineness. When the note is found to be forged, Lalla at once admits that he sold it. He says at once he got it from prisoner. Either Itwari's name is fraudulently inserted in H by Lalla to support this story, or H strongly corroborates him. Now, if Itwari's name was so inserted, it can only have been by writing the whole page over again. An examination of the page, and of the position of Itwari's name in it, where it is partly in one line and partly in another, and where the entries all fit in exactly, shows this. What time was there for Lalla to do this? Supposing he had time and opportunity to do it, why should he do it? Why not name Damri and Sanichar? If Lalla's story is false, he must, unless he is in league with the police so as to have had an opportunity given him of concocting H, have heard of the notes being forged before the police went to his house, have prepared H for the purpose of charging Itwari, have had his story ready then, and have then, or since, secured the complicity of the other witnesses in a nefarious conspiracy. Why should he? There is no reason suggested for his naming Itwari untruly. Assuming it to be a matter of absolute indifference to him, whether or not he commits forgery, perjury, and subornation of perjury, why should he take all this trouble? Again, the note, after having passed through several hands, was stopped by the Bank at Lucknow. It is not suggested that Lalla had any dealings or communication with Lucknow, and therefore it is very unlikely that he heard more of this note after he despatched it until it was put into the hands of the police.

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In expressing dissent from a conclusion upon facts come to by other minds, we are indisposed, when we can avoid it, to use epithets as a mode of signifying that dissent. We should not say that the three jurors are either perverse, or manifestly wrong, or unreasonable. But we do say, that we think the evidence so much preponderates against their opinion, that we disagree with their verdict. We think it proved that Itwari sold the notes. We also agree with the two jurors who found that he had absconded. The evidence, we think, proves this. We cannot account for the negative finding on this point of the other three save on the supposition that they supposed that to establish this it was necessary that proof should be given that he had been actually seen in the act of absconding, which is not the case. His absconding, under the circumstances, is itself strong evidence of guilty knowledge. But *W* is conclusive. It is immaterial whether he wrote it or not. It seems probable that he did, though we should not find against the opinion of the jurors on this point. But he sells a note purporting by an endorsement on it to have been sold to his firm, and it is proved that it was not sold to his firm by the persons named in the endorsement. The conclusion is irresistible; upon the evidence, we find that he sold the note knowing or having reason to believe it to be forged. We convict him, therefore, under ss. 467 and 471, Indian Penal Code. As to the sentence, the offence is a very serious one, and is calculated to do almost incalculable injury to the public. For the protection of the mass of the trading community, whose whole business would become disorganised by such a crime as this unless severely repressed, we think it necessary to impose a very severe sentence, and we sentence Itwari to rigorous imprisonment for seven years.

K. M. C.

Verdict set aside, and accused convicted.

CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice Tottenham.

1887.

Dec. 21.

IN THE MATTER OF THE PETITION OF PANATULLA.
PANATULLA v. QUEEN-EMPRESS.¹15 Cal. 386. *Penal Code, s. 177—Furnishing false information for the purpose of preventing the commission of an offence, Meaning of.*

The information which, under the second branch of s. 177 of the Penal Code, a person is legally bound to give "for the purpose of preventing the commission of the offence" relates, not to the commission of offences generally, but to the commission of some particular offence.

PANATULLA, a constable, was employed to make his rounds by night and call at the house of the notorious bad characters on his beat, who were under police supervision, and to ascertain whether they were indoors or not. On one occasion, having made his rounds, he falsely stated to his superior officer as to some of these people that they had been inside their houses when, as a matter of fact, they had not. Upon these facts the Deputy Magistrate was of opinion that "the information which the accused was required to give, and which he falsely furnished, was information required for the purpose of preventing the commission of an offence, and therefore the offence made out fell under the

¹ Criminal Motion, No. 356 of 1887, against the order passed by *C. A. Kelly*, Sessions Judge of Dinagapore, dated 4th of October 1887, affirming the order passed by *H. Thompson*, Deputy Magistrate of Dinagapore, dated the 9th September 1887.

second part of s. 177 of the Penal Code." He accordingly sentenced the accused to be rigorously imprisoned for six months.

On appeal the Sessions Judge declined to interfere. An application was therefore made to the High Court on behalf of the accused, and a rule obtained.

Baboo *Josoda Nundan Pramanick* for the petitioner.

The judgment of the Court (WILSON and TOTTENHAM, JJ.) was as follows :

WILSON, J.—The accused in this case was charged and convicted under s. 177 of the Penal Code. This section contains two branches. The first branch of it runs thus: "Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both." This deals with the simple case of a person who, being bound to furnish true information to a public servant, furnishes false information to him, and, under this part of the section, the maximum punishment is six months' simple imprisonment with or without fine.

The second branch of the section is expressed thus: "Or if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The facts found against the accused were these: He was a constable, and was employed on what is described as round duties—that is to say, it was his duty to make his rounds by night, and to call at the houses of the notorious bad characters on his beat who were under police supervision, and to ascertain whether they were indoors or not. And on one occasion, having made his rounds, he falsely stated as to some of these people that they had been inside their houses, when, as a matter of fact, they had not. Now, that was information which he was bound to furnish to a public servant, that is to say, to his superiors, and it is found that he wilfully made a false statement; therefore his offence comes under the first part of the section. But he has been convicted under the second part of it on the ground that the information was required for the purpose of preventing the commission of an offence. I think that must mean not for the purpose of preventing the commission of offences generally, or rendering the commission of them more difficult, but for the purpose of preventing the commission of some particular offence. That being so, the case does not come within the second part of that section. It follows, therefore, that the sentence which was passed was one which ought not to have been passed. The prisoner was sentenced to six months' rigorous imprisonment, whereas the maximum punishment to which he could have been sentenced was six months' simple imprisonment. It appears that he has already undergone three months' rigorous imprisonment, which he ought not to have been subjected to, and therefore the justice of the case requires that the three months' rigorous imprisonment which he has undergone should be taken as equivalent to the term of simple imprisonment to which alone he could have been legally sentenced. He will, therefore, now be released from imprisonment, the sentence of six months' rigorous imprisonment, which was passed upon him, being reduced to to one of simple imprisonment from the date of the conviction to the present date.

K. M. C.

Sentence reduced.

I. L. R., Cal. 103.

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CRIMINAL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Ghose.

1888.

Jan. 24.

15 Cal. 388.

BHAGIRAM DOME (COMPLAINANT) v. ABAR DOME AND ANOTHER (ACCUSED).¹*Fishery—Infringement of exclusive right of fishery in public river—Theft—Criminal misappropriation—Mischief—Criminal trespass—Unlawful assembly—Penal Code, ss. 143, 378, 403, 426, and 447.*

Fish in a public river cannot be said to be property in the possession of the person who may have the fishery right, and the infringement of that right is not *theft* under s. 378 of the Indian Penal Code.

The accused were charged with unlawfully taking fish along with some eleven others in a public river, the right of fishing in which had been let out by the Government to the complainant, and the lower Court, amongst other offences, convicted them of theft, criminal misappropriation, mischief, criminal trespass, and unlawful assembly.

Held that the conviction was wrong, and that no offence had been committed.

This was a reference under s. 438 of the Code of Criminal Procedure by the Deputy Commissioner of Sibsagar, who considered that the accused had been wrongly convicted by the Assistant Commissioner of offences under ss. 143, 447, 379, 426, and 506 of the Indian Penal Code for unlawfully taking fish from a public river, the right to the fishery of which had been leased by Government to the complainant.

Each of the accused were fined Rs. 10, or in default sentenced to two months' rigorous imprisonment; and, in referring the case, the Deputy Commissioner stated that he considered the conviction was based on an erroneous view of the law, and that it should be set aside.

The facts of the case and the reasons given by the Assistant Commissioner for arriving at the conclusions he did are sufficiently stated in his judgment, which was as follows:—

"The question of fact in this case is extremely simple. Accused and eleven others, thirteen in all, are said to have caught fish in complainant's julkar in the Bhagdai (Desoi) river. Accused, in admitting the fact of fishing, state that they were fishing in the Romari Pathar, two or three miles off, and not in the bed of the river. Complainant does not claim the julkar of the Romari Pathar. Complainant would have no motive to complain against persons who fished in the Pathar, and the evidence leaves no room to doubt the truth of the complaint.

I find that accused and eleven others were fishing together without complainant's consent in the bed of the Bhagdai or Desoi river, Block I (from Naga Hills to Malo Pathar), the exclusive fishery right of which has been settled with complainant by Government for 1887-88; that each of the accused and the others of the thirteen men are proved to have actually caught fish and moved them from their nets into their boats, though there is no evidence that the fish so caught were actually removed from the river; that on complainant objecting and attempting to stop their fishing he was threatened by accused.

As to the question of law, it is urged that, on the finding, no offence has been committed. The pleaders urge (a) that the fish are not complainant's property within the meaning of the Penal Code; (b) that they were not in com-

¹ Criminal Reference, No. 279 of 1887, made by J. Knox-Wight, Esq., Deputy Commissioner of Sibsagar, Assam, dated the 5th of October 1887, against the order passed by P. G. Melitus, Esq., Assistant Commissioner of Jorehat, dated the 12th of September 1887.

plainant's possession within the meaning of s. 378 of the Penal Code; (c) that trespass on a fishery in a public river is not criminal trespass within the meaning of s. 441. They quote the following rulings:

(A) *The Queen v. Revu Pothadu*¹ following a previous ruling.—In these rulings it was held that fish in a creek or in an open irrigation tank are not in such "possession" as is contemplated in s. 378 of the Penal Code; consequently the taking of such fish does not constitute theft under s. 379.

(B) *Empress v. Charu Nayiah*.² Held that the unlawful infringement of a right of exclusive fishery in a part of a public river is not an offence which can be brought within the definition of criminal trespass, though under this ruling unlawful fishing in a tank or private river apparently would amount to criminal trespass.

(C) *The Meherpore case, 1887*.³ This case refers to the Chukka Khola Bheel, a large natural bheel which draws its fish supply from the Jellinghee and Bhysakh rivers through khals and natural hollows. It was ruled—(a) that the fish in this bheel being *feræ naturæ* are not "property;" (b) that they were not

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¹ I. L. R., 5 Mad. 390.

² I. L. R., 2 Cal. 354.

³ *Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.*

IN THE MATTER OF THE PETITION OF MADHAB HARI AND OTHERS.*

Baboo Doorga Das Dutt for petitioners.

Mr. Kilby for the Crown.

THE facts of this case appear sufficiently from the judgment of the High Court, which was delivered by

PETHERAM, C.J. (and of which the material portion was as follows).—In this case some sixty-eight persons have been convicted of stealing under these circumstances. It appears that in the neighbourhood where this transaction took place there is a large bheel. The land surrounding this bheel belongs to one person, and he has let the right of fishing in it to the complainant in this case for the sum of Rs. 500 a year. There is nothing to show that this bheel is anything in the nature of a tank in which fish are caught and stored in any sense, but it is a natural reservoir of water which has come there without human agency, and in which fish would naturally be.

That being the state of things, it appears that, on a particular day in the year, it is the practice of the inhabitants of the neighbouring towns and villages to go to this bheel and catch what fish they can, and for doing that these sixty-eight persons have been convicted of stealing fish and punished in an extraordinary manner. A large number of them were whipped there and then, or at any rate a few hours after, and a large number of them have been sentenced to two months' rigorous imprisonment.

Under these circumstances no crime has, in our opinion, been committed. It is perfectly clear that the offence of theft could not have been committed, because the fish said to have been stolen were not the subject of any one's property; they were wild fish in a natural lake, and until they were reduced to possession by being caught no property could be acquired in them by any one, so that there could be an offence of theft committed by another person; and it seems to us therefore that these persons did not commit any theft, and that, so far as the offence of which they have been convicted is concerned, it is quite clear that on that ground alone the conviction cannot be sustained.

In addition to that, as Mr. Justice Ghose reminds me, it is clear that there was no dishonest intention to take the fish, because, whether such a custom could be legally established or not, on the Magistrate's own view of the case, these people went there relying on their supposed right to go there and catch fish. For both reasons, therefore, we are of opinion that the offence of theft was not committed by these men.

* Criminal Motion, No. 133 of 1887, against the order passed by *Hewling Luson*, Assistant Magistrate of Meherpore, dated the 15th of April 1887.

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in the "possession" (as required by s. 378 of the Penal Code) of the holders of the julkar. This ruling is counteracted by the ruling in the Meherpore case, 1886,¹ referring to the same bheel, in which the Court held (a) that the fish were "property;" (b) that they were in "possession;" (c) that the offence of theft would have been committed if they had actually been moved.

Then Mr. Kilby argues that, though the offence of theft may not have been committed, the offence of criminal trespass has, because he says that if these people had gone to the land of some one who had ordered them not to go there, they would have been guilty of criminal trespass.

The first remark that I have to make with reference to this argument of Mr. Kilby is that it is not clear that they were directed not to go on the land by any one entitled to prevent them from going there, for the person who directed them not to go on the land was not the zemindar nor the person who had a right to forbid them, but the person who had taken a lease to catch the fish. But for the purpose of what I am going to say I will assume that these people were rightly forbidden to go on the land, but a trespass under such circumstances is not a criminal offence for which the persons committing it could be criminally prosecuted and a criminal punishment imposed. Unless they went on the land for some of the purposes mentioned in s. 441 of the Indian Penal Code their going there would not amount to criminal trespass, and the purposes mentioned in that section are "to intimidate, insult, or annoy any person in possession of the property." As I said just now, what these people went there for was to fish in this natural lake; they did not go there to intimidate any one, certainly not to intimidate the person who was in possession, the zemindar, because he had no interest in it, and takes no interest in these proceedings now, but they went to catch fish, and their intention must be limited to that, and therefore, in our opinion, the offence of criminal trespass was not committed, and thus it remains that the only offence of which they have been guilty is an offence against the civil law by walking on a man's land when he has forbidden them to do so. That is not a criminal offence by the English law, nor, so far as I know, is it a criminal offence in this country, and therefore, there being no criminal offence whatever, the conviction must be set aside.

Conviction quashed.

1886.

July 9.

¹ Before Mr. Justice Mitter and Mr. Justice Grant.

MODHOO MUNDLE AND OTHERS (PETITIONERS) v. UMESH PARNI (OPPOSITE PARTY).*

In this case the accused were charged under ss. 143 and 379 with being concerned together and with others in stealing fish from the complainant, one Umesh Parni. The offence was alleged to have been committed on the 1st Bysack and on a large bheel called the Chukka Khola Bheel, of which the complainant was the ijardar. It was alleged that it was a custom in that part of the country for the villagers to assemble together and fish in different bheels on the 1st Bysack without the owner's consent, and on this occasion the complainant a few days before the 1st Bysack put in a petition before the Assistant Magistrate asking for protection of his bheel, and stating that he expected a great number of persons would collect there and steal his fish on the day in question. In answer to that petition the Assistant Magistrate deputed a police-constable to watch the bheel.

On the day in question a number of persons did collect at the bheel to fish, and in consequence thereof the present case was instituted.

The Assistant Magistrate in his judgment stated that there had been a number of similar cases, in some of which the defence had been set up that it was the custom for the villagers to fish in the various bheels on the 1st Bysack, but he found that, though such had been the case, it had not been done with the consent of the zemindars, and in some instances compensation had afterwards been paid to the owners of the bheels, and there could, therefore, be no doubt that private rights had been invaded. In the present cases the Assistant Magistrate found that there was no question as to a number of persons having assembled and fished, and that the accused did not claim any right so to fish; but on

* Criminal Revision, No. 263 of 1886, against the order passed by *Hewling Luson, Esq.*, Assistant Magistrate of Meherpore, dated the 2nd June 1886.

Some other rulings are cited as to fisheries in the sea or in tidal rivers which do not bear upon the case. The Bhagdai or Desoi is a river navigable for small boats for a part of the year.

The sum total of these rulings is: (a) [except the Meherpore case (1887)] it appears to be admitted that fish in a river or in an open tank or bheel are the property of the holder of the fishery; (b) but they are not in such "possession" that their taking constitutes theft (s. 379); (c) that trespass on a fishery in a public river is not criminal trespass, the river not being in the exclusive possession of the fishery-holder, and the public having the right of entry on it.

These rulings are rulings of Divisional Benches. So far as I know, the matter has never been fully argued, or referred to a Full Bench.

It is contended for the prosecution that the facts constitute offences under the following sections of the Penal Code:—

S. 379 of the Penal Code—Theft.—It is said that all the essentials of theft exist. I examine each essential in detail:—

(a) "*Moving in order to take.*"—This appears on the finding: each accused moved a fish from their net to their boat. From the newspaper reports of the Meherpore case of 1886 it appears that the High Court held that the offence of theft would only be completed if the fish were actually removed from the bheel, but probably the newspaper reporter was mistaken. Under s. 378 of the Penal Code the offence of theft is completed when the property is moved.

(b) "*Dishonestly.*"—Accused had no title to this fish; they knew the fishery to be leased to complainant. These were wrongful gain to themselves, loss to the lessee, and loss to Government from tendency to diminish revenue.

(c) "*Moveable property.*"—It seems admitted in the rulings above mentioned (except, so far as I can judge from newspapers, in the Meherpore case) that fish in a fishery is the property of the fishery-holder. The fishery-holder

the contrary, that one of them pleaded guilty, and that the others merely pleaded *alibis*. As regards the latter he disbelieved the evidence adduced on their behalf, and, without considering the legal question subsequently raised in the High Court, convicted all the accused, and sentenced them, some to fines, others to imprisonment, and the remainder to a whipping, and awarded Rs. 15 to the complainant as compensation under s. 545 of the Criminal Procedure Code.

Against these sentences the accused applied to the High Court to set aside the convictions under its revisional power on the ground that no offence had been committed. That application was granted, and the record sent for. Upon the case coming on to be heard, Baboo Doorga Dass Dutt appeared for the petitioners, and Baboo Sharada Prosunno Roy for the opposite party, who was the complainant before the Assistant Magistrate.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows:—

We think that there is no evidence in support of the conviction in this case under either of the sections under which the petitioners have been convicted, *vis.*, ss. 143 and 379. There is no evidence to establish that the petitioners acted in concert so as to have one object. No doubt, the act complained of was that they were fishing, but there is nothing on the record from which it could be inferred that they were acting in concert with that one common object. Unless that is proved, the conviction under s. 143 of the Indian Penal Code would be illegal. On the other hand, the circumstances of the case would tend to show that they were acting quite independently. Similarly, under s. 379 there is no evidence to show the removal of any fish by the petitioners from the bheel.

We therefore set aside the convictions under both these sections, and direct that the fines, if realized, be refunded, and if any one of these petitioners be still in jail under these sentences we direct their immediate release. The order regarding compensation will also be set aside, and such compensation-money, if paid, must be refunded.

Conviction quashed.

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can recover in the Civil Court the value of the fish taken without his consent. By the customary law of the country property in river fisheries (other than tidal rivers) vests in Government, and can be leased by Government to private persons, and, if so, the fish in the fishery are the property of the lessee. Theft of fish from a fishery in England would not be a larceny at common law, but neither would theft of trees, crops, fruit, &c., be larceny, though it is undoubtedly theft under the Penal Code. The Penal Code is based on English criminal law; but the laws relating to real property in this country follow the old land laws of the country, which recognize fish in a fishery to be the property of the owner of the fishery. Hence the *fera natura* theory does not apply to fish in this country, though it does apply to wild birds and animals. Fishings of large and small rivers, bheels, &c., have been settled on this understanding from 1793 downwards.

(d) "*Out of possession.*"—It is urged (a) that the fish in the fishery was in the possession of complainant, the lessee in possession of the fishery. This is negatived by the two Madras rulings and the Meherpore ruling of 1887, in which it was held that this kind of constructive possession is not possession within the meaning of s. 378 of the Penal Code; (b) that complainant might, at any time he thought proper, have confined the fish within a limited sheet of water. It is the custom, as the floods subside, to put bamboo fencing across the bed of the river and other outlets so as to shut in the fish. When this is done, the fish are in possession; but the question is whether complainant, having the right and the power to put up the fencing whenever he thinks proper, is not to be considered in possession of the fish, whether he actually fences them in or not. I doubt if this has ever been brought before the High Court. It is the general custom with small rivers and bheels. I am inclined to think that complainant, having the power to shut in the fish whenever he pleased in as small a space as he pleased, must be held to be in possession of the fish, whether he actually shuts them in or not. In the present case the fencing had not been put up on the date of occurrence, as it does not pay to put it up till towards the end of the rains.

(e) "*Without consent.*"—Consent was wanting on the finding. Moreover, complainant objected at the time with the result of being threatened.

S. 403 of the Penal Code.—The only point that may be considered wanting to constitute theft is the possession. The fish being complainant's property, even assuming they are not in his possession, an offence under s. 403 of the Penal Code has been committed. Accused dishonestly misappropriated the fish, knowing their action to be an infringement of the property rights of the holder of the fishery. If evidence of actual removal is wanting, the facts on the finding show an attempt; ss. 403 to 511 of the Penal Code. At any rate, they entered upon the fishery with the intention of criminally misappropriating the fish. The applicability of s. 403 of the Penal Code has apparently never been considered by the High Court.

S. 426 of the Penal Code.—Accused committed mischief by removing the fish supply of the fishery and thus diminishing the value of the fishery. The mere fact of accused taking a fish each would not affect the fishery much; but if every one acted on the same principle, the fishery would be injuriously affected, and its value materially diminished. It may be a matter of doubt whether a fishery is "property" under s. 425 of the Penal Code. In *Empress v. Charu Nayiah*¹ it is laid down that the fishery of a public river is property

¹ 1. L. R., 2 Cal. 354.

within the meaning of s. 411 (but that the river being a public one was not in any one's exclusive possession, and a man's entry on a public river to infringe a fishery right is not criminal trespass, because he does not enter upon property in the possession of another). If a fishery is property under s. 441, I presume it is also property under s. 425.

S. 447 of the Penal Code.—The question is whether in the face of the above ruling a finding of criminal trespass can hold. In an exactly similar case—*Proceedings, 15th February 1870*¹—it was held that the offence of criminal trespass had been committed. "Where in a ryotwari district the accused cultivated waste land which they had been ordered by the Collector not to cultivate, it was held that they were properly convicted of criminal trespass when they entered on it to commit an offence under s. 188." Waste land in a ryotwari tract is in no one's exclusive possession. It is in the possession of Government just as a river is in the possession of Government. The public have the right of entry on, and right of way over, waste land as long as it continues waste land, just as they have the right of entry on a river for travelling or recreation, or bathing or drawing water. If it is criminal trespass to enter upon waste land to commit an offence, it seems to be equally criminal trespass to enter on a river to commit an offence. In the present case the entry is criminal trespass, as it was made with intent to (a) commit mischief, s. 426; (b) criminal misappropriation, s. 403; (c) theft, s. 379.

S. 143 of the Penal Code.—There is no evidence that accused and others had actually conspired to fish there, but when a number of persons do the same wrongful act in the same time, place, and manner, a common intent must be presumed. In this case twelve persons were fishing near each other at the same time near complainant's julkar, to which they had no right, without his consent, and on being told to stop refused to do so; some of them threatened complainant. It is a fair and reasonable presumption that they had a common intent, at least after they were told by complainant to stop. The presumption is strengthened by the fact that Domes generally fish in numbers and not singly. Their common intent was to commit (a) criminal trespass, s. 447 of the Penal Code; (b) mischief, s. 426; (c) theft, s. 379; (d) criminal misappropriation, s. 403.

Ss. 504, 506 of the Penal Code.—On being told by complainant to stop fishing, accused threatened him "*Marien Gosari halai tau baba*," as much as to say: "We will beat you within an inch of your life"—an expression of intention which might be either insulting under s. 504, or criminally intimidating under s. 506 of the Penal Code, according to the character of the person addressed. In the present case it appears to have caused an alarm.

I think therefore accused are guilty of offences under s. 143, 379, 426, 403, 447, 504, or 506 of the Penal Code. S. 403 of the Penal Code is not summarily triable, but the offence under ss. 143, 447 of the Penal Code, where the intent is to commit an offence under s. 403, are triable summarily."

No one appeared on the reference.

The judgment of the High Court (NORRIS and GHOSE, JJ.) was as follows:—

This is a reference by the Deputy Commissioner of Sibsagar under s. 438 of the Criminal Procedure Code, questioning the legality of the conviction of Abar Dome and Bhagiram Dome by Mr. Melitus, Assistant Commissioner of Sibsagar, under ss. 143, 379, 426, 447, and 506 of the Indian Penal Code.

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The two accused were charged before the Assistant Commissioner under ss. 143, 379, and 447; and apparently they were called upon to make their defence in respect only to offences said to have been committed under those sections. It appears, however, that the Assistant Commissioner, in the course of his judgment, finds them guilty, not only of the offences of which they were charged, but of others as well.

The main charge was one of theft, said to have been committed in respect of fish in a public river, the *julkar* right in which had been leased to the complainant by Government; but there were, as mentioned above, charges in respect of other offences, *viz.*, for being members of an unlawful assembly and for criminal trespass.

The Assistant Commissioner tried the case summarily, and, after giving in his proceeding a short epitome of the evidence taken by him, proceeded to give his judgment. In the first place, he notices the grounds upon which it was contended before him that no offence had been committed; and he then summarises the decisions of this Court, and of the Madras High Court, that were quoted before him as follows:—

“The sum total of these rulings is—(a) (except the Meherpore case, 1887) it appears to be admitted that fish in a river or in an open tank or bheel are the property of the holder of the fishery; (b) but they are not in such possession that their taking constitutes theft, s. 379; (c) that trespass on a fishery in a public river is not criminal trespass, the river not being in the exclusive possession of the fishery-holder, and the public having the right of entry on it.” He adds: “These rulings are rulings of Divisional Benches. So far as I know, the matter has never been fully argued, or referred to a Full Bench.”

Then the Assistant Commissioner says that it is contended before him for the prosecution that the facts proved in the case constitute offences under various sections of the Penal Code, and he gives those sections one after another, and his argument for holding that the accused are guilty under those sections. The sections are 379 (theft), 403 (criminal misappropriation), 426 (mischief), 447 (criminal trespass), 504 or 506 (insult or criminal intimidation).

Now, the first observation which we have to make upon this judgment of the Assistant Commissioner is that, if the rulings referred to by him lay down the propositions indicated by him, it was his bounden duty to follow them so far as they were applicable to this case, and not to disregard them, as he evidently does, on the ground that they are rulings of Divisional Benches, and also on the ground that, so far as he knows, “the matter has never been fully argued.” Where the Assistant Commissioner derives this knowledge from, we are at a loss to conceive. But, whether the matter was fully argued or not, the Assistant Commissioner was bound to follow those rulings as rulings of the highest Court in this presidency until they were overruled by decisions of the Full Bench.

In the present case, the river from which the fish were taken is a public river. Whether or no it is navigable throughout the year, we do not know. The Assistant Commissioner, however, says (for which there is no evidence on this record) that it is a “river navigable for small boats for a part of the year.” Assuming that it is, as the Assistant Commissioner represents, we take it that it is a flowing river, and that fish enter it, and leave it, at their pleasure; and that the lessee of the fishery has no control whatever over them. The fish are not stored or bred there; they are not confined within an enclosed space, and are therefore free to go wherever they please. They are *feræ naturæ*, and

as such nobody can be said to be in "possession" of them, and therefore no theft can be committed in respect to such fish. This is not only the common law in England, but it is a law which has been accepted both in Bengal and Madras for many years. (See *Kashi Chunder Dass v. Hurkishore Dass*,¹ *Bhusun Parui v. Denonath Banerjee*,² *Kheller Nath Dutt v. Indro Jalia*,³ *Empress v. Charu Nayiah*,⁴ *The Queen v. Revu Polhadu*,⁵ Russell on Crimes and Misdemeanours, Vol. II., p. 376.)

The Assistant Commissioner, however, while discussing s. 379, says, broadly, but apparently without any authority, that the "*feræ naturæ* theory does not apply to fish in this country, though it applies to wild birds and animals;" and that "fishings of large and small rivers, bheels, &c., have been settled on this understanding from 1793 downwards." No doubt, fishery is a right which is recognized as *property* in this country; but the question is whether fish in a river can be said to be property in the "possession" of the person who may have the fishery right, and whether the infringement of that right is a criminal offence as defined in s. 378 of the Indian Penal Code. We are decidedly of opinion that it is not.

We observe that the Assistant Commissioner, while he felt himself pressed by the authority of the Meherpore case of 1887 and two Madras cases quoted before him, sought to get over them by saying that it is the custom as the floods subside to put bamboo fencing across the bed of the river and other outlets so as to shut in the fish, and that "in the present case the fencing had not been put up on the date of occurrence, as it does not pay to put it up till towards the end of the rains." We do not know in what sense the word *custom* is used; but taking it in the sense that it is in some cases the practice to put up fencing when the floods subside for the purpose of shutting up the fish, and supposing that the fish are thus shut up, they are in the "possession" of the owner of the *julkar*, that argument cannot possibly avail in this particular case, for the offence is said to have been committed in the month of September, while the floods must have been high, and when, as the Assistant Commissioner himself says, no fencing had been put up.

The next offence which the Assistant Commissioner holds that the accused are guilty of is one under s. 403 (criminal misappropriation). There was no charge under this section, and indeed there could not be any, because the accused were tried summarily. The Assistant Commissioner, however, proceeds to hold that an offence under that section has been committed, though he does not convict the accused under that section by reason of its being a summary trial: and he observes that "the applicability of s. 403 of the Penal Code has apparently never been considered by the High Court." The Assistant Commissioner may or may not be right in this; but if the point has never been considered, it is because nobody ever thought of raising it before. Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent (see Mayne, p. 335). In this particular case there cannot be any pretence for saying that subsequent to the act of taking the fish anything happened which constituted the retaining of the fish wrongful and fraudulent. The intention was one and the same throughout; and no

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I. L. R., Cal. 104.

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new facts occurred which could possibly change the character of the seizure and retention of the fish.

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The next section that the Assistant Commissioner discusses is s. 426 (mischief), and he holds that the act complained of diminished the "value of the fishery," and that fishery is property within the meaning of s. 425, and that therefore the accused are guilty under s. 426. The accused had not been charged with an offence under s. 426, and we think that in respect also of this section the Assistant Commissioner is completely in error. If it was a flowing river, and on the date of occurrence the flood was high, as it must have been in September, and if no fencing had been put up to shut up the fish in any manner, and they were free to escape in any direction they pleased, we fail to see how the act of the accused could possibly diminish the value of the fishery, or cause any change in the property, supposing that fishery is property within the meaning of s. 425, as the Assistant Commissioner holds it to be.

The Assistant Commissioner then takes up s. 447 (criminal trespass), and holds, in the face of the rulings of this Court, that an offence under that section has been committed; and the only pretence for his doing so is a decision of the Madras High Court [*Proceedings, 15th February 1870*¹], which refers to the case of waste land belonging to Government, and devoted to the use of the village community; and where the accused cultivated the land, although he had been ordered by the Sub-Collector to refrain from cultivating it; and it was held that the Sub-Collector had legally the power to make the order, and therefore when the accused went upon the land he did so with the intent of committing an offence under s. 188 of the Penal Code. In the first place, that case has no application to this case; and in the second place, supposing it has any application, the Assistant Commissioner was bound to have guided himself by the rulings of this Court, and not by any rulings by the Madras High Court. We may here observe that, throughout his judgment in this case, the Assistant Commissioner has displayed a clear and deliberate intention to ignore the decisions of this Court—a spirit which cannot but be deprecated in a Judicial Officer who is bound to follow the decisions of the superior Court.

We are of opinion that, the river being a public one, it was not in the exclusive possession of the complainant, and that the entry of the accused upon that river was not with the intent of committing any of the offences mentioned by the Assistant Commissioner, *viz.*, criminal mischief, criminal misappropriation, or theft.

The next section that the Assistant Commissioner takes up is s. 143 (unlawful assembly). It is sufficient to say that there is no evidence upon the record of this case to indicate that the men who went to fish in the river were bound by any common object within the meaning of that section; and for aught that appears, although more than five persons were engaged in fishing at the same time, place, and manner, they were engaged for their own respective purposes, and no common object can legitimately be presumed from their acts.

The last sections that the Assistant Commissioner takes up are 504 and 506 (insult and criminal intimidation). The accused were not charged with any offence under either of these sections, and so far as s. 504 was concerned, there is no evidence that the insult, if there was any, was offered with the intention or knowing it to be likely that the provocation given would cause the person insulted to break the peace; nor do we think there is sufficient evidence

¹ 5 Mad. H. C. Ap. XVII.

in this case as would bring the case within the offence of criminal intimidation as is defined in s. 503.

Having now discussed the various sections of the Indian Penal Code under which the Assistant Commissioner held the accused were guilty, we have merely to say that the conviction must be set aside, and the fine, if paid, must be refunded.

We cannot, however, close this judgment without once more saying that throughout this case the Assistant Commissioner has displayed a wanton disregard of the authority of the rulings of this Court, which cannot but be gravely censured.

H. T. H.

Conviction quashed.

CRIMINAL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Ghose.

MAYA RAM SURMA (COMPLAINANT) *v.* NICHALA KATANI AND OTHERS (ACCUSED).¹

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15 Cal. 402.

Fishery—Fishing in tank connected with a running stream—Theft—Criminal trespass—Penal Code, ss. 379, 447.

Accused were charged with having taken fish from a tank belonging to the complainant, and convicted of theft and criminal trespass under ss. 379 and 447 of the Penal Code. It was found that the tank in question was not enclosed on all sides, and was dependent on the overflow of a neighbouring channel which was connected with flowing streams for its supply of fish, that the fish were not reared and preserved in the tank, and that the occurrence complained of took place at a time when the floods were high, and the tank was connected with the streams, so that the fish could leave it at pleasure.

Held that the fish were *feræ naturæ* and not in "the possession of" the complainant, and consequently no offence had been committed.

Held, further, that, had the fish been taken at a time when they were restrained of their natural liberty, and were liable to be taken at the pleasure of the owner of the tank the conviction would have been upheld.

The Meherpore case of 1887² distinguished.

In this case the accused were tried before the Assistant Commissioner of Sibsagar for an offence under s. 379 of the Penal Code in respect of fish which they were charged with having taken from a tank belonging to the complainant, and they were further charged under s. 447 with criminal trespass in respect of the tank. The Assistant Commissioner convicted the accused, and sentenced them each to pay a fine of Rs. 5, or in default one month's rigorous imprisonment; but the Deputy Commissioner, considering that the evidence, even if believed, did not establish the offence of theft or criminal trespass, having regard to the decision in the case of *In the matter of the Petition of Madhab Hari*,³ and that the lower Court had based its decision on an erroneous view of the law, referred the case to the High Court.

The facts of the case and the grounds upon which the Assistant Commissioner based his judgment are sufficiently stated in the judgment of the High Court.

¹ Criminal Reference, No. 280 of 1887, made by J. Knox Wight, Esq., Deputy Commissioner of Sibsagar, dated 5th October 1887, against the order passed by P. G. Melitus, Esq., Assistant Commissioner of Jorehat, dated 12th September 1887.

² *Ante*, p. 819n.

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No one appeared on the reference.

The judgment of the High Court (NORRIS and GHOSE, JJ.) was as follows:—

This is a reference by the Deputy Commissioner of Sibsagar under s. 438 of the Criminal Procedure Code, questioning the legality of the conviction of one Nichala Katani and three others by Mr. Melitus, Assistant Commissioner of Sibsagar, under ss. 379 and 447 of the Indian Penal Code.

The accused in this case were charged with the offence of theft said to have been committed in respect of fish in a tank belonging to the complainant, and also with the offence of criminal trespass.

The Assistant Commissioner in the first instance, *i. e.*, on the 1st August last, dismissed the complaint under s. 203 of the Procedure Code with the following observations:—

Complainant did not cultivate the fish; they entered the tank in flood time. Therefore, according to a High Court ruling (in the *Meherpore case*¹), they are *feræ naturæ* and no man's property, and no offence (such as theft or trespass) has been committed. The circumstances of the tank and of the Chucka Khola Bheel (which I know) are identical, except that the Chucka Bheel is of larger area. This tank is a tank in the *pathar* connected with the river by jans and hollows; so is the Chucka Khola Bheel. Complaint dismissed under s. 203 of the Criminal Procedure Code. If complainant wishes, I will refer this case to High Court for orders.

On the 12th of August, the Assistant Commissioner took up the matter again, although the complainant did not apparently move him to refer the matter to the higher Court; and in a proceeding which he recorded on that day, he repeated that the "circumstances of the bheel in the Meherpore case and the tank of the complainant were identical so far as the dominion and control of the owner of the tank or bheel over the fish is concerned," the only differences being, as he said, that the Meherpore Bheel is of larger area, and is a natural bheel, whereas the tank in this case is "partially at least excavated;" and then he observed that "whatever law applies to the Chucka Khola Bheel applies also to this tank, and to other private tanks and bheels, and to the numerous public bheels and rivers which are held under temporary fishery leases from Government." Having made this observation, the Assistant Commissioner said as follows: "The Meherpore case has not been, so far as I know, authoritatively reported, and I doubt if I was right in accepting mere newspaper reports and the statement of the law, which conflicts with previous rulings and practice, especially as it appears from the newspapers that the High Court held in 1886² in the matter of the same Chucka Khola Bheel that the offence of theft under s. 379 would have been committed if the fish had actually been removed from the bheel. In the present complaint of Maya Ram Surma, it appears that the fish had not merely been moved in order to the taking, but actually removed and taken away from the tank. The matter is one of such importance to Government and the public, that I do not feel justified in allowing this complaint to remain struck off on my own authority. I request the favour of definite instructions for future guidance. To D. C. for orders."

The above proceeding being laid before the Deputy Commissioner, Mr. Wight—the same officer who has made the present reference—he recorded the following order on the 22nd August:—

In the present state of the record I am unable to refer the matter to the High Court. The High Court are not the legal advisers of Government, and they have

¹ *Ante*, p. 819n.

² *Ante*, p. 820n.

invariably refused to act as such. They only deal with cases, and pronounce judgment upon them when they are brought judicially under their notice. You have dismissed the case under s. 203; I think you are wrong. The ruling you refer to is that of a Division Bench, and there are rulings in the opposite sense. Please take up the case and enquire into it. If you acquit on the evidence, or if you *convict*, the matter would be dealt with and referred to higher authority if necessary. Having power to deal with cases dismissed under s. 203 myself, I am not justified in referring them.

Upon the matter going back to the Assistant Commissioner, that officer recorded certain evidence, and on the 8th September last found that the accused entered upon complainant's tank and unlawfully took therefrom some fish and accordingly held them guilty under ss. 379 and 447 of the Penal Code.

In dealing with the case, the Assistant Commissioner makes the following observations: "The tank was excavated by complainant in the *pathar* (fields) on his own decennially-settled *patta* land. It gets its fish-supply from the overflow of the *pathar*; it is connected with the Rararian stream, which is itself connected with the Dhale stream. Both these streams flow from the Naga Hills towards the Brahmaputra. When the inundation is high on the *pathar*, the fish are at liberty to leave the tank, unless complainant fences in the tanks or outlets; but when the floods subside, the fish are shut in, and unable to leave the tank. On the date of this occurrence the inundation appears to have been high. Such cases have been always dealt with under ss. 447, 379, of the Penal Code. The recent ruling in the *Meherpore case*, 1887,¹ has thrown some doubt on the applicability of these sections. In this ruling it appears to have been held—(a) that fish entering a bheel or tank in this manner are *feræ naturæ*, and not the property of the owner of the bheel, tank, &c.; (b) that they are not in the possession of such owner."

Having made the above observations, the Assistant Commissioner again points out, as he had done on the 1st of August, that the circumstances of the Meher Bheel and of this tank are identical except in this, that the area of the latter is much smaller, and it is an "excavated tank" and not a natural hollow, and adds "that if the complainant pleased he could at any time *confine the fish in a very small space*."

The Assistant Commissioner then observes that the "customary law of the country recognizes that the property in fish vests in the owner of a bheel or tank. If the fish are held to be in the possession of the owner, the offence of taking them amounts to theft under s. 379; if they are held not to be in possession within the meaning of s. 378, their taking amounts to an offence under s. 403 of the Penal Code (criminal misappropriation). The High Court have apparently never considered the applicability of this section. The entry upon the tank to commit either of these offences amounts to criminal trespass under s. 447."

He then says that the High Court in the *Meherpore case* of 1886² held "that the offence of theft would have been committed in the Chukka Khola Bheel if the fish had actually been moved," and that, moreover, it appears to him, upon the principles laid down in the case of *The Empress v. Charu Nayiah*,³ that it would be "criminal trespass to enter upon a private tank or river to unlawfully take fish," and he concludes by saying as follows: "Following these two rulings in preference to the Meherpore ruling, 1887,¹ I convict accused under ss. 447, 379 of the Penal Code."

1888.

MAYA RAM-
SURMA

v.

NICHALA
KATANI,
15 Cal. 402;¹ *Ante*, p. 819n.² *Ante*, p. 820n.³ I. L. R., 2 Cal. 354.

1888.

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Subsequently, on the 12th September, the accused persons presented a petition to the Assistant Commissioner, asking him to refer the case to the High Court, and Mr. Melitus forwarded the application to the Deputy Commissioner.

The Deputy Commissioner, Mr. Wight, who had, on the 22nd August, held that the Assistant Commissioner was wrong to dismiss the complaint under s. 203, and had observed that the ruling in the *Meherpore case* was that of "a Division Bench, and that there were rulings in the opposite sense," now observes that "the evidence, even if believed, does not establish the offence of theft or criminal trespass if the recent ruling in the *Meherpore case* be correctly reported;" and "as the lower Court has based its decision on a wrong view of the law, the order should be reversed," and he concludes by saying that the point referred is "of the greatest importance to the public and to Government, and it is very necessary to have the correctness of the present order either affirmed or denied."

No doubt, the question raised is of very great importance; but looking at the course this case has taken as noticed above, one cannot help observing that both the Assistant Commissioner and the Deputy Commissioner assumed almost from the very beginning an attitude towards the decision of this Court in the *Meherpore case* of 1887,¹ which cannot but be disapproved.

If properly examined, it will be seen that the ruling in that case does not conflict with the decision of this Court in 1886, nor with that in the case of *The Empress v. Charu Nayiah*.² The Assistant Commissioner has evidently not taken pains to examine the cases, and yet he says he follows these two latter rulings "in preference to the *Meherpore* ruling in 1887."¹

In the *Meherpore case* of 1886³ the questions that were raised and discussed before this Court in 1887 were not raised, and indeed it was wholly unnecessary to consider them. What this Court in 1886 held was simply this, that the conviction for theft could not be sustained, because the fish had not been moved away. It did not hold, as the Assistant Commissioner supposes, "that the offence of theft would have been committed if the fish had actually been moved." In the other case referred to, *viz.*, *The Empress v. Charu Nayiah*,² the only question before this Court was whether the charge of criminal trespass could be maintained against a person who had entered upon a public river and fished in it, and the Court held that it could not be maintained, because the owner of the fishery was not in exclusive possession of the river, it being a public one. No question was then raised or discussed as to the circumstances under which a person would be guilty of criminal trespass if he entered upon a private tank or river.

Turning now to the case before us, it appears upon the facts found by the Assistant Commissioner that the tank is an artificial piece of water, and of comparatively small dimensions; it is not a natural reservoir of water, and there is no assertion of any customary right to fish in this tank, as was found to exist in the *Meherpore case* of 1887 by the Magistrate, and upon which finding this Court held that there could be no dishonest taking of the fish when the accused went to fish relying upon that custom; and in this view of the matter the facts of this case are clearly distinguishable from those in the *Meherpore case*, and we should have been quite prepared to affirm the conviction in this case had it appeared that the fish had been at the time of occurrence in the "pos-

¹ *Ante*, p. 819n.² I. L. R., 2 Cal. 354.³ *Ante*, p. 820n.

session" of the owner of the tank—that is to say, if they had been restrained of their natural liberty, and liable to be taken according to the pleasure of the owner, or, in other words, if they had been practically in the power and dominion of the owner of the tank. (See Russell on Crimes and Misdemeanours, Vol. II., p. 376.) But upon the facts as found by the Assistant Magistrate, and which have been quoted above, it seems to be clear that they were not so. The tank was evidently not enclosed and shut up on all sides; the fish were not reared and preserved therein, but found their way there through the overflow of the neighbouring channel, which was connected with other flowing streams; and on the date of the occurrence the inundation was high, and the fish were at perfect liberty to leave the tank. This being the state of things, the fish were *feræ naturæ*, and were not in the power and dominion of the owner of the tank; and the case would therefore fall within the principle laid down in *The Queen v. Revu Pothadu*¹ and *Rex v. Carradice*.² For these reasons we are of opinion that the conviction for the offence of theft cannot stand.

Nor can it stand for the other offence of which the Assistant Commissioner has found the accused guilty, *viz.*, the offence of criminal trespass. If the fish were *feræ naturæ*, and not in the power and dominion of the owner of the tank, there is nothing to show in this case that the accused entered upon the tank with the intent of committing any offence under the Penal Code, or for the purpose of intimidating, annoying, or insulting the owner of the tank. It was indeed an act of trespass on the part of the accused to enter upon the private property of the complainant, but it was not "criminal trespass" within the meaning of s. 447. The Assistant Commissioner has, however, specially referred to s. 403, and he maintains that the accused entered upon the tank for the purpose of committing the offence of criminal misappropriation, and that the applicability of this section was never considered by the High Court. It is not necessary here to state the reasons why we do not consider that there could be no offence under s. 403, for we have done so in our decision in another case—*Bhagiram Dome v. Abar Dome*³—tried by Mr. Melitus and referred to us by Mr. Wight.

We are therefore of opinion that the conviction in this case is bad in law, and must be set aside. The fine, if paid, to be refunded.

H. T. H.

Conviction quashed.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

QUEEN-EMPRESS *v.* RAMDHANI PASSI.⁴

The Cantonments Act (III. of 1880), s. 14—Bengal Excise Act (Beng. Act VII. of 1878), ss. 4, 11, 29, 32—Spirituous liquor—Tari—Cantonment Magistrate, Powers of, to cancel license—Revenue authorities.

"Tari" or "toddy" is "spirituous liquor" within the meaning of s. 14 of Act III. of 1880. The words "spirituous liquor," "wine," and "intoxicating drugs" in that section, must be taken in their popular and ordinary meaning.

¹ I. L. R., 5 Mad. 390.

² R. & R. C. C. 205.

³ *Ante*, p. 818.

⁴ Criminal Reference, No. 357 of 1887, made by C. B. Garrett, Esq., Sessions Judge of 24-Pergunnahs, dated the 30th of December 1887, against the order passed by W. Hopkinson, Esq., Cantonment Magistrate of Dum-Dum, dated the 10th of November 1887.

1888.

MAYA RAM
SURMA

v.

NICHALA
KATANI,
15 Cal. 402.

1888.

Feb. 28.

15 Cal. 452.

1888.

QUEEN-
EMPRESS
v.
RAMDHANI
PASSI,
15 Cal. 452.

A Cantonment Magistrate in his judicial capacity has no authority to cancel a license. The power to cancel licenses belongs to the revenue authorities.

This was a reference to the High Court by the Sessions Judge of the 24-Pergunnahs under the provisions of s. 438 of the Code of Criminal Procedure. Ramdhani Passi, who held a license under the Bengal Excise Act of 1878 for the sale of fermented tari or toddy, on the 10th of November 1887 was convicted by the Cantonment Magistrate of Dum-Dum under s. 14 of Act III. of 1880 of selling tari to a European soldier. The Magistrate sentenced him to pay a fine of Rs. 50, and directed the cancellation of his license.

The terms of the reference were as follows :—

The applicant in this case has been convicted of selling toddy to a European soldier under s. 14, Act III. of 1880, and has been sentenced to pay a fine of Rs. 50. It does not appear from the papers whether the tari sold was fermented or unfermented, but the dealer appears to hold a license for the sale of fermented toddy, and it is reasonable to suppose that he sold the article in which he dealt, *vis.*, fermented toddy.

Act III. of 1880 prohibits the sale of three articles to European soldiers, *vis.*, spirituous liquor, intoxicating drugs, and wine. Fermented toddy clearly is neither spirituous liquor nor an intoxicating drug. The question is whether it is "wine." Wine is an intoxicating liquor obtained by fermentation, and toddy answers this description; the applicant's pleader says that wine is an intoxicating liquor fermented from the juice of grapes; but if it be necessary to prove that the wine sold to a soldier was the fermented juice of the grape, it would scarcely ever, I suppose, be possible to obtain a conviction under the Act. Fermented toddy appears to be wine, as that liquor is strictly defined, and, if so, the conviction would appear to be right. It is, however, certainly a matter of doubt, and I think I ought, as requested by the applicant, to lay the matter before the High Court for orders.

Baboo *Obhoy Churn Bose* for the petitioner.—The conviction must be set aside. S. 14 of Act III. of 1880 prohibits the sale of spirituous liquors, wines, and intoxicating drugs to European soldiers, but not tari. The intention of the Legislature is not to forbid the sale of all excisable articles, but only two, namely, spirituous liquors and intoxicating drugs; because if such was its intention the words "fermented liquor," which includes tari, would have been used. Spirituous liquors, fermented liquors, and intoxicating drugs, are excisable articles (s. 4 of Beng. Act VII. of 1878). Tari is neither a spirituous liquor nor an intoxicating drug. It is not wine. Wine, though not defined either in the Bengal Excise Act, 1878, or in the Cantonments Act, 1880, is, no doubt, a fermented liquor, and, therefore, an excisable article; but it does not include tari. Therefore no offence under s. 14 of Act III. of 1880 has been committed.

Even if an offence has been committed, the Magistrate has no power to cancel the license. The Collector is the proper person to grant licenses and to cancel them (ss. 11 and 29, Beng. Act VII. of 1878).

Mr. *Kilby* for the Crown.—Spirituous liquor is any liquor with alcohol in it, and it is reasonable to say that tari is spirituous liquor within the meaning of s. 14 of Act III. of 1880. According to the Bengal Excise Act, 1878, tari is fermented liquor, but that Act has not been incorporated in the Cantonments Act, 1880, which stands by itself. The words "spirituous liquor" must, therefore, be taken in their ordinary meaning, and not in any technical sense.

As regards the cancellation of the license, the Magistrate as Magistrate has no power to cancel the license; but he is *ex-officio* a Superintendent of Excise, and as such has all the powers of a Collector of Excise (s. 32 of Beng. Act VII. of 1878), and therefore he could cancel the license.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was as follows:—

Two points have been raised before us in this reference. The conviction is a conviction under s. 14, Act III. of 1880, for selling toddy, which it has been found was fermented toddy, to a European soldier within prohibited limits. The first point raised is this: it is said that fermented toddy does not come within the words of s. 14, which forbids the sale of any spirituous liquor, wine, or intoxicating drug to European soldiers. In many different Acts in this country words of a somewhat similar import to these have been used in a defined and limited sense, such as the words "spirituous liquors," "fermented liquors," "intoxicating liquors." In the Excise Act, for instance, they have been so used. But this is an Act which stands by itself; the Excise Act has nothing to do with it; and we have to read these words as any ordinary person acquainted with the English language and unacquainted with any technical use of such terms would understand them. I do not think there can be the least doubt that the words "spirituous liquor" in the popular sense of the word include an alcoholic liquor of the kind that was sold to the soldier by the petitioner in this case. The first point taken before us therefore fails.

The second point is this: As part of his sentence the Cantonment Magistrate has cancelled the license of the person convicted. We have nothing to do, of course, with the action of the Cantonment Magistrate, except in so far as he acts as a judicial officer, that is to say, as a Cantonment Magistrate strictly. In his judicial capacity it appears to us that the Magistrate had no authority to cancel this license, the power to cancel licenses belonging to the revenue-authorities. It may be that the same officer may also be vested with powers as a revenue officer, and he may as such have authority to cancel the license; but there is nothing before us to show whether that is so or not.

The only course, therefore, is for us to set aside so much of the judicial sentence of the Cantonment Magistrate as cancelled the license upon this narrow ground, that as a judicial officer he had no power to cancel that license. If it be that the same gentleman or any other revenue officer has the power to cancel the license, nothing that we have said or could say would interfere with their power of doing so now. Nor is there, in our decision, anything which can tend to affect the discretion of any revenue officer in dealing with the question whether this license should be cancelled or not.

C. D. P.

Conviction upheld.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

QUEEN-EMPRESS ON THE PROSECUTION OF PALAKDHARI MAHTON
AND OTHERS *v.* GAYITRI PROSUNNO GHOSAL.¹

1888.
Feb. 20.

Bail—Illegal Practice—Police-officer—Court, Duty of—Criminal Procedure Code (Act X. of 1882), ss. 344, 526, 526A.

15 Cal. 455.

The practice of leaving to the police the decision as to the sufficiency of bail, when bail has been ordered by the Court, is contrary to law. The duty of deciding as to its sufficiency or otherwise is with the Court itself, and not with the police.

¹ Criminal Reference, No. 360 of 1887, made by *H. W. Gordon, Esq.*, Sessions Judge of Sarun, dated the 22nd of December 1887, against the order passed by *Baboo Ram Anugraha Narain Singh*, Deputy Magistrate of Chupra, dated the 21st of November 1887.

I. L. R., Cal. 105.

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QUEEN-
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PROSUNNO
GHOSAL,
15 Cal.455.

M, the complainant, on the 19th November 1887, made an application to the Deputy Magistrate, under s. 526A of the Criminal Procedure Code, for the postponement of his case against G, to enable him to apply to the High Court under s. 526 for a transfer of the case from the file of the Deputy Magistrate to that of another officer. On the same date the Deputy Magistrate refused the application, and proceeded with the case, acquitting G.

Held, having regard to the words "the Court shall exercise, &c.," in s. 526A, the order of the Deputy Magistrate of the 19th November, refusing to grant the application, was illegal.

THIS was a reference to the High Court by the Sessions Judge of Sarun under s. 438 of the Criminal Procedure Code and Rule 34 of the Circular Orders (Criminal) of the High Court. The terms of the reference were as follows :—

On the 16th November 1887 one Palakdhari Mahton and others complained to the District Magistrate that the Court Sub-Inspector Gayitri Prosunno Ghosal had attempted to obtain from them an illegal gratification in regard to bail tendered by them on behalf of Bidya Mahton and others, then under trial for certain offences before the Deputy Magistrate of Chupra. The complaint was made over on the same date by the District Magistrate to Mr. Martin, Deputy Magistrate, for enquiry; and subsequently, on the 18th idem, the District Magistrate transferred it to the file of Baboo Ram Anugrah Narain Sing, Deputy Magistrate, for reasons recorded in the order-sheet.

On the 19th November the complainant Palakdhari petitioned the Deputy Magistrate under s. 526A of the Criminal Procedure Code to adjourn the hearing of his case against the Court Sub-Inspector, to enable him to make an application to the High Court under s. 526 of the Criminal Procedure Code to transfer the case to the file of another Magistrate; and on the same date the Deputy Magistrate refused this application for reasons recorded thereon, and proceeded with the trial; and on the 21st November 1887 he acquitted the accused Gayitri Prosunno Ghosal.

Subsequently Gayitri Prosunno Ghosal applied to the Deputy Magistrate under s. 195 of the Criminal Procedure Code for sanction to prosecute Palakdhari and one Malang Meah (a witness for Palakdhari) under ss. 211 and 193 of the Penal Code, and sanction was accordingly granted, and a rule was also issued on certain other persons to show cause why they should not be prosecuted for abetment under ss. 211 and 109 of the Penal Code.

It is now urged before me among other points that the Deputy Magistrate acted illegally in refusing to allow the complainant a reasonable time to apply to the High Court under s. 526A of the Criminal Procedure Code. I think this contention is valid. The language of s. 526A is imperative; and I think, therefore, the Deputy Magistrate was bound to grant the complainant such a postponement as would afford him a reasonable time to make the application under s. 526 of the Criminal Procedure Code, and this, too, without determining whether the application to him was or was not a *bona fide* one. As his order of the 19th November refusing the application is, in my opinion, illegal, all his subsequent proceedings in continuing to try the case, and his order of sanction under s. 195 of the Criminal Procedure Code, which is based on his judgment in that case, are null and void; and I recommend that these proceedings be set aside, and that the Deputy Magistrate be directed to retry the case from the point where his action was illegal, *vis.*, his refusal to grant the complainant time under s. 526A of the Criminal Procedure Code.

Baboo Ambica Churn Bose and Baboo Ashootosh Dey for Palakdhari Mahton.

Baboo Rajendra Nath Bose for the opposite party.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was as follows:—

We agree with the Sessions Judge in thinking that in the proceedings in this case there has been such irregularity, and indeed illegality, that they must

be set aside from a certain point. What appears is this: Two persons were ordered by the Deputy Magistrate to be discharged on bail, and enquiries took place before the Police Sub-Inspector with regard to the bail. There, in the first instance, it is necessary to point out what seems to be an impropriety of practice. According to the statement of the Sub-Inspector, it would seem that, under the practice in vogue in that district, the decision as to the sufficiency of bail, when bail has been ordered by the Court, is left to the Police Sub-Inspector. That is clearly contrary to what is intended by the law. If the Court admits a man to bail, it is of course at liberty to call for a report from the police as to the sufficiency of the bail, but the duty of deciding as to its sufficiency or otherwise is with the Court itself, and not with the police. If that irregularity had not been allowed to prevail, it seems very likely that the incidents which followed would never have happened. If such duties are irregularly entrusted to the police, two dangers are likely to arise: first, a police-officer may sometimes be unscrupulous enough to take advantage of the power entrusted to him, as is alleged in the present case, for the purpose of extortion. On the other hand, the same irregular practice may lead to another evil, only second to the first, namely, the bringing of false charges against police-officers. If the police were limited to their proper functions, both these dangers might be diminished, if not wholly avoided. The next thing that happened was that certain persons were tendered as bail, and were rejected by the police-officer who enquired into the matter. On the 16th of November a complaint was made by two people to the District Magistrate to the effect that the police-officer in question had endeavoured to extort from them a sum of Rs. 50 before he would accept certain persons as bail. . . . The order that was made by the District Magistrate is this: he referred it to Mr. Martin, a Deputy Magistrate, for enquiry. . . . That order was made on the 16th November, on the same day that the complaint was made. Then on the 18th of November there is another order by the District Magistrate, also written on the back of the complaint, *viz.*, "Transferred to the file of Baboo R. A. N. Singh—*vide* order-sheet." . . . The case accordingly having been transferred to the file of the Second Deputy Magistrate, it was called on on the 19th of November. On the 19th of November the complainants presented a petition asking for an adjournment sufficient to enable them to apply to this Court for a transfer of the case from that Magistrate to another. That petition was refused in these terms: "It was urged by the opposite party that the present charge has been got up by conspirators, and the complainant is merely a tool in the hands of others; that the consideration of this petition be deferred until after the cross-examination of the complainant. It is urged that the aiders of the complainant by obtaining postponement wish to have time to concoct evidence against the accused. *Ordered:* That the consideration of this petition be deferred until after examination of the complainant."

That was the order made on the 19th, and the complainant was required there and then to go on with his case, and certain witnesses were examined. . . . Then another order was made, apparently on the same day, as follows: "Consideration resumed after examination of complainant. Without expressing any opinion on the merits of the case at this stage of the proceedings, I find facts have been elicited from the complainant's examination which would tend to show that he is a mere tool in the hands of others, and any postponement will be detrimental to the accused. *Ordered:* That the petition be refused." Accordingly, the complainant's witnesses having been examined on the 19th of November, the matter was adjourned to the 21st November. . . . On the 21st of November the complainant put in a petition asking for some time to produce further evidence, and the order upon that application was this: "At the

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instance of the pleader for the defence, the petitioner was asked what were the contents of this petition. The petitioner said in this petition, he prays for five or six days' postponement to bring more witnesses, and that this petition also contains a statement that he petitioned the Magistrate-Collector for the examination of his witnesses, and that he wired the High Court for the trial of this case by that Hon'ble Court;" and it was ordered "that the Court does not think it necessary to go into the irrelevant matters alleged to have occurred four months before, which have no bearing on the present case. The prayer of the applicant for six days' postponement to examine fresh witnesses for prosecution is untenable, as he closed his case on 19th instant, and said that he had no other witnesses to examine. Application refused." On the same day, the 21st, two witnesses for the defence were examined, and then the accused person was acquitted. On the same day an order was made directing proceedings to be taken against the complainants for having made a false complaint. . . . We agree with the Sessions Judge that on the grounds pointed out by him these proceedings are wholly illegal. Under s. 526A, added by Act III. of 1884 to the Criminal Procedure Code, we think the Sessions Judge is right in saying that the public prosecutor, or the complainant, or the accused, has the right to notify to the Court before which a case or appeal is pending, before the commencement of the hearing of the case, that he intends to make an application to this Court to transfer the case from one officer to another; and if he does so, the words of the section are: "The Court shall exercise the powers of postponement or adjournment given by s. 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or, in the case of an appeal, before the hearing of the appeal." These words are obligatory; and the refusal to grant the application was illegal, and the whole of the proceedings that followed cannot be supported. The result is that, after hearing those who have appeared on behalf of all parties, the Crown, the complainant, and the accused, we have no hesitation in saying that the order recommended by the Sessions Judge should be made, *vis.*, that the proceedings in this case from the 19th of November, when the application for postponement was made and refused, must be set aside. The whole trial must be begun over again from that point; and of course the order directing the prosecution of the complainants for making a false complaint is set aside also.

Order set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

1888.

Feb. 21.

. ISHAN MUCHI AND OTHERS *v.* THE QUEEN-EMPRESS.¹

15 Cal. 511.

Receiving stolen property—Evidence—Penal Code (Act XLV. of 1860), s. 411.

To constitute the offence of receiving stolen property, there must be some proof that some person other than the accused had possession of the property before the accused got possession of it.

ISHAN MUCHI, Ananda Muchi, Tushti Muchi, Bonomali Muchi, and Istambar Muchi, were tried by the Sessions Judge of Jessore for the offence of

¹ Criminal Appeal, No. 16 of 1888, against the order passed by *F. E. Pargiter, Esq.*, Sessions Judge of Jessore, dated the 2nd of December 1887, committed for trial to the Court of Session by Baboo *Kader Nath Bismas*, Deputy Magistrate of Jhenidah, dated 2nd August 1887.

receiving stolen property, first, in respect of property belonging to one Taramoni Baishnavi ; and, secondly, in respect of property belonging to another person of the name of Nimai Karikar. There were two trials and a conviction in each.

The facts of the first case were as follows : About midnight on the 16th June 1887, Taramoni Baishnavi was awaked by knocks at her door. She got up, lit a lamp, and called to a neighbour, but got no reply ; she heard the sound of pots knocked about, and the voices of two neighbours talking. She called to them and to other neighbours, but got no satisfactory replies, till at length the chowkidar was sent for, who came with two neighbours, Mohun Das and Nando Kapali.

She found a pillow torn up in her verandah ; but these men after a cursory view left her. After staying about an hour in the verandah she entered her house, and was about to shut the door when two men entered, the foremost of whom resembled one Sona Kapali, and the second resembled one Ghulam Kahar in his voice. They put out the light, and one of them pulled off a gold bracelet from her wrist. They told her to go outside ; and she went to her neighbour Nobin Dass's house. From there she saw several men go southward from her house past his, carrying a tin box. The tin box (which was a rather large one) contained two small wooden boxes, in which was a large quantity of jewellery. The wooden frame work, in which the tin box was, was found broken in the yard ; and next morning the tin box and the two small boxes were found in the field opened. All the jewellery, which she valued at Rs. 308-10, was gone.

Next day, Taramoni complained to the police, and they came to investigate on 19th June ; but nothing material was discovered till 27th June. On 28th June the Sub-Inspector searched the house of the accused Ananda Muchi ; and the Inspector searched the houses occupied by the other accused. Ananda lived in Paltadanga, and the other accused in Raghunathpur, about five miles apart. These villages are some miles distant from Gilapol, where Taramoni lives.

The prosecution proved that in Ananda's house, in a cow-house, were found buried in the ground, beneath a heap of cow-dung, a silver girdle and some other ornaments. In the house occupied by Ishan Muchi were found, hidden inside a pillow case, two chains of a gold necklace and some gold "cocoanut flower" ornaments, and inside a pot of kalai were found one chain of a gold necklace and some "cocoanut flower" ornaments. In a heap of earth beneath the cave of Tushti Muchi's house were found one chain of a gold necklace and some "cocoanut flower" ornaments. Nothing was found in the house occupied by Bonomali and Istambar Muchi. The chains were all alike, and the "cocoanut flower" were also all alike. Taramoni identified them and the girdle as her property, which was stolen on the night of the robbery. The accused all admitted the property was found as stated by the prosecution, but denied all knowledge of it.

The facts of the second case were very similar.

In both cases the Court found Ishan, Ananda, and Tushti Muchi guilty under s. 411 of the Penal Code of dishonestly receiving stolen property ; and sentenced them in the first case to three, five, and one year's rigorous imprisonment respectively, and in the second case to one year's rigorous imprisonment each.

Bonomali and Istambar Muchi were acquitted in both cases.

The Court directed the restoration of the stolen property to Taramoni Baishnavi and Nimai Karikar.

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Ishan, Ananda, and Tushti Muchi, appealed to the High Court.

No one appeared on the appeal.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows :—

The prisoners are convicted of dishonestly receiving stolen property, first under s. 411, in respect of the goods belonging to one person, and, second, in respect of goods belonging to another. They were separately tried and sentenced on each of these charges.

There is no proof against them save the fact that the goods found in their possession were stolen from different persons, and were found in their possession under such circumstances as to prove a guilty knowledge on their part.

There is no proof as to their receipt of the goods; nothing to show that they received them at different times or from different persons. All the goods in the possession of each prisoner may have been stolen by the same thief, and may have been by him delivered to that prisoner at the same time, although stolen on different occasions.

If each prisoner received the goods found in his possession together at the same time, that would constitute only one offence.

There is nothing in the fact that the goods were stolen at different times, to constitute by itself proof that they were received at different times, or under such circumstances as to show that more than one offence was committed in receiving them.

It need not be considered whether, if a thief brought to a receiver, say, a coat and a ring, stolen from different persons, and on the same occasion gave them to the receiver, if he said, "Here is a coat stolen from A, take this," and the receiver took it, and also, "Here is a ring stolen from B, take this," and the receiver took it, these acts would or would not constitute different offences, because there is nothing to show that such a case existed here.

Here there is nothing but possession of stolen property found concealed established; and this is consistent with only one offence having been committed, so far as receiving is concerned; but in truth the offence proved is only the retaining of stolen goods.

In this case, as observed, there is no proof of actual receiving; and it has been held in England (2 Russell on Crimes citing *R. v. Cordy*) that to constitute the offence of receiving there must be *some* proof that some person other than the prisoner had possession of the goods before the prisoner got possession of them; otherwise, possession of them is only proof of the stealing, which is not found here.¹

If this rule prevails under the Penal Code (and we see no reason why it should not), the prisoners should have been convicted of the retention of stolen goods, knowing or having reason to believe that they were stolen, of the existence of which knowledge or belief their concealment of the goods was evidence.

We therefore set aside the conviction in the second trial. The first conviction in the first case we also set aside, and in lieu thereof we convict the prisoners under the same section (411) of dishonestly retaining stolen property, and sentence the prisoners on the findings in the first case, Ishan to four years, Ananda to six years, and Tushti to two years, all in rigorous imprisonment.

Conviction and sentences varied.

C. D. P.

¹ See the case of *Empress v. Uttum Koondoo*, 1 L. R., 8 Cal. 634, where, however, the point does not seem to have been taken.—*Ed.*

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

IN THE MATTER OF SARBANANDA BASU MOZUMDAR AND ANOTHER (PETITIONERS) *v.* PRAN SANKAR ROY CHOWDHURI AND OTHERS (OPPOSITE PARTY).¹

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Criminal Procedure Code (Act X. of 1882), s. 145—Dispute as to right to collect rents—Tangible immovable property.

A dispute as to the right to collect rents is a dispute concerning tangible immovable property within the meaning of s. 145 of the Criminal Procedure Code.

*Harak Narain Singh v. Luchmi Bux Roy*² and *Sutherland v. Crowdy*³ referred to; *Pramatha Bhusana Deb Roy v. Doorga Churn Bhattacharji*⁴ followed.

Where a dispute arose as to the right to collect the rents of certain land the ownership of which was claimed by both A and B, and the tenants who had been paying rent to A refused to pay rent to A and attorned to B; *Held* that the conduct of the tenants in attorning to B was not an assertion of possession adverse to A such as to put an end to the relation of landlord and tenant between them and A and to A's right to collect the rents. Such attornment, therefore, did not deprive A of his right to have recourse to s. 145 in case of a likelihood of a breach of the peace, so as to have his possession of the right to collect the rents maintained, pending proceedings in a civil suit.

THIS case arose out of a dispute concerning the right to collect the rents from the ryots of a piece of re-formed chur land in the district of Faridpore, called Shomaspur by the petitioners, and Dowlutdia by the opposite party.

In 1859 the river Padma flowed on the east of a group of temporary settled estates known as the Panchas Hazari Mehals. In midstream there was an island called Dowlutdia, which belonged to the Teota Rajahs (the opposite party to these proceedings). In this island there were a few small churs which did not belong to the Teota Rajahs; the chur on the extreme east of the island was called Shomaspur, and belonged to Sarbananda Basu Mozumdar, one of the petitioners.

Between 1859 and 1875 the Padma had shifted its course, the island Dowlutdia had disappeared, and large accretions had formed contiguous to the Panchas Hazari Mehals. Beyond these accretions, there was a narrow strip of land.

About 1877 the accretions, extending up to the main stream of the Padma, were at first settled to the Panchas Hazari Mehals; but subsequently all the lands on the east of the western boundary of the island of Dowlutdia were released to the Teota Rajahs with the exception of some portions, which were claimed by Sarbananda Baboo and a Mr. Renny.

All along a suti (a channel) ran through the relinquished tract from north to south. On the east of this suti, and a good way off from it, flowed the main stream of the Padma. Both these kept constantly shifting eastward until the suti occupied the position which the main stream of the Padma did in 1877. This suti was called Kootibaree suti in 1881, and is still known by that name. The main stream of the Padma at this time was about a mile on the

¹ Criminal Revision, No. 322 of 1887, against the order passed by *W. H. Thomson, Esq.*, Deputy Magistrate of Goalundo, dated the 27th of August 1887.

² 5 C. L. R. 287.

³ 18 W. R. Cr. 11; 9 B. L. R. 229.

⁴ 1. L. R., 11 Cal. 413.

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east of the suti. The land in dispute lay between the Kootibaree suti and the river Padma, and began to reform some time between 1877 and 1880.

The tenants on the disputed land paid rents to the Teota Rajahs, the opposite party, down to March or April 1886. Subsequently disputes arose between the tenants and the Rajahs, who tried to raise the rents. Being unable to obtain enhancement of rent from the tenants, the Rajahs declared the land to be their khas khamar, settled them with other tenants, and unsuccessfully endeavoured to oust the old and put the new tenants in possession. The tenants refused to pay any rents to the Rajahs, and attorned to Sarbananda Basu and another, the petitioners, executing kabuliats which were registered in the course of August 1886. In consequence of the threatening attitude of the parties indicating a probability of a breach of the peace, proceedings under s. 145 of the Code of Criminal Procedure were instituted in October 1886.

Mr. W. H. Thomson, the Deputy Magistrate of Goalundo, found that, on the 30th October 1886, the date the initial proceedings were framed, the Teota Rajahs, the opposite party, were in possession by receipt of rent from the tenants as against the petitioners; and by his order of 27th August 1887 passed under s. 145 ordered that the opposite party do remain in possession until evicted therefrom in due course of law, and forbade all disturbance of such possession until such eviction. He further ordered under s. 148 that the petitioners should pay the opposite party the sum of Rs. 1,500 as costs.

The Sessions Judge of Faridpore confirmed the order of 27th August 1887 on the 19th September.

The petitioners applied to the High Court under the revisional sections, and obtained a rule calling on the opposite party to show cause why the order of 27th August 1887 should not be set aside.

Mr. *Evans* and Mr. *M. P. Gasper*, Baboo *Guru Dass Bannerjee*, and Baboo *Jogesh Chunder Dey* for the petitioners.

The *Advocate-General* (Mr. *Paul*), Mr. *Woodroffe*, Baboo *Ambica Churn Bose*, and Baboo *Grija Sanker Mozumdar* for the opposite party.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

This matter under s. 145, Code of Criminal Procedure, relates to nearly 10,000 bighas of chur land in the district of Faridpore. The parties are zemindars; and the question at issue is the right to receive rent from the cultivators. None of these ryots is a party to these proceedings. It has been found by the Magistrate, after a long and careful investigation, and in a well considered judgment, that up to the end of the Bengali year, March or April 1886, the ryots on this chur paid rents to the Teota Rajahs, party No. 1; that subsequently disputes arose, and the Rajahs, being unable to obtain enhancement of rent from the tenants, declared the lands to be their khas khamar, and unsuccessfully endeavoured to make settlements with some other tenants for a portion at least of the lands. The tenants, on the other hand, told the Rajahs that they would not pay them any rents. The tenants probably finding themselves unable, unless supported by some person of influence, to resist the Teota Rajahs, put themselves into the hands of Sarbananda Basu and another, the second party to these proceedings, and attorned to them executing kabuliats, which were registered in the course of August. In consequence of the threatening attitude of the parties indicating probability of a breach of the peace, proceedings under s. 145 were instituted in October 1886. It is unnecessary to refer to the cause of those proceedings, except to state that, on the 27th August 1887, the sub-divisional officer of Goalundo found that the first

party, the Teota Rajahs, were in possession by receipt of rent from the tenants as against the second party.

The main objections taken before us as a Court of Revision are that this dispute between zemindars with respect to land occupied or held by tenants is not properly cognizable under s. 145, and that, if cognizable, on the findings of the Magistrate, the second party was entitled to be declared to be in possession.

The first contention is founded upon a construction of the section in the present Code similar to that adopted at one time by PHEAR, J., with respect to s. 530 of the old Code—that is, that the section is applicable only to cases of actual or manual possession, such as that of ryots.

That was not, however, the construction of the words of the section, which finally prevailed in this Court. Under s. 530 it was, as JACKSON, J., said in *Harak Narain Singh v. Luchmi Bux Roy*,¹ “settled law that the section contemplates disputes between owners as well as occupiers of land,” following in this respect *Sutherland v. Crowdy*,² and he pointed out in that case that this construction of the section is in conformity with the policy of the law as shown in previous legislation on this subject.

It is argued that the introduction into the present s. 145 of the word “tangible” before the words “immoveable property” indicates that actual possession is alone contemplated by it. As to this, we can but adopt and follow the language of FIELD, J., in *Pramatha Bhusana Deb Roy v. Doorga Churn Bhattacharji*.³ We think that a dispute as to the right to collect rents is a dispute concerning tangible immoveable property under s. 145. There can be no question that disputes regarding the exercise of this right are most fruitful causes of disturbance, especially in newly formed alluvial lands, such as are the subject of the proceedings now before us. We have no doubt that it is the policy of the law that Magistrates should have summary jurisdiction to pass temporary orders in such matters, so as to prevent the occurrence of serious breaches of the peace. We are so strongly impressed with this view that, had the decision of another Division Bench been to the contrary, we should have felt it our duty to refer the matter to a Full Bench.

As to the second objection, it is contended that, inasmuch as the tenants had attorned to the second party, the first party had ceased to be in possession, and that consequently the order of the Magistrate in their favour should be set aside; that the previous existing tenancy had been determined by the action of the Teota Rajahs in declaring the lands to be their khas khamar; and next that, even if this were not sufficient to determine the tenancy, the conduct of the tenants in attorning to the second party would be an assertion of possession adverse to the Teota Rajahs, such as to put an end to any previously existing relations between them and the Rajahs, and, with them, to the existence of such a right to collect the rents as is within the section. We do not think so. No doubt, a zemindar and his tenants might, by agreement, determine any relation of landlord and tenant existing between them. But the acts of the two parties, the Rajahs and the tenants, in the matter before us, certainly cannot be construed as constituting such an agreement between them. The attornment by the tenants to the second party is not shown to have been even known to the Rajahs until after the proceedings under s. 145 were instituted. We regard the acts done by the Teota Rajahs and the tenants in this way: The Rajahs

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¹ 5 C. L. R. 287 (289).² 18 W. R. 11.³ I. L. R., 11 Cal. 413 (416).
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1888. endeavoured to terminate the tenancy in a manner which was wholly unlawful, and in this they were opposed by the tenants, and were unsuccessful in obtaining from them a surrender of their lands. Under such circumstances, the original tenancy still subsisted, and the tenants in possession of the lands remained liable to pay rent as heretofore. The subsequent acts of the tenants in repudiating as their landlords the Teota Rajahs, and in attorning to the second party to these proceedings, could not by themselves alone operate so as to determine their tenancy. As has already been stated, no notice was given to the Rajahs that the tenants had put an end to their tenancy under them. We need not consider what the effect of such notice, if any, might have been.

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It was argued that the decision of the Magistrate was wrong, as involving the acceptance of this proposition; that the right of a zemindar to come in under this section must exist, even though the payment of rent has been withheld from him for years, so long as his right to recover it by proceedings-at-law can be shown; and that such a proposition cannot be accepted, as it cannot be supposed that questions of title were intended to come before a Magistrate for decision under this section. There may be great force in that argument, and the Magistrate, so far as he adopted this view, may have been wrong. The point need not be decided by us in this case, and we do not decide it. Here the rent was paid down to just before the dispute between the Rajahs and the ryots which led to the proceeding under s. 145, Code of Criminal Procedure; and upon the dispute taking place they attorned, by real or pretended payments of rent, to a stranger. The question on the second branch of the case is, whether such a proceeding by the tenants of a zemindar can deprive him of recourse to this section in case of danger to the peace, to have his possession of the right to collect rents maintained, pending civil proceedings; and we must determine that question in the negative.

Having regard to the length and character of the proceedings before the Magistrate, we are of opinion that his order regarding costs should stand.

The rule must, therefore, be discharged.

C. D. P.

Rule discharged.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

1888. LUCKHEE NARAIN BANERJEE AND OTHERS (PETITIONERS) v. RAM
Mar. 24. KUMAR MUKHERJEE (OPPOSITE PARTY).¹

15 Cal. 564. *Criminal Procedure Code (Act X. of 1882), ss. 133—137, Course to be followed in the administration of—Obstruction to highway—Claim of title—Bona fides of claim of title, Right of Magistrate to enquire into—Jurisdiction.*

The mere assertion of a claim of title made without reasonable ground, or honest belief in it, or honest intention to support it, will not oust a Criminal Court of its jurisdiction under ss. 133—137 of the Criminal Procedure Code.

In proceedings under s. 133 of the Criminal Procedure Code, with reference to obstructions to public ways, it is open to the Magistrate to enquire into the *bona fides* of the

¹ Criminal Reference, No. 296 of 1887, made by R. M. Towers, Esq., Sessions Judge of Midnapore, dated the 29th of October 1887, against the order passed by E. Grake, Esq., Assistant Magistrate of Midnapore, dated the 12th of September 1887.

claim; and where he decides against its *bona fides*, he must state reasons for his decision which will be subject to revision by the High Court.

Such a claim must be set up at or before the hearing and not afterwards. *In re Chundernath Sen*,¹ *Chuni Lall v. Ram Kishen Sahoo*,² *Mutty Ram Sahoo v. Mohi Lall Roy*,³ and *R. v. Sandford*,⁴ referred to.

This was a reference by the Sessions Judge of Midnapore under the provisions of s. 438 of the Criminal Procedure Code. The terms of the reference were as follows:—

In this case the present petitioner was called on by an order from the Magistrate of the district to remove a fence from an alleged public way, or to show cause (s. 133 of the Criminal Procedure Code) before the Assistant Magistrate why the order should be set aside or modified. Before that the opposite party had made another petition under ss. 133 and 144, which was dealt with by a Deputy Magistrate, Baboo Bankim Chunder Chatterjee, under s. 144 only, he not being empowered to act under s. 133. The order passed by him (dated 13th August) after a local investigation dealt with a different obstruction (to the same road) from that now under consideration. From the language used by him in the order in question, he does not appear to have thought that the way in question was one coming within the second para. of s. 133. He says: "The other obstruction (the one now under consideration) is at a spot the connection of which with any public thoroughfare was not clear to me. It is quite possible it may be so connected, but a portion was under water and another portion cut up, so that the traces of a footpath, if any existed, were not visible to me. An embankment was pointed out as being a continuation of the road, but it is overgrown with jungle, and bore no traces of having been used as a thoroughfare for some time past."

The Assistant Magistrate, after taking evidence on both sides, passed an order on the 12th September under s. 137 that the order of the Magistrate directing the removal of the obstruction be made absolute. The Magistrate of the district directed, on the 14th September, notice to issue under s. 140, allowing three days from the date of its receipt for carrying out his original order. Against these proceedings the present application for reference has been made, and both parties have been heard through pleaders.

For the present petitioner the rulings in *Basaruddin Bhuiah v. Bahar Ali*,⁵ *Askar Mea v. Sabdar Mea*,⁶ and *Lal Miah v. Nasir Khalashi*,⁷ are relied on; by the other side *Angelo v. Cargill*.⁸ There was no essential difference in the wording of the sections of the Criminal Procedure Code which were in force when the above decisions were respectively passed. It is difficult to reconcile them. But I think it is clear that the High Court have now for some time maintained the view of the law which is favourable to the present petitioner.

The Assistant Magistrate, while acknowledging the authority of these decisions, considered himself at liberty to go into the *bona fides* of the question of title, *i. e.*, of the claim set up by petitioner to hold the land free of any public right of way over it.

He took evidence on both sides, and decided that the petitioner had not satisfied him of the *bona fides* of his claim. As far as the materials before him went, I should not say he was wrong in deciding that petitioner had not made out his title, but it is a difficult matter to conclude that he did not make a *bona fide* claim to it. In *Askar Mea v. Sabdar Mea*,⁶ the High Court observe that the enquiry contemplated is an enquiry into the existence or non-existence of the obstruction complained

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¹ I. L. R., 5 Cal. 875; 6 Cal. L. R. 379.

² *Ante*, p. 460 (of the Original Report). This is a Civil Case.

³ 7 Cal. L. R. 433; I. L. R., 6 Cal. 291.

⁴ 30 L. T. 601.

⁵ I. L. L., 11 Cal. 8.

⁶ I. L. R., 12 Cal. 137.

⁷ I. L. R., 12 Cal. 696.

⁸ 9 B. L. R. 417.

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of, and not one as to disputed question of title. In *Basaruddin Bhuiah v. Bahar Ali*,¹ it is said: "In the present case it is plain that the right of way is really in dispute, and that its existence is at least open to doubt; no order can therefore be made under the sections referred to until the public right has been established by proper legal proceedings, civil or criminal."

There is no doubt that the right of way is really in dispute. Besides the oral evidence there are on the record some documents which are certainly in favour of the contention of the petitioner. Besides that alluded to in the Assistant Magistrate's order, there is a registered lease of the tank, over the south bank of which the alleged road lies, from the Manager of the Court of Wards, and a bill of sale, a document over thirty years old, from a former proprietor to the uncle of petitioner. These documents give the boundary of the tank, but are silent as to any road. Had there been a public one over the south bank—*vide* the map—it is contended that it would have been specified in these documents.

On the facts then I think that the Assistant Magistrate, though probably right on the materials before him in deciding in favour of the right of way, was not right in holding that petitioner had no *bond fide* claim of title. That being so, his decision is opposed to the later rulings of the High Court already quoted.

But there is a further difficulty. The allegation of the opposite party (who initiated the proceedings) is that the road is a public one. If there is a *bond fide* contest about this, the Magistrate is, by the rulings in question, ousted of jurisdiction. Then what redress is open to the public? It has been frequently held that no suit will lie in a Civil Court for obstructing a public thoroughfare without proof of special injury to the plaintiff. In all such cases, if the complainant is met with the allegation of a *bond fide* claim of title in the Criminal Court, and the Magistrate, therefore, refuses to interfere, there seems to be no remedy. The Civil Court will throw out a suit for obstruction, and under the present Code of Criminal Procedure the complainant is also without redress. In the Code of 1872 it was not so. S. 532 of that Code, for which s. 147 of the present one has been substituted, provided that if a dispute arose concerning any right of way, the Magistrate might enquire into the matter, and if he found that the subject of dispute were open to the use of the public, might order that possession might not be retained to the exclusion of the public until the person claiming exclusive possession established his right in the Civil Court.

By s. 147 of the present Code the Magistrate can only interfere where he considers the dispute is likely to cause a breach of the peace.

Such being the circumstances of this case, I think it my duty to refer it for the decision of the High Court. It is desirable to have an authoritative decision on a matter which seriously affects public rights, and on which there is a conflict of rulings. I do not think any injustice has been done in this particular case by the orders of the Assistant Magistrate, but it appears incorrect as not being in accordance with the view of the law at present adopted by the High Court. His explanation accompanies the record.

Mr. K. B. Dutt and Baboo Jogesh Chunder Dey for the petitioners.

Mr. P. L. Roy and Baboo Romesh Chunder Bose for the opposite party.

Mr. Dutt.—The Magistrate has no jurisdiction in this case, as there is a claim of title—*Basaruddin Bhuiah v. Bahar Ali*;¹ *Askar Mea v. Sabdar Mea*.² Ss. 133 to 137 of the Criminal Procedure Code only entitle the Magistrate to hold an enquiry into the existence or non-existence of an obstruction, but nothing more. The English cases bear out my contention—see *R. v. Barnaby*;³ *Charter v. Greame*;⁴ *R. v. Cridland*;⁵ *R. v. Nunneley*.⁶

¹ 1 L. R., 11 Cal. 8.

² 1 L. R., 12 Cal. 137.

³ 1 Salk. 181; 2 Ld. Ray 900.

⁴ 13 Q. B. 216.

⁵ 7 El. & Bl. 853; 27 L. J. M. C. 28.

⁶ 1 El. Bl. & Bl. 852.

It has even been held that, upon a mere suggestion of title, the jurisdiction of the Magistrate is ousted (per HOLT, C.J., in 2. Ld. Ray, 901, referred to in Paley on Summary Convictions, 5th Ed., p. 144, note). I do not contend that the Magistrate has no jurisdiction to enquire into the *bona fides* of the claim set up. The test of a *bona fide* claim is whether there is any evidence to go to a jury (Stone's Justices of the Peace, p. 340).

Mr. Roy, *contra*.—The two cases of *Basaruddin Bhuiah v. Bahar Ali*,¹ and *Askar Mea v. Sabdar Mea*,² cited by the other side, merely lay down that when a person raises *band fide* a question of title, the Criminal Courts have no jurisdiction; but these cases do not lay down that the Magistrate has no jurisdiction to enquire into the *bonafides* of the claim set up. That point, moreover, has been conceded by the other side; and the Magistrate was, therefore, within his jurisdiction in deciding upon the facts of this case that the claim set up was a mere pretence to oust his jurisdiction and not a *bona fide* one.

Ss. 133 to 139 of the Criminal Procedure Code clearly show that the intention of the Legislature was to vest the Magistrate with very large discretionary powers; and in this view of the matter the contention that the Magistrate is merely entitled to hold an enquiry into the existence or non-existence of an obstruction and nothing more is untenable.

The English cases do not support the contention of the other side. Although under the English decisions the summary jurisdiction of the Justices of the Peace is ousted where the title to property is in question [*R. v. Barnaby*],³ yet it is always a necessary condition "that there must be some show of reason in the claim, and it is not sufficient unless the defendant satisfy the Justices that there is some reasonable ground for the assertion of title"—*Cornwell v. Sanders*;⁴ *Hunt v. Andrews*;⁵ *Legg v. Pardoe*;⁶ *Calcraft v. Gibbs*.⁷ *R. v. Nunneley* lays down that the claim must be *bona fide* and not a mere pretence to oust jurisdiction. And it is for the Justices to say whether the claim be *bona fide* or a mere pretence—see also *R. v. Huntsworth*;⁸ *Pease v. Claytor*.⁹

In *R. v. Cridland*¹⁰ the decision was based upon the ground that the assertion of title was a *bona fide* one, and therefore is not against me. *R. v. Barnaby*³ lays down the well-known maxim of English law that, where the title to property is in question, the exercise of summary jurisdiction by Justices is ousted. This decision does not interfere with my contention.

The case of *Charter v. Greame*¹¹ is under "The Malicious Trespass Act," and has no reference to the present matter. *Playter's case* referred to by HOLT, C. J., in 2 Ld. Ray 901, clearly shows that the Justices acted from undue motives—see also *R. v. Harpur*.¹²

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

It is a rule of English law that a *bona fide* claim of title ousts the jurisdiction of Justices proceeding in a summary way; this does not depend on enactment, but is a qualification which the law itself raises in the execution of penal statutes, save when the terms of the statute, under which the Justices proceed, show that the Justices are not to hold their hands even if a right be set up.

¹ 1. L. R., 11 Cal. 8.

² 1. L. R., 12 Cal. 137.

³ 1 Salk. 181; 2. Ld. Ray 900.

⁴ 3 B. & S. 206.

⁵ 3 B. & Ald. 341, 346.

⁶ 9 C. B. N. S. 289.

⁷ 4 T. R. 681.

⁸ 33 L. J. M. C. 131.

⁹ 3 B. & S. 620.

¹⁰ 7 El. & Bl. 853; 27. L. J. M. C. 28.

¹¹ 13 Q. B. 216.

¹² 1 D. & R. 222.

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Under the Criminal Procedure Code of 1872 it was held by this Court, in revision, that in proceedings under s. 521 of that Code, which is similar to s. 133 of the present Code, if a claim of private right were set up in respect of what was alleged to be a thoroughfare or public place, the Magistrate should not make any order under s. 521 and the following sections, but should proceed under s. 532, so that the person claiming such private right should have an opportunity of having the question raised by him duly enquired into and determined; it being no part of the duty either of the Magistrate or of a jury, acting under s. 526 of that Code, to determine the rights of parties in property—*In re Chundernath Sen*¹ and other cases.

S. 147 of the present Code, which corresponds to s. 532, is more limited in its operation, being confined to cases in which a dispute likely to cause a breach of the peace exists. But no such alteration has been made in the terms of s. 133 *et seq.*, which corresponds to s. 521 *et seq.* of the old Code, as would make the decisions upon these sections of the old Code inapplicable to those of the present; and in accordance with those decisions, it has been held by this Court that a Magistrate proceeding under the sections of the present Code ought not, when a *bond fide* claim of title is set up, to proceed to make an order, but should allow the party setting up such a claim to substantiate it, if he can do so, by civil proceedings. The ground upon which these decisions have proceeded is that there is no provision made in Ch. X. of the Code for an enquiry into disputed questions of title; and that it cannot be held to have been the intention of the Legislature that questions of this nature raised *bond fide* should be finally decided in a summary manner and to the exclusion of any recourse to the Civil Courts. These decisions go, not actually to the jurisdiction of the Magistrates, as the English rule referred to does, but rather to the mode in which, in revision, this Court has held that the Magistrates should exercise their powers, following the principle of the English rule so far as may be. A decision of a Full Bench of this Court—*Chuni Lall v. Ram Kishen Sahoo*²—soon to be delivered will lay down the manner in which the question of title, such as appears to have arisen in this case, can be brought before a Civil Court. We have deferred judgment in these cases until the question in that case should have been decided. In this case the defendant appears to have asserted his right to the land in question, free from any right of way over it, in the public, or any part of the public.

When such a question is *bond fide* raised, the Magistrate ought not to make an order under these sections of the Code, but should allow an opportunity for the determination of the question by the Civil Court.

The claim of title must, however, in order that it should be allowed to have this effect, be *bond fide*, and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim be *bond fide* or a mere pretence. The Magistrate cannot, of course, in determining this, decide contrary to the facts that the claim is not made *bond fide*, but must have reasonable and probable cause for his decision, which will be subject to revision by this Court. The rule, however, that a *bond fide* claim of title ought not to be determined in summary proceedings before the Magistrate is subject to this, that the objection must be raised by the defendant at or before the hearing; he cannot be heard afterwards to object to the result of proceedings to which he has deliberately submitted himself.

¹ I. L. R., 5 Cal. 875; 6 Cal. L. R. 379.

² *Ante*, p. 460 (of the Original Report). This is a Civil Case.

A fortiori, if the defendant expressly consents that the question of the propriety of the order shall be considered, and with it the question of right, he cannot object, before the Magistrate or afterwards, in this Court, in revision, to the Magistrate's order. We say nothing here as to the effect of an order so made upon any civil proceedings in which he might afterwards seek to establish his right—see per FIELD, J., *Mutty Ram Sahoo v. Mohi Lall Roy*.¹ As to the considerations which should guide the Magistrate in determining whether a claim of title is *bond fide* made, it would not be safe to attempt to lay down any general rule, save that there must be some show of reason in the claim, and it is not sufficient unless the defendant satisfy the Magistrate that there is some reasonable ground for his assertion of title. The claim must be one that can legally exist, and consequently [to mention two English cases from Paley²] defendant was not allowed to oust the jurisdiction of the Justices by claiming a right as one of the public to fish in a non-navigable river, though, if he had made such a claim with respect to one where the tide ebbs and flows, it might have been sufficient. And so a claim by a defendant as one of the public to shoot over certain land when in fact the public had hitherto shot without interruption was held insufficient, as no such right is known to the law. And in another case it was held that the mere assertion of a right made by the defendants' attorney in writing, but without stating any grounds for it, was not enough.

In a recent case this Court was asked to interfere, in revision, with a Magistrate's order for the removal of an obstruction from a public road, on the ground that the defendant had made a *bond fide* claim of right. It appeared that the piece of land in question had been recently fenced in by the defendant; that before that it had been used as a road, and had been repaired at the cost of the Road Cess Committee. No ground of title to the land was shown on the part of defendant, save his attempt recently made to appropriate the land, and this Court refused him a rule.

These cases are referred to here, because it is desirable to point out that the action of the Magistrate under these sections is not to be trammelled by a mere assertion of right made without fair ground, or honest belief in it, or honest intention to support it.

The course which we hold that the Magistrate should follow in administering these sections where a claim of right is set up is as follows :—

He should consider, having regard to what has been said above, whether the claim is made *bond fide*; and if on a fair consideration of the matter, and remembering how scrupulously private rights should be respected, he thinks the claim not *bond fide*, he should record his reasons for thinking so, and decide the case without further reference to the claim. It is for the defendant to set it up, and unless he does so the Magistrate has nothing to do with it, and the defendant must set it up at or before the hearing.

Of course, if the Magistrate, on hearing the defendant, thinks his claim of right well founded, he will take no further proceedings; for in that case it will have been shown to him that s. 133 does not apply to the case.

If the Magistrate does not think this claim well founded, so far as he can judge, but considers that it is made *bond fide*, he should allow the defendant an opportunity of asserting it by civil proceedings. The existence of an in-

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¹ 7 Cal. L. R. 443-444; 1 L. R., 6 Cal. 291.

² Paley on Summary Convictions, 5th Ed., pp. 138, 139.

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tention or desire to do this is one test of *bona fides*—*Reg. v. Sandford*.¹ If the defendant does not, within a reasonable time, assert his right, the Magistrate may proceed. If the defendant does so with success, the public right, which is the foundation of proceedings under s. 133, is either negatived or shown to be so doubtful that the Magistrate ought not to proceed further. If the defendant does not go into a Civil Court within a reasonable time, or fails there, the Magistrate may proceed.

Our observations in this judgment are of course directed to that part of s. 133 which relates to the case now before us, and deals with obstructions to public ways.

We may observe that in cases in which danger to public health or safety is involved, we by no means suggest that the Magistrate is fettered in the exercise of the powers given to him under these sections by the considerations to which we have adverted.

Having referred to these general considerations, we proceed to express our judgment upon the case now before us. As will be seen from what we have said, the view expressed by the Magistrate in his excellent judgment in this case as to the propriety of a Magistrate's forming an opinion upon the *bona fides* of a claim of title when set up is, we think, correct. That is, we think, a necessary part of his duty in such cases, and in the present case we are of opinion that the Magistrate's decision that the claim of title set up here was not such a *bona fide* claim of title as ought to prevent his proceeding to make an order is one which we cannot dissent from. Taking all the circumstances before the Magistrate into consideration, the length of the occupation by the defendants, the absence of proof of title (for the mowrosi deed was not, and could not be, put in), the proof of user up to a recent time, the existence of disputes between the rival parties in the village, throwing some light on defendant's present acts, are all matters to be weighed in determining this question, and we think that under the circumstances what the Magistrate had before him was enough to justify him in coming to the conclusion that the claim of right was not *bona fide* raised, and we, therefore, let the order which is the subject-matter of this reference stand. We may add, however, that if it be the case, notwithstanding the absence of proof of it, that the defendants really had a *bona fide* claim of right, although they had not made it appear that they had, they are not, as will be seen when the Full Bench judgment in *Chuni Lall v. Ram Kishen Sahoo*² is delivered next week, without the means of resorting to the Civil Court, should they desire to do so. When the judgment of the Full Bench has been delivered and printed, a copy of that judgment will be put up with these papers when they are returned to the District Judge.

C. D. P.

*Order upheld.*¹ 30 L. T. 601.² *Ante*, p. 460 (of the Original Report). This is a Civil Case.

ORIGINAL CRIMINAL.

Before Wilson, J.

QUEEN-EMPRESS v. MEHER ALI MULLICK AND TWO OTHERS.

Evidence—Statement of accused to police-officer during investigation—Admissions—Confessions—Experts, Evidence of—Medical witnesses, Evidence of—Opinion of experts how elicited—Evidence Act (I. of 1872), ss. 25, 26, 27, 45.

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Instances of statements made by an accused person to a police-officer held to be admissible and inadmissible in evidence against such accused person.

A medical man who has not seen a corpse which has been subjected to a *post-mortem* examination, and who is called to corroborate the opinion of the medical man who made such *post-mortem* examination, and who has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such opinion is to put the signs observed at the *post mortem* to the witness, and to ask what, in his opinion, was the cause of death on the hypothesis that those signs were really present and observed.

IN this case the three prisoners, Meher Ali Mullick, Bhutto, and Torab, were charged with the murder of one Hurree in a godown at the Doveton Young Ladies' Institution, in Park Street, on the 4th April 1888. The three accused were all servants employed in the institution, being respectively the khansama and two of the kitmatghars. The evidence for the prosecution was purely circumstantial. The body of the deceased was found in a box at Juggarnauth Ghat on the evening of that day tied up with cords, and on the neck was found a piece of cloth, alleged to have been torn from a dhotee, twisted and four ply, and it was a portion of the case for the prosecution that death had been caused by strangulation, and that such strangulation was caused by this cloth cord. During the course of the enquiry, to ascertain how the murdered man came by his death, the police on the morning of the 5th April proceeded to the Doveton Institution, and during the course of investigating the case certain statements were alleged to have been made by Torab, and the clothes worn by the deceased was produced to the police, together with an umbrella he had with him and a bill written in the Bengalee character, which it was alleged Hurree had taken with him to the Doveton on the 4th for the purpose of obtaining payment of monies due to him from Meher Ali. At the time these statements were made, Meher Ali was under arrest, but neither of the other two accused was suspected of having had any hand in the murder, and they were not then under arrest.

During the trial it was sought to give evidence for the prosecution of these statements. The statements were the following, and made under the following circumstances: A Superintendent of Police, during the course of his evidence, stated that, on going to the godown where the murder was alleged to have been committed, he saw Torab there, and he asked him if he had seen Hurree the previous day. Upon his being asked what Torab said, counsel for the defence objected. The objection was overruled, and the witness stated: "Torab remained silent, and on my repeating the question he said Hurree had come the previous day at noon to the premises, but that he did not know when he left."

The witness then proceeded to state that he went with others into a godown, and on telling Torab to empty his box Torab produced the Bengalee bill referred to above and made a statement. Counsel for the defence again objected to evidence of this statement being given. The statement sought to be proved was to the following effect:—

Sir, I have something to give you. Meher Ali gave me this paper yesterday evening to keep for him.

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Upon the objection being taken, the question was not allowed, and the question of the admissibility of the evidence was reserved by His Lordship.

At a later stage of his examination the witness stated that, after producing the bill, Torab made another statement, and he was asked what that statement was.

The statement as recorded in the deposition of this witness taken before the Magistrate, upon which he was being examined, was as follows :—

Torab said : " Hurree came here yesterday at 1 P.M. Hurree and I and Bhutto and Meher Ali were seated in this room looking over his account, when Hurree took sick with cholera ; he went out of the room three times to ease himself, and came back and sat down, when angry words passed between him and Meher Ali." He also made a further statement.

Counsel for the defence again objected to this question, and stated that it was clear that the whole of Torab's statement was not there given, and referred to the deposition of this witness before the Coroner, where the same statement was more fully recorded, and contended that, if a portion of the statement was to be admitted, the whole must be admitted. In the deposition of this witness before the Coroner the statement was recorded as follows : " Torab said that the deceased Hurree had called the previous day, was taken ill with cholera, was purged three times, after which a dispute arose regarding accounts in Exhibit F (the Bengalee bill) ; that Hurree had abused Meher Ali's wife, on which Meher Ali had given Hurree a push in the throat, when Hurree fell backwards and became insensible ; that they tried to get a box from the second shelf from the west of the room ; that they tried to put the corpse into the box ; it was too big ; that they had to tie the body to make it fit into the box ; that they then put the lid on after placing a sheet on the body ; that they covered the box with a gunny, and then tied it up with a rope ; that they left the box till evening ; and that at 6 P. M. Meher Ali got a cooly and had the box removed through the small door of the Institution opening into Free School Street."

The argument as to whether evidence of these statements was admissible was reserved till the jury had withdrawn.

Mr. Pugh (*Officiating Standing Counsel*) for the prosecution.

Mr. Gasper for Meher Ali.

Mr. Lal Mohun Ghose for Torab and Bhutto.

Mr. Pugh.—The statements made by Torab are admissible in evidence, as he was not then under arrest ; besides, the evidence has a material bearing on the case against him. The sections of the Evidence Act bearing on the subject are ss. 25, 26, and 27, but these statements are not " confessions " within the meaning of that term as used in those sections. " Admissions " are not " confessions," and are treated in the Evidence Act as distinct. *The Queen v. Macdonald*¹ is an authority in my favour, and that case was followed in *Empress v. Dabee Pershad*.² It is only a confession made to police-officers that is inadmissible in evidence, and if a statement does not amount to a confession it is otherwise admissible. In England it has always been the practice to admit such statements as these—*Rex v. Greenacre*.³ They are put forward as statements made by the accused as their defence, and the prosecution use them for the purpose of showing that they are inconsistent with the truth.

¹ 10 B. L. R. App. 2.

² 1 L. R., 6 Cal. 530.

³ 8 C. & P. 35.

They are not put forward as confessions at all. It is in that connection that I propose to use these statements.

Mr. *Gasper*.—The statement by Torab—"Sir, I have something to give you. Meher Ali gave me this paper yesterday to keep for him"—is perfectly innocuous. I shall not take up your Lordship's time about it.

I do not dispute the law obtaining in England on this subject as referred to by Mr. *Pugh*, but here we are governed by the Evidence Act, which has in this respect made a very great departure from the English law. I do not object to the statement made by Torab on his producing the Bengalee account paper, but the other statements are to all intents and purposes confessions, and it is impossible to distinguish them from a confession even in its ordinarily and accepted sense. I am prepared to contend that the Evidence Act does not make any difference between admissions and confessions. Ss. 17 to 31 deal with admissions, and in s. 24 you come to the first of those sections which deal exclusively with admissions in criminal cases.

[WILSON, J.—Is there any authority for saying that admissions and confessions are one and the same?]

Mr. *Gasper*.—There is the case of *Empress v. Pandharinath*,¹ which lays down that a statement made to a police-officer, although made in self-exculpation, may still be an admission of a criminating circumstance, and thus a confession, and inadmissible under ss. 25 and 26.

[WILSON, J.—That case falls far short of holding that admissions and confessions are the same thing.]

Mr. *Gasper*.—Another case bearing on the question is that of *The Queen v. Hurribole Chunder Ghose*,² and the precise nature of the statement in that case is to be found in Hume's Criminal Digest, p. 310. There is also the case of *Queen v. Macdonald*³ referred to in that case. The real question here is, does the statement contain an admission of a material fact necessary for the prosecution to prove or material for them to prove? If it does, then it amounts to a confession, and is inadmissible, and I contend that the statements I object to fall within that category, and should not therefore be admitted.

Mr. *Pugh* in reply.—There is no authority for Mr. *Gasper's* proposition; a confession is an admission of guilt, and not a statement made with the sole object of exculpating the maker, or, to use the words of Mr. Justice Stephen, "a confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime." See *Queen-Empress v. Babu Lal*.⁴

WILSON, J. (having taken time till the following morning to consider the question).—I have come to the conclusion that evidence can be given as to what Torab said when he made over the paper to the police, but that evidence of the other statements sought to be proved cannot be given.

During the trial Dr. Mackenzie, the police-surgeon, was called to give evidence as to the cause of death, and in the course of his evidence he stated the various marks and indications he found when making the *post-mortem* examination, and gave it as his opinion that death was due to asphyxia caused

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by strangulation. This opinion was challenged by counsel for the defence, and Dr. Mackenzie was cross-examined to show that death had not been caused as alleged. Subsequently the prosecution called another witness, Dr. Macleod, who had not been present at the *post-mortem*, and had not been called before the Magistrate, nor had he had anything to do with the case, the defence having been previously furnished with a statement of what Dr. Macleod was called to prove.

Upon Dr. Macleod being put in the box, the appearance of the body as spoken to by Dr. Mackenzie, together with the signs spoken to by him as having been noticed by him when making the *post-mortem* examination, were put to him, and he was asked, "Upon these facts, what, in your opinion, would be the cause of death?"

Mr. *Gasper* objected to the question.

Mr. *Gasper*.—This question cannot be put. Such a question is only admissible when the facts are admitted, and the question is one relating purely to medical science. Here the facts are not admitted—*R. v. Wright*,¹ *M'Naghten's case*.²

[WILSON, J.—In both those cases the question put to the witness involved the truth of the evidence. Those cases don't raise the precise point that arises here. The only case that I know of in this Court is *Roghuni Singh v. The Empress*,³ and the point raised there is the precise point raised in this case.]

If the judgment in that case is carefully read, it is in my favour, and besides this Dr. Shaw was called by the Court, and under the Evidence Act the Court may put any question to a witness. There is no case in which a question of this sort has been put, and there is no instance of a medical officer being called who has not been present at a *post-mortem*, and who is asked his opinion upon a disputed state of facts. Here we are governed by s. 45 of the Evidence Act, and in this case the only evidence Dr. Macleod can give is that of an expert, and he can only give his opinion on a pure question of science. The only question this witness can be asked is, what are the usual indications of death by strangulation, and not the question put.

WILSON, J. (after rising to consult one of his colleagues, and without calling on Mr. *Pugh*).—I think the question can be put.

Attorney for the Crown: The *Government Solicitor*, Mr. *R. L. Upton*.

Attorney for the prisoner: Mr. *E. J. Fink*.

H. T. H.

¹ R. & R., Cr. Cas., 456.

² 10 Cal. & F. 200 (Cf. p. 211).

³ 1 L. R., 9 Cal. 455.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

QUEEN-EMPRESS v. NILMADHUB MITTER.

Confession—Criminal Procedure Code (Act X. of 1882), ss. 1, 164, 364, 533—Defect in confession—Evidence Act (I. of 1872), ss. 21, 26, 80—Presidency towns, Investigations in.

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June 7.

15 Cal. 595.

An accused, in custody at the time, made to a Magistrate in Calcutta, in the course of a police-investigation held in Calcutta, a statement confessing that he had murdered his father. The accused spoke and understood English, and the Magistrate questioned him in English, and was answered sometimes in English and sometimes in Bengali; whenever the answers were given in English, they were so taken down; when in Bengali, they were written down in English, and read over to the accused in that language, who accepted the English as being the meaning of that which he had stated, and signed the document in the presence of the Magistrate, who affixed the usual certificate thereto. In taking this confession, the Magistrate purported to have acted under ss. 164 and 364 of the Criminal Procedure Code. At the trial, subsequently to the admission of the confession in evidence under s. 80 of the Evidence Act, the Magistrate was called as witness, and deposed to the above facts, with reference to the language in which the confession was taken, and the mode in which it was recorded. *Held*, on a reference to a Full Bench as to whether the confession was inadmissible in evidence by reason of some of the answers having been given in Bengali, but recorded in English, that the provisions of s. 164 of the Code had no application to statements taken in the course of a police-investigation made in the town of Calcutta, and that consequently ss. 364 and 533 had no application. *Held*, nevertheless, that the document was properly admitted upon the evidence of the Magistrate under the provisions of s. 26 of the Evidence Act.

Semle.—That the provisions of s. 164, as read with s. 364, would not be complied with where answers made by an accused to a Magistrate in one language are taken down in another, unless it could be shown that it was impracticable to have taken down the answers in the language in which they were given; and, further, that there would be grave doubt if such a defect could be cured by s. 533.

REFERENCE made by Mr. Justice Wilson under cl. 25 of the Letters Patent.

One Nilmadhub Mitter was tried before Mr. Justice Wilson and a special jury upon a charge of murdering his father, Khetter Mohun Mitter. He was said to have shot his father, at the house of the latter, No. 86, Cornwallis Street, at about 1 A. M. on Monday, the 26th March last. The father died on the 28th.

The police-investigation began early in the morning of the 26th, and continued throughout the day. Soon after 6 o'clock, P. M., Baboo Kalinath Mitter, a Presidency Magistrate, who had been sent for, arrived at the house, 86, Cornwallis Street, where the prisoner was in the custody of the police. The prisoner then made the following confession in the presence of Baboo Kalinath Mitter:

Q.—What is your name?

A.—My name is Nilmadhub Mitter.

Q.—Do you wish to make any statement regarding the wounds inflicted on your father, Baboo Khetter Mohun Mitter?

A.—Yes, I do.

Q.—You must know that there is no obligation on your part in making any statement, and should it be against your interest it will be used against you. Are you, having heard this, still willing to make the statement?

A.—Yes, having heard this, I am still willing to make the statement.

Q.—Has any inducement been made by any one to persuade you to make this statement, or are you making it of your own free will?

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A.—No inducement has been used, and I am making the statement of my own free will.

Q.—Who shot your father?

A.—I shot my father, Baboo Khetter Mohun Mitter.

Q.—When did you do it, and under what circumstances?

B. 1. A.—Last night I shot him when he was asleep in his bed at about 1-30 A.M. I shot him with this pistol. I shot only once. My father was then lying in a room to the south of the other house (*sic*). That is the room in which he generally sleeps. I also shot my youngest brother at the same time by firing another shot. He was asleep in the next room.

[The Bengali words used by Nilmadhub Mitter are :—

আমি আমার পিতাকে গুলি মারিয়াছি যে পিস্তলের দ্বারায় মারিয়াছি
তাহা এই আর তার পরে আমার জাতাকে ঐ পিস্তলের দ্বারায় মারিয়াছি।*

Q.—Where did you get this pistol?

A.—I purchased it from Messrs. Walter, Locke, & Co. about a fortnight ago. I purchased it myself.

Q.—Why did you shoot your father and brother?

B. 2. A.—I shot my father because he did not behave properly with me, and lately I asked him for Rs. 10,000 for giving deposit to Messrs. Barry & Co. for obtaining the post of cashier. My father refused to pay the money. This is nearly 20 or 22 days ago. I then purchased the pistol with the object of shooting my father. I shot my brother Raj Kristo Mitter, because he used to create ill-feeling between myself and my father.

After purchasing the pistol I kept it, with the case, behind the book-shelf in the room in which I am now making the statement.

Q.—When did you purchase the bullets?

A.—I purchased them at the same time that I purchased the pistol.

Q.—Where did the pistol remain?

A.—It remained behind the book-shelf until I took it out this morning at 1-30 A.M.

Q.—Where did you leave the pistol after shooting your father and brother.

A.—I left at the room in which my brother was sleeping.

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NOTE.—I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it, and admitted by him to be correct, and it contains a full and true account of the statement made by him.

KALINATH MITTER,

Presidency Magistrate.

The facts with reference to the language in which the Magistrate and the prisoner spoke to one another, and with reference to the mode in which the con-

* [NOTE.—I shot my father with bullet. The pistol with which I shot is this one, and after that I shot my brother with the same pistol.—Translated by the Court interpreter.

fession was recorded, appeared from the evidence of Baboo Kalinath Mitter, which, so far as it bore upon this matter, was as follows. In examination-in-chief he said :—

I knew the late Khetter Mohun Mitter. I had once, so far as I remember, seen the prisoner before the time I took down his statement. I remember going to 86, Cornwallis Street, on the 26th of March. This statement 'B' is in my writing. It is the deposition made by Nilmadhub. The signature is his. I went in consequence of having received a letter. Before I began writing, I had a conversation with Nilmadhub. No one else was in the room. Before taking his deposition I asked him questions. I asked him whether it was true that he wanted to make any statement. He said, 'yes,' he wanted to make a statement. I asked whether he wanted to do so voluntarily, or whether any pressure had been brought to bear upon him. He said he wanted to make a statement; it was voluntary on his part, no pressure had been brought to bear on him. The first conversation was in Bengali. He understands English, and speaks English. In the deposition the questions were put in English, one and all. He gave some answers in English, and some in Bengali. When he gave an answer in Bengali, I rendered it into English, read it over to him, and asked him if that was his answer, and he said, 'yes.'

In cross-examination the witness said :—

I put no question in Bengali when taking down his statement. Before that I spoke to him in Bengali. Out of the answers I cannot give you the exact number that were given in Bengali. The two answers marked B 1 and B 2 were given in Bengali.

The witness, also in his cross-examination, said :—

In 'B 1' a part, not the whole, of the English is a translation of the Bengali that follows. I put no questions in both English and Bengali.

At the trial this confession was admitted in evidence, under s. 80 of the Evidence Act, previously to the examination of Kalinath Mitter. The learned Judge in charging the jury pointed out to them that, apart from the confession, the other evidence in the case was not sufficient to support a conviction against the prisoner.

A majority of six to three of the jury returned a verdict of guilty, in which verdict the learned Judge agreed, and the prisoner was convicted, subject to the opinion of the Court upon the question hereinafter stated. Sentence was deferred, and the prisoner remanded to jail.

The question reserved was "whether, having regard to the facts stated by Baboo Kalinath Mitter, and to the terms of the confession itself, that confession is rendered inadmissible in point of law, by reason of some of the answers of the prisoner having been given in Bengali, but recorded in English?"—and in reserving this question the learned Judge stated that there was nothing to show that the irregularity, if any, in recording the confession, had injured the accused in any way as to his defence on the merits.

Mr. Woodroffe and Mr. Henderson for the prisoner.

The Advocate-General (Mr. Paul) and the Officiating Standing Counsel (Mr. Pugh) for the Crown.

Mr. Woodroffe.—The confession was admitted in evidence under s. 80 of the Evidence Act previous to the evidence given by Kalinath; I objected to it on several grounds, *viz.*, that on the face of the document it did not purport to have been taken in accordance with the law, that there was no proof that it was signed by the accused, and that s. 80 did not apply to presumption as to the signature of the accused. Kalinath was not called as a witness for the purposes

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of s. 533 of the Criminal Code, but because he was a witness before the committing Magistrate. The mode in which the confession was taken down is not in accordance with s. 364 of the Criminal Procedure Code. The Magistrate and the accused were both Bengalis, and it was practicable for the former to have recorded the answers in the language in which they were given. The Magistrate is certain that he put two questions in Bengali, and there may have been others. If it should be contended that the confession can be good as to part and bad as to the other parts, I submit that the answer to the question—who shot your father?—might have been consistent with a shooting by accident or in self-defence. In the part of the confession marked B 1 there are a number of the English words which find no place in the Bengali. Has not the prisoner been prejudiced by this mode of taking down his confession? I submit he has. The evidence in the case showed that his younger brother was found standing up in the room in which his father lay, and the doctor's evidence showed that the wound on the younger brother might possibly have been self-inflicted. It was therefore important to see whether, as stated by the accused in his confession, the younger brother was asleep at the time. The Bengali words in B 1 do not mention this point. Moreover, it does not appear that the Bengali words were read over to the prisoner at all.

The Magistrate appears to have done that which was held fatal to a confession in the case of *Queen v. Bheebekke*.¹ The confession in the part marked B 2 is not clear; the evidence at the trial showed that the pistol was bought on the 2nd March; and the refusal of the father to stand security for the prisoner for the appointment in Barry & Co.'s Office was long after the purchase. Again, the sum mentioned as the security required was in the confession Rs. 10,000, but the evidence in the case disclosed that Rs. 20,000 had been asked for by Barry & Co. All these matters make it of the utmost importance to show that the confession was taken down correctly. Secondary evidence of this imperfect confession could not be accepted—*Queen-Empress v. Viran*.² Parker, J., there held that the provisions of s. 164 were inoperative, and that s. 533 would not render a confession admissible where no attempt had been made to conform with the provisions of s. 164. See also *Reg. v. Bai Ratan*,³ *Queen v. Omerto Govindo*,⁴ *Queen v. Daya Anand*,⁵ *R. v. Shivya*.⁶ Kalinath's evidence rebutted the presumption that the confession had been properly given, and therefore s. 533 had no application; the concluding portion of s. 533 shows that it is only when evidence is taken for the purposes of that section that the saving clause has any application. The confession having been wrongly admitted in the first instance, it ought to have been withdrawn after the evidence given by Kalinath. The moral effect of the confession on the jury would have been very different had they first heard the evidence of Kalinath as to how the confession was taken—the case of *Reg. v. Bai Ratan*.³ But in any case Kalinath's evidence only amounts to this, that he took down a certain statement in writing, and that the statement put before him was that statement; he was not asked what the accused said or answered. Assuming I am in error in saying that s. 533 does not apply, then what effect should be given to the words "duly made the statement recorded" in s. 533? I submit that the word "duly" has reference to the provisions of the law. [WILSON, J.—I think the meaning of s. 533 is that, if the Court finds that the Magistrate has not done

¹ 4 N. W. (All.) 16.² I. L. R., 9 Mad. 224.³ 10 Bom. H. C. 166.⁴ 10 Bom. H. C. 497.⁵ 11 Bom. H. C. 44.⁶ I. L. R., 1 Bom. 119.

all his duty, the Court may then take evidence to show that the prisoner has done all that was necessary for him on his part to do. It seems not to be necessary to take evidence under that section to prove that the Magistrate has done all that is necessary.] Further, Kalinath did not inform the accused that he was a Magistrate; the accused was brought from the hands of the police to Kalinath, and during the confession the police, although not actually in the room, were just outside the door. [PIGOT, J.—The cases regarding statutory confessions set out in *Russell on Crimes*, 426, appear to be in your favour.]

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The *Advocate-General* (Mr. Paul).—There is a great difference between a statement of law, as laid down in *Russell on Crimes*, and the actual law in this country. Under s. 364, the accused, after his statement is taken down, is at liberty to explain or add to his answers, and where the whole is conformable to that which he declares to be the truth, the Magistrate shall certify that the examination was taken in his presence and hearing, and that it contains a full and true account of the statement made by the accused. That is what substantially took place in this case; the statement was read over to the accused, and he did not object to it or add to it, and that being so it was admissible.

[Mr. Woodroffe.—The certificate of the Magistrate is under s. 364.] Be it so, it is also in compliance with s. 364, as s. 164 provides that it shall be signed in the manner prescribed by s. 364, but surely not without being read over to the accused. The evidence at the trial shows that the prisoner understood English; as to this there is the evidence of Kalinath, the evidence of Bradshaw, who sold the pistol to him; and the cross-examination was not directed to rebut this fact. Then in what language was he examined? Undoubtedly all the questions were put in English, and the answers also given in that language, although it appears that some of them may have been both in Bengali and English. It cannot, however, be said that the examination was conducted in Bengali, nor partly in Bengali and partly in English; then under those circumstances it was not practicable to take down the examination all in Bengali. The intention of s. 364 is that the questions and answers should be taken down in one language; it was not practicable to do this, as the answers were given in two languages, and then, if it is not possible so to do, they should be taken down in English; when an answer was given in Bengali, it was rendered into English, and read over to the accused, and he acquiesced in it. This was sufficient. The words "duly made and recorded" in s. 533 mean "made in due course of things," and s. 533 cures any defect. The case of *Queen-Empress v. Viran*¹ merely decides that when a statement taken is radically insufficient, then the Court would hold the statement to be inadmissible. Here in the present case the confession is not radically insufficient. The case of *Queen v. Ramanjiyya*² shows that ss. 122 and 346 of the old Code must be read together, and that evidence may be given to explain that a confession has been duly recorded. The case of *Titu Maya v. The Queen*³ does not follow *Bai Ratan's* case.

The *Officiating Standing Counsel* (Mr. Pugh).—There are no instances of confessions used on the Original side of the High Court having been taken down in any other language than English. In the case of *Biddi Churn Nurie*, decided by Prinsep, J., on the 4th September 1885, the Magistrate was examined, and stated that the confession was made in Urdu, but was taken down in English; that confession was admitted. [O'KINEALY, J.—Does s. 164 of the

¹ 1. L. R., 9 Mad. 224.² 1. L. R., 2 Mad. 5.³ 1. L. R., 8 Cal. 618 (note).

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Criminal Procedure Code apply at all having regard to s. 1? S. 164 falls under Ch. XIV., which is headed, "Information to the Police, and their powers to investigate." Most of that chapter, if not all of it, appears to have no reference to the Presidency. If s. 164 does not apply, neither does s. 364, and those two sections are the only grounds for saying that the answer to the Magistrate ought to have been taken down in Bengali. An investigation of Ch. XIV. clearly shows that it is only applicable to mofussil police-reports and investigations. But, assuming the chapter to apply, the requirements of ss. 164 and 364 have been complied with. S. 364 provides for the recording of a confession in three languages. It cannot be said that the prisoner has been examined in two languages, because he has given occasional answers in Bengali. But supposing the confession has not been properly recorded, is it a defect? I submit not. It is true that the case of *Queen-Empress v. Viran*¹ lays down that the provisions of s. 164 are imperative, yet the decisions in this Court do not go to that effect. See *Titu Maya's* case and those following it. Substantial compliance with the section is only necessary—*R. v. Kala Chand Pal*;² *Behari Hajdi, In re*;³ *Krishno Monee v. Empress*.⁴ The other cases which show that any defect is cured by s. 533 are: *Empress of India v. Bhairon Singh*;⁵ *Empress of India v. Yakub Khan*;⁶ *Empress v. Sagambur*;⁷ *Empress v. Munshi Sheikh*;⁸ *Fekoo Mahto v. Empress*.⁹

Mr. Woodroffe in reply.—It is said that s. 1 of the Code and Ch. XIV. show that s. 164 does not apply to the Presidency. Supposing it to be so, then the matter is reduced to an absurdity, for the confession was admitted under s. 80 of the Evidence Act, and that section has no applicability if s. 164 does not apply. [PETHERAM, C.J.—Assuming that the confession was wrongfully admitted under s. 80, the defect is cured by Kalinath's evidence.] No, the document was not admissible in evidence at the time when it was put in evidence; it was admitted on the Monday, and Kalinath's evidence was taken on the Friday following. Supposing s. 164 does not apply, did Kalinath's evidence make the confession evidence? He did not pretend to say that he could tell which of the recorded answers were given in Bengali; the translation of the Bengali words does not fit in any one place in the confession; what the Magistrate did was not to make a translation of the Bengali words, for the English sentences are many more in number than the Bengali, and bear a further meaning. It has been assumed that the prisoner spoke English; there is no evidence to that effect. It is absolutely necessary that the Court should have the exact words of the confession; failing this the prisoner is prejudiced. Then supposing even that the Court would hold that, there being no proof that the Bengali words were read, nor that the whole of the English statement was read over, with or without the Bengali words, before it was signed by the accused, can it be said that the mere fact of the signature of the accused makes it a statement that could be safely used as evidence against him? Suppose the Bengali words were taken into the confession, do they amount to a confession of the murder? No circumstances are given here at all; it may well be that it was not murder, but suicide or accident. Then as to whether the confession could be struck out after having once been received in evidence, there is direct authority of the English Courts that it can—*The Queen v. Garner*.¹⁰ Then can it be held that s. 164 does not apply? To hold so would be to hold that the police in Calcutta

¹ I. L. R., 9 Mad. 224.² 24 W. R. Cr. 29.³ 5 C. L. R. 238.⁴ 6 C. L. R. 289.⁵ I. L. R., 3 All. 338.⁶ I. L. R., 5 All. 253.⁷ 12 C. L. R. 120.⁸ I. L. R., 8 Cal. 616.⁹ I. L. R., 14 Cal. 539.¹⁰ 1 Den. C. C. 329.

are under the control of no law, and that a Police Magistrate may take evidence of a confession in Calcutta, but he may not do so outside Calcutta. The whole mode of taking the confession tends to show that it was taken under s. 164. Then, as to whether the defects in the confession can be remedied by s. 533 of the Code: the authorities show that they cannot. See *Empress v. Hari Kisto Birwar*¹ and *Empress v. Manoo Tamoolee*,² where the confession was defective as not being signed or marked by the prisoner, but the Court held that this defect could not be cured by s. 533 of the Criminal Procedure Code. The only case since the new Code of 1882 is the case of the *Queen-Empress v. Viran*,³ and that is in my favour. S. 553 of the Code does not apply, as I have already pointed out. Kalinath was not called under that section. I obliged them to call Kalinath Mitter. He was not called from day to day, but when it was necessary for them to show that there was no police interference. It was for the purposes of their case that he was called. Had it not been the case, and if the learned Judge had considered that there was some statutory defect in the confession itself, Kalinath Mitter would have been called much earlier. The case of the *Queen v. Ramanjiyya*, which I have before cited, shows that "duly made" is equivalent to "duly recorded."

The opinion of the Court (PETHERAM, C.J., WILSON, PIGOT, O'KINEALY, and GHOSE, JJ.) was delivered by

PETHERAM, C.J.—The only fact which it is necessary to mention beyond that stated by the learned Judge is that the document, the admissibility of which is in question, was put in on Monday, May 21st, as being a document made under the provisions of s. 164 of the Criminal Procedure Code, and admissible in evidence without proof under the provisions of s. 80 of the Evidence Act, and that Baboo Kalinath Mitter was not called until the following Friday.

Several questions have been raised and argued before us as being necessary to the decision of the general question whether the document upon the facts proved at the trial was properly admitted as evidence against the prisoner. They were: 1st, does s. 164 apply to a statement made by a person in custody to a Magistrate in Calcutta in the course of an investigation, made by the police in the town of Calcutta, into the circumstances of a crime committed in Calcutta; secondly, if it does not, was the document in question properly admitted upon the evidence of Baboo Kalinath Mitter under the provisions of ss. 21 and 26 of the Evidence Act? thirdly, if s. 164 does apply to this case, was the statement of the prisoner recorded in accordance with the provisions of that section coupled with s. 364? and, fourthly, if it was not so recorded, is the defect cured by s. 533 of the same Act?

The first question depends on the construction to be placed on s. 1 of the Criminal Procedure Code. That section, so far as it is material to the present question, is as follows: "In the absence of any specific provision to the contrary, nothing herein contained shall affect . . . the police in the town of Calcutta."

S. 164 deals with statements made to a Magistrate in the course of an investigation under Ch. XIV. of the Act, and the point for consideration is, whether the investigation, in the course of which the statement in question was made, was an investigation under that chapter.

The investigation was by the Calcutta Police in the town of Calcutta, and unless there is some specific provision making Ch. XIV. applicable to the police

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in Calcutta, the section does not apply, as the statement was not made in the course of an investigation under the chapter.

The chapter is headed, "Information to the Police, and their powers to investigate." It is clear that many sections of the chapter cannot refer to Calcutta, and the only section which must apply to the police in Calcutta is s. 155. But we do not think that that section is sufficient to amount to a provision that the whole chapter is to apply to the police in Calcutta, or to give them any power to make investigations under it, and it follows that the present case is not in any way affected by s. 164 of the Code, or, as a necessary consequence, by s. 364 or s. 553.

The second question then arises, whether the document in question was properly admitted under the provisions of the Evidence Act?

Baboo Kalinath Mitter was called, and he stated that he questioned the prisoner in English, that the prisoner understands and speaks English, and sometimes answered him in English and sometimes in Bengali; that when his answers were in English he wrote them down, when in Bengali he wrote them in English, and read over what he had written to the prisoner; that the whole document contains the prisoner's deposition, and that the prisoner signed it in his presence.

If the contents of the document did not amount to a confession, the document itself would be relevant as an admission under s. 21 of the Evidence Act; and though it is a confession, it is relevant, and may be proved, unless it is excluded by s. 26 of that Act. That section is as follows: "No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

At the time when the prisoner made the statement he was in the custody of the police; but it was made to, and in the immediate presence of, Baboo Kalinath Mitter, who has stated what is undoubtedly the fact, that he is a Magistrate for Calcutta, and consequently it is obvious that the confession is not excluded by s. 26; and this being so, and it being proved that the whole of the statements contained in the document were either the actual words spoken by the prisoner, or were accepted by him as representing the true meaning of what he had said, and as the whole document is signed by him with his own hand, the whole of the admissions contained in the document were strictly proved to have been made by him, and were admissible against him under the Indian Evidence Act.

In this view of the law, the third and fourth questions become immaterial in the present case, but we wish to guard ourselves from being supposed to hold that when answers are made by an accused person in one language and written down in another, unless it is shown that it was impracticable to write them in the language in which they were spoken, s. 164 would be complied with; on the contrary, we think that, when such a proceeding is adopted, the statement of the accused would not be recorded under that section, read with s. 364, and we have very grave doubts whether the defect could be cured under the provisions of s. 533.

The question as to whether or not s. 164 has force in Calcutta was not raised at the trial. The document was put in by the prosecution, and admitted in accordance with the practice which has been followed since the passing of the Criminal Procedure Code of 1882 at Sessions held in Calcutta.

In this Court the point has for the first time been raised, and argued by the Crown.

On the whole, for the reasons given in our answers to the first and second questions, we think that the confession was in the present case admissible in point of law, and we answer the question reserved by the learned Judge in the negative.¹

T. A. P.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

IN THE MATTER OF HARI DASS SANYAL AND OTHERS *v.* SARITULLA.²

Further enquiry—Notice to accused—Discharge by Magistrate—Criminal Procedure Code, Act X. of 1882, s. 437.

No notice to an accused person is necessary in point of law before an order under s. 437 can be passed; but as a matter of discretion it is proper that such notice should be given.

Held by the majority of the Full Bench (PRINSEP, WILSON, TOTTENHAM, NORRIS, PIGOT, and O'KINEALY, JJ.)—After an enquiry by a Subordinate Magistrate and the discharge of an accused person, a Sessions Judge or Magistrate has jurisdiction, under s. 437 of the Criminal Procedure Code, to order a "further enquiry" or a re-hearing upon the same materials which were before the Subordinate Magistrate, *i. e.*, when no further evidence is forthcoming. But (PRINSEP, J., dissenting) the words "further enquiry" in that section mean the enquiry preliminary to trial which regularly results in a charge or discharge, and do not include the trial. And if on the evidence taken the accused ought to be committed, then, in a case triable only at the Sessions, the proper course is to commit under s. 436; in other cases to refer to the High Court.

Per PRINSEP, J.—The word "enquiry" includes a trial, and the "further enquiry" would therefore allow of the framing of a charge, and the cross-examination of witnesses for the prosecution.

Per PETHERAM, C.J., and GHOSE, J.—The power given by s. 437 of the Criminal Procedure Code to order a further enquiry is confined to cases in which the revising officer is satisfied, for one of the reasons mentioned in s. 435, that the subordinate officer has proceeded on insufficient materials, and that with a more exhaustive enquiry further material would be forthcoming. It was not intended that such an enquiry should be granted simply for the reconsideration of evidence.

THIS reference arose out of a case and counter-case of rioting; the two cases were heard separately by the Joint-Magistrate of Attia, who, on the hearing of the case against Hari Dass Sanyal and others, discharged the accused. In the counter-case the accused Saritulla and others were convicted, but on appeal to the Sessions Judge this conviction and sentence was reversed. Saritulla thereupon applied to the Sessions Judge to set aside the order of discharge passed

¹ An application was subsequently made to WILSON, J., for leave to appeal from the conviction and sentence to the Privy Council. In refusing the application Mr. Justice Wilson said: "I have fully considered the matter, and I have consulted the other Judges, before whom the question of law I referred was argued and decided, and I think it clear that I must refuse the application. The principles upon which Courts could act in such matters were fully considered in the Bombay High Court in the case of *Reg. v. Pestanji Dinsha*, 10 Bom. H. C. 75. I fully accept the explanation of law given in that case by Chief Justice Westropp in his judgment, and I think, accepting this, that I should go quite outside them, and far beyond any of the authorities in any High Court in this country, or decision of Her Majesty in Council, if I were to make the order now asked for. The application is, therefore, refused.

² Full Bench on Criminal Motion No. 53 of 1887 against an order of *R. F. Rampini, Esq.*, Sessions Judge of Mymensingh, dated the 23rd February 1887.

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in the case of Hari Dass Sanyal and others, urging that the Joint-Magistrate had not examined all the witnesses forthcoming on behalf of the prosecution; it however did not appear that the "witnesses forthcoming" had been summoned when the case was before the Joint-Magistrate. On this application the Sessions Judge passed the following order:—

I am inclined to grant this application. I do not think that the discrepancies in the evidence which the Joint-Magistrate has alluded to in his judgment are of such importance as he attaches to them. From his judgment in the cross case, in which the present applicant was an accused, I am led to think that the Joint-Magistrate may have taken a wrong view of the facts of this case. The gunshot wound, from which the complainant's brother is proved by the medical evidence in this case to be suffering, is strong circumstantial evidence in support of the complainant's story. Under these circumstances I think this case should be re-enquired into, particularly as it is urged on behalf of the applicant that the Joint-Magistrate did not examine all the witnesses that are forthcoming on his side. . . . I am aware that in certain cases [see *Darsan Lall v. Fumuk Lall*]¹ the High Court of this Province has held that a Sessions Judge is not competent to order a re-hearing of a case unless additional evidence is forthcoming. But in this case additional evidence is forthcoming. It is said that the Joint-Magistrate did not examine four witnesses named in a petition presented to him; moreover, it would seem to me from the Bombay High Court ruling in the case of the *Queen-Empress v. Dorabji Harmasji*,² and the very recent Full Bench ruling of the Allahabad High Court in the *Queen-Empress v. Chotu*,³ that a re-enquiry can be ordered even when no additional evidence is forthcoming. From the provisions of s. 437 of the Criminal Procedure Code, and the Bombay High Court ruling, it is evident that no notice to the opposite party is necessary before ordering a re-enquiry under s. 437 of the Criminal Procedure Code. I have, therefore, not given any such notice. I therefore, under s. 437 of the Criminal Procedure Code, direct a further enquiry into this case.

Hari Dass and the other persons affected by this order applied to the High Court to have the order of the Sessions Judge set aside on the following grounds:—

1. That the Sessions Judge had nothing before him to indicate the nature of the additional evidence referred to by him, and that, without being satisfied that such evidence would have been material, and without any satisfactory explanation of the reasons which induced the prosecution to withhold such additional evidence during the trial of the case, the Sessions Judge ought not to have ordered what is practically a re-trial of the case.

2. That the law not allowing an appeal on the facts in cases of discharge, the Sessions Judge was wrong in dealing with the matter as an appeal on the facts.

3. That the Sessions Judge was unable to indicate any point for further enquiry; and had practically ordered a new trial.

4. That the Sessions Judge had no power to order a further enquiry when there was no error of law committed by the Joint-Magistrate, and when no material evidence was forthcoming.

5. That the order ought not to have been made *ex parte*, or that at all events, as a matter of sound discretion, the Sessions Judge ought to have given notice.

6. That the Sessions Judge had erred in law in allowing his judgment to be influenced by the record of another case to which the petitioners were no parties.

¹ I. L. R., 12 Cal. 532.² I. L. R., 10 Bom. 131.³ I. L. R., 9 All. 52.

7. That the Sessions Judge had been mainly influenced in the matter by the opinion he had formed in the counter-case which he decided on appeal.

On the hearing of this application the Court (PETHERAM, C.J., and GHOSH, J.), considering that the questions arising were of great importance, and that the rulings on the points were conflicting, referred the following questions to a Full Bench :—

1. Whether, after an enquiry by the Joint-Magistrate and discharge of the accused, a Sessions Judge or the Magistrate, as the case may be, has jurisdiction, under s. 437 of the Criminal Procedure Code, to order a "further enquiry," or a re-hearing, upon the same materials which were before the said Joint-Magistrate, *i.e.*, when no further evidence is forthcoming?

2. Whether in the circumstances of the case and the materials before him the Sessions Judge had authority under s. 437 to direct a fresh enquiry?

3. Whether he could do so without notice to the accused?

Mr. Woodroffe and Baboo Grish Chunder Chowdhry for the petitioners.

The Deputy Legal Remembrancer (Mr. Kilby) on behalf of the Crown.

Mr. Woodroffe.—I submit the order was bad, as no notice was given to my clients. I rely on the cases of *Chundy Churn Bhuttacharjea v. Hem Chunder Bannerjea*;¹ *Jeebunkisto Roy v. Shib Chunder Das*;² *Queen-Empress v. Amir Khan*;³ *Queen-Empress v. Erramreddi*;⁴ *Darsun Lall v. Jumuk Lall*;⁵ *Queen-Empress v. Hasnu*;⁶ *Queen-Empress v. Chotu*.⁷ All the High Courts, except the Bombay High Court in the case of *Queen-Empress v. Dorabji Hormasji*,⁸ have held that notice is necessary; and s. 439 of the Code is explicit on the point. S. 436 also always down that the accused shall have an opportunity of showing cause. [PETHERAM, C.J.—We are all agreed on that point.] On the second question, the Judge had no materials before him for a fresh enquiry; he merely found that the Joint-Magistrate "did not examine all the witnesses forthcoming," but did not find that the evidence they could have given would have been material. On the first question referred, the matter depends on the consideration of the word "further" and the word "enquiry." Now, "enquiry" is defined in s. 4 of the Code as including "every enquiry conducted under this Code by a Magistrate or Court." The word is used in many other sections of the Code, but there is one general line of thought made use of in its use. Throughout the whole of Ch. XV., and up to the end of the Code, save in the two sections mentioned in the Bombay case, the word "enquiry" is contrasted with the word "trial," and seems to be distinctly referable to preliminary proceedings before a Magistrate as distinguished from a trial. In the old Code an "enquiry" is defined as "an enquiry conducted by a Magistrate," and in that Code there was also a definition of the words "enquired into" and "trial." The new Code has dropped those definitions, and has enlarged them under the term "investigation." There is a difference between an "investigation" and "trial," and an enquiry does not include an investigation. In Ch. XX. the heading is "of trial of summons cases," and in Ch. XXII. the heading is "of summary trials." In s. 176 the word seems to be used in the sense of a local enquiry, and in another different sense in ss. 375 and 380, on which sections the Bombay Court have built up so much argument. Under

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15 Cal. 608,¹ I. L. R., 10 Cal. 207.² I. L. R., 10 Cal. 1027.³ I. L. R., 8 Mad. 336.⁴ I. L. R., 8 Mad. 296.⁵ I. L. R., 12 Cal. 522.⁶ I. L. R., 6 All. 367.⁷ I. L. R., 9 All. 52.⁸ I. L. R., 10 Bom. 131.

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s. 428 the taking of evidence is, for the purposes of Ch. XXV., to be deemed an enquiry, and what reason is there for reading ss. 375 and 380 in a different way? The above are all the places in which the word is used until the referring sections. In s. 436 the words "fresh enquiry" are used, and in s. 437 "further enquiry." S. 537 governs the revisional sections. [PIGOR, J.—Is not s. 537 to be taken subject to any former provisions of the Code?] I understand the case of *Bachu Mullah v. Sia Ram Singh*¹ to show that s. 537 governs the revisional sections, and that an erroneous view of a judicial officer is not a failure of justice which would entitle another Court to deal with the matter except on appeal. Under s. 439, read with s. 423, the High Court has all the powers of an Appellate Court; and has power under that section to set aside an order of discharge. In the Allahabad case of the *Queen-Empress v. Chotu*² the Chief Justice uses certain sections to limit the cases which may be brought up on revision; but is that so? S. 423 gives the Appellate Court power to reverse an order on appeal, to direct a further enquiry or an accused to be re-tried, and to reverse or alter any other order. If in s. 439 the High Court as a Revisional Court is entitled to exercise powers under s. 423, there is nothing to support the conclusion of the Chief Justice.

The Bombay Court, in the case of the *Queen-Empress v. Dorabji Hormasji*,³ eludes the force of the observations of MITTER and FIELD, JJ., in the case of *Chundi Churn Bhuttacharjea v. Hem Chunder Bannerjea*,⁴ and the case of *Jeebunkisto Roy v. Shib Chunder Das*⁵ lays down that a further enquiry must be on additional evidence. This case was followed in *Darsun Lall v. Jumuk Lall*,⁶ and the cases of *Queen-Empress v. Hasnu*,⁷ *Queen-Empress v. Erramreddi*,⁸ and *Queen-Empress v. Amir Khan*,⁹ are to the same effect. There is also an unreported case of *Abdul Nazir v. Gunga Singh*, decided by PETHERAM, C.J., and PRINSEP, J., on the 3rd March 1887 (Cr. Motion 77 of 1887), similarly decided.

The Deputy Legal Remembrancer (Mr. Kilby) for the Crown.

The following opinions were delivered by the Full Bench:—

PETHERAM, C.J.—S. 435 of the Code of Criminal Procedure gives power of revision, and is in these terms:—

The High Court or any Court of Session, or District Magistrate, or any Sub-Divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction, for the purpose of satisfying itself or himself as to the correctness, legality, or propriety of any finding, sentence, or order recorded or passed, and as to the regularity of any proceeding of such inferior Court.

If any Sub-Divisional Magistrate acting under this section considers that any such finding, sentence, or order, is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

Orders made under ss. 143 and 144, and proceedings under s. 176, are not proceedings within the meaning of this section.

S. 436 gives power to Courts of Session or District Magistrates to order committal where a case is triable exclusively by the Court of Session.

¹ I. L. R., 14 Cal. 358.

² I. L. R., 9 All. 52.

³ I. L. R., 10 Bom. 131.

⁴ I. L. R., 10 Cal. 207.

⁵ I. L. R., 10 Cal. 1027.

⁶ I. L. R., 12 Cal. 522.

⁷ I. L. R., 6 All. 367.

⁸ I. L. R., 8 Mad. 296.

⁹ I. L. R., 8 Mad. 336.

When, on examining the record of any case under s. 435 or otherwise, the Court of Session or District Magistrate considers that such case is triable exclusively by the Court of Session, and that an accused person has been improperly discharged by the inferior Court, the Court of Session or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh enquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Court of Session or District Magistrate, improperly discharged.

Provided as follows—

(a) that the accused has had an opportunity of showing cause to such Court or Magistrate why the commitment should not be made.

(b) that, if such Court or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Court or Magistrate may direct the inferior Court to enquire into such offence.

S. 437 gives power to order further enquiry when a complaint has been dismissed or discharged :—

On examining any record under s. 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged.

The section which relates to dismissals is s. 203. This section is in the chapter headed "Complaints to Magistrates." Under this chapter the Magistrate is to examine the complainant on oath, and, if he thinks fit, to direct an investigation; and (s. 203) he may, if not satisfied with the statement of the complainant and the result of the investigation, if any, dismiss the complaint without issuing any process.

The sections which relate to discharges are ss. 209 and 253.

The first is in the chapter headed "Enquiry into Cases triable by the Court of Session or High Court."

S. 208 provides that the Magistrate shall, when the accused is brought before him, hear the complainant and the evidence on both sides, and (s. 209), if he is not satisfied that there are sufficient grounds for committing the accused, discharge him.

S. 253 is in the chapter headed "Trial of Warrant-cases by Magistrates."

S. 252 provides that, when the accused is brought before him, the Magistrate shall hear the complainant, and shall hear the evidence for the prosecution, and summon witnesses *for the prosecution*, if necessary, and (s. 253) shall, if he finds that no case has been made out which unrebutted would warrant a conviction, discharge the accused.

In cases under ss. 200-203 it would appear that, if the Magistrate does not believe the complainant, and thereupon, without taking any further step, dismisses the complaint, the revising officer may, under s. 437, direct that, by way of further enquiry, he shall cause an investigation to be made, or if one has been made which he considers insufficient or unsatisfactory, or if he considers that the complainant has not been sufficiently examined, may order that the complainant be re-called, and his examination be continued. But it is difficult to see how a further enquiry can be ordered in any but one of these three cases, as it is clear that the enquiry is preliminary to the issue of process, and the next step to take, if the enquiry, as far as the collection of materials is complete, is the issue of process. In such a case the only Court which could deal

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with the matter must be the High Court, under s. 439, embodying sub-s. (c) of s. 423.

In cases under ss. 206-209 the Magistrate is, in the presence of the accused, to hear the evidence of the complainant or otherwise produced before him, and must, unless for some good reason he does not think it necessary, issue process and compel the attendance of other witnesses or the production of documents, and, if he is not satisfied that there are grounds for putting the accused on his trial, may discharge him *at any time*. Here, if in the opinion of the revising officer the Magistrate has not sufficiently examined the witnesses, or has not summoned witnesses who should have been summoned, or has not compelled the production of documents which were material for the prosecution, no doubt the revising officer may direct a further enquiry, either by recalling witnesses who have been examined, or by compelling the attendance of others, or the production of documents, so as to complete the enquiry which must be made before the charge is framed. But if the revising officer is satisfied that all the materials have been collected, I do not see how the revising officer can direct a further enquiry, because he does not agree with the conclusion at which his subordinate has arrived upon those materials. To do so is in effect to direct the Subordinate Magistrate, against his own view of the case, to frame a charge—a power which is given to the High Court alone under the section above cited.

The only other cases are those which arise under Ch. XXI., ss. 251-253. These are cases in which the accused is brought before a Magistrate on a warrant. In these cases the Magistrate is to take all such evidence as is produced before him; to ascertain if there are other witnesses likely to be acquainted with the facts of the case and *able to give evidence for the prosecution*, and to summon such of them *as he thinks necessary*; and if, upon hearing the witnesses produced, and if he thinks it necessary to compel the production of other evidence, after hearing such other evidence, the Magistrate finds that no case has been made out against the accused, which, if un rebutted, would warrant his conviction, the Magistrate shall discharge him.

Here, also, it is manifest that the revising officer may, if he thinks fit, direct the subordinate officer to compel the production of further witnesses, and also, as it seems to me, direct him to recall and further examine any witness who has been already examined. But if and when the revising officer is satisfied that all the materials which can be collected have been collected, I do not see how he can direct the Subordinate Magistrate to make further enquiry, the next step being to frame a charge, which is a proceeding subsequent to the completion of the enquiry, the taking of which, as it seems to me, can only be compelled by the High Court.

On the whole, then, in my opinion, the power given by s. 437 to order a further enquiry is confined to cases in which the revising officer is satisfied, for one of the reasons mentioned in s. 435, that the subordinate officer has proceeded on insufficient materials, and that, with a more exhaustive enquiry, further material would be forthcoming.

I think notice is not required by the law, but that, except in cases of dismissal under s. 203, notice should be given

WILSON, J. (TOTTENHAM, NORRIS, PIGOT, and O'KINEALY, JJ., concurring).—The main question which we have to answer on this reference seems to me to involve three distinct enquiries, which should, I think, be considered separately. And as to each of those three enquiries, the language of the present Code

of Criminal Procedure is so entirely different from that used in the earlier Code that the decisions upon that earlier Code afford us no practical assistance. The three questions I propose to consider are :—

- I. On what grounds is an order of discharge made under s. 209 or s. 253 liable to be set aside by a Court of Revision?
- II. What Courts have jurisdiction to set it aside?
- III. What orders are proper to be made if an order of discharge is to be set aside?

The series of ss. 435 to 439 must, as more than one learned Judge has pointed out, be read together. Of these, s. 435 is the principal section dealing with the grounds upon which revisional jurisdiction may ordinarily be exercised. It says that—

The High Court, or any Court of Session, or District Magistrate, or any Sub-Divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the records of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction, for the purpose of satisfying itself or himself *as to the correctness, legality, or propriety of any finding, sentence, or order recorded or passed, and as to the regularity of any proceedings* of such inferior Courts.

This I read as an express enactment that every finding, sentence, or order, is liable to review, not only on the ground of illegality or irregularity, but also on the ground of incorrectness, that is to say, on the ground that it is wrong on the merits. And an order of discharge is no exception to the general rule. I do not mean to say that an order of discharge may not, under the subsequent sections, be set aside on other grounds, such as the discovery of fresh evidence, but only that it is liable to be so dealt with on any of the grounds here mentioned.

The second point for enquiry is, what tribunals have jurisdiction to set aside an order of discharge? This Court has power under s. 439 to deal as a Court of Revision with any finding, sentence, or order which comes under its notice. Sessions Judges and District Magistrates in most cases have not this power; their course ordinarily is to refer the matter to this Court if they think there is ground for doing so. But in particular instances they themselves exercise revisional powers. And with regard to orders of discharge it is expressly enacted that they may do so, though to what extent and in what form is of course another question. S. 436 says that—

When, on examining the record of any case under s. 435 or otherwise, the Court of Session or District Magistrate considers that such case is triable exclusively by the Court of Session, and that an accused person has been improperly discharged by the inferior Court, the Court of Session or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh enquiry, order him to be committed for trial.

The words here used, “instead of directing a fresh enquiry,” must, I think, refer to the power given by the next section of ordering a “further enquiry,” for, except in the single case spoken of in prov. *b*, there is no other section giving power to order any enquiry at all. The next section, s. 437, says :—

On examining any record under s. 435 or otherwise, the High Court or Court of Session may direct the District Magistrate, by himself or by any of the Magistrates subordinate to him, to make, and the District Magistrate may himself make or direct any Subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged.

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With regard to these sections, I think it clear, first, from the express reference to s. 435, that the Courts mentioned have power to interfere with an order of discharge on any of the grounds mentioned in s. 435, on the ground that it is incorrect, that is, wrong on the merits, no less than on the ground of illegality or irregularity. I think it clear, secondly, that the words "fresh enquiry" in s. 436 and "further enquiry" in s. 437 are used as meaning the same thing. Thirdly, though I am inclined to agree with the contention urged before us that the mention of the High Court in s. 437 was not strictly necessary, and that, if it had not been mentioned, it would have had, under ss. 435 and 439, the same powers which are here expressly given to it, still I think the mention of the three tribunals together, the High Court, the Court of Session, and the District Magistrate, tends to show that the Legislature intended them to have the same power with regard to the matter dealt with in the section.

The examination of the sections so far satisfies my mind that the High Court, the Court of Session, and the District Magistrate, all have power, as Courts of Revision, to deal with an order of discharge, and to deal with it on the merits as well as on other grounds.

The third question is, what orders these Courts can make when the necessity arises for setting aside an order of discharge. The High Court, under s. 423, embodied in s. 439, can set aside the order of discharge, and direct a charge to be framed and tried by the proper Court. It can, under s. 437, and probably also under s. 439, order a further enquiry instead of a committal. The Court of Session and the District Magistrate have, in cases triable exclusively by the Court of Session, the same alternative open to them under ss. 436 and 437. In other cases they can set aside the discharge, and order a further enquiry under s. 437, or refer the matter to this Court.

The meaning of "further enquiry" has still to be considered. The word "enquiry" is one of frequent occurrence in the Code. The definition in the interpretation-clause is very wide, and in some sections of the Act it certainly includes trial. If that meaning were adopted here, it might be that s. 437 would authorise a Sessions Judge or District Magistrate, not only to order further enquiry preliminary to trial, but also to order a charge to be framed and the trial of that charge to proceed. The word is often, however, used in a more specific sense, to denote the enquiry before a Magistrate preliminary to trial, which regularly results in a charge or a discharge. I am not prepared to adopt any but the narrower sense in the present section. My reasons are that, the order to be set aside being an order of discharge, the further enquiry would naturally be one of the same kind as that which has miscarried, an enquiry leading up to a charge or discharge. And upon the other view s. 436, relating to committal in cases triable only by the Sessions Court, would seem to be superfluous. For, if "further enquiry" would cover a charge and a trial in the one case, it would equally do so in a case of the other class. But in s. 436 committal and further enquiry are spoken of as distinct alternatives. Taking, however, this narrower sense, I think the enquiry includes, not merely the taking of evidence, but the consideration of that evidence, and the conclusion to charge or discharge the accused.

I think it unnecessary to consider what "further" enquiry would mean if the words were not explained by the context. Those words might mean an additional enquiry supplemental to the first; they might cover, not only this, but also a new enquiry superseding the first. Here I think they are used in the wider sense, first, because the further enquiry may be ordered on the ground that the first finding was incorrect; secondly, because it may be by a different

Magistrate from the first; thirdly, because the words "further enquiry" and "fresh enquiry" are used as meaning the same thing.

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The result is that in my opinion this Court or the Court of Session or the District Magistrate has jurisdiction on any sufficient ground to set aside an order of discharge, and direct either an additional investigation of the facts, or a reconsideration of the evidence, by the Magistrate whose order is set aside, or a new enquiry before another Magistrate; and among such sufficient grounds are the omission to take evidence which ought to have been taken, the discovery of fresh evidence, mistakes of law, illegality or irregularity in the proceedings, and the incorrectness of the first finding. I agree with the view taken in the Bombay High Court in *Queen-Empress v. Dorabji Hermasji*,¹ and to a great extent with that taken by the Full Bench of the Allahabad Court in *Queen-Empress v. Cholu*.²

But, although the jurisdiction of this Court and of the Court of Session and of the District Magistrate is upon this view a very wide one, the discretion thus conferred is a judicial discretion. No Court can properly set aside an order of discharge without having and assigning solid and sufficient reasons for doing so. And, if there is reason to set aside an order of discharge, it is the duty of the Court which has to deal with the matter in each case to make such order as is appropriate to the facts of the case. In a case triable only by the Sessions Court, to which s. 436 applies, if the Sessions Judge or the District Magistrate is satisfied that on the evidence taken there is a clear case for a committal, and there is no reason for desiring a further consideration by a Magistrate, I think it would ordinarily be his duty to direct a committal under s. 436, and not to order a further enquiry under s. 437. In the same way, in a case not triable only by the Court of Session, if the Sessions Judge or the District Magistrate is satisfied that on the evidence taken there is a clear case for charging and trying the accused, and there is no reason for desiring further magisterial examination, I think it is ordinarily his duty to refer the case to this Court, which can make a suitable order, and not to direct a further enquiry by a Magistrate.

Any order, moreover, of a Sessions Judge or District Magistrate setting aside an order of discharge is, of course, liable to be reviewed, in its turn, by this Court as a Court of Revision. And, in my opinion, if in any case this Court were to find that the lower Court had set aside an order of discharge on insufficient grounds, or that, while there was good ground for setting it aside, the lower Court had made an order inappropriate to the facts of the case, it would be right in reversing the order.

The result is that I should answer the first question referred to us in the affirmative.

As to the second question, I should say that, if it is to be understood as a mere question of law going to jurisdiction, it must be answered in the affirmative; but that, if the question is whether in each case there are good grounds on which the order of the Court below can be supported, we have not sufficient materials in the order of reference to enable us to answer the question.

As to the third question, I agree with PRINSEP, J.

The cases must, therefore, in my opinion, go back to the referring bench to be dealt with on the whole of the materials before it.

¹ I. L. R., 10 Bom. 131.

² I. L. R., 9 All. 52.

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PRINSEP, J.—I have had the advantage of seeing the judgments which the Chief Justice and Mr. Justice WILSON propose to deliver. So far as it goes, I agree with the opinion expressed by WILSON, J., as to the enlarged interpretation which is put on s. 437; but, after very careful consideration, I am of opinion that the terms of that section should bear a still larger interpretation, and that it is competent to the High Court, Court of Session, or District Magistrate, to set aside an order of discharge passed against the weight of evidence, and to order a further enquiry, within which I would include the framing of a charge, and thus to enable the accused to cross-examine the witnesses for the prosecution.

The term "enquiry" as defined in s. 4 (c) includes every enquiry conducted under the Code by a Magistrate or Court. The term is evidently used in contradistinction to "investigation," which it follows, and which may be described as including all proceedings conducted by the police or any other person not a Magistrate, but authorised by a Magistrate in that behalf.

In my view an enquiry is not concluded by proceedings taken by a Magistrate up to the time that either a charge must be drawn or the accused should be discharged. If the offence be one exclusively triable by a Court of Session, the drawing up of a charge does not necessarily amount to a commitment, for ss. 211—213 show that other proceedings may intervene. If the offence be a warrant-case, in which the Magistrate has jurisdiction, but which he may nevertheless commit, the drawing up of a charge in the latter case has the result just mentioned, and in the former enables the Magistrate to complete the evidence by requiring the accused to rebut the *prima-facie* case made out by cross-examining the witnesses for the prosecution or otherwise. An enquiry, as defined, seems to me to include a trial. It is not limited, as under the former Code, to the drawing up of a charge which, it was then expressly declared, was the commencement of a trial. I would also refer to s. 436 and especially to prov. b. That section enables the Court of Session and District Magistrate to order a person improperly discharged of an offence exclusively triable by such Court to be arrested and forthwith to be committed for trial; but prov. (b) also provides that, if the Court of Session or District Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Court or Magistrate may direct the inferior Court to enquire into such offence. What would be the nature of such enquiry? *Prima facie* a particular offence has been established. The enquiry would therefore be to ascertain how a charge of such an offence could be rebutted, to use the terms of ss. 209, 253. The rebuttal would be by requiring the accused to make his defence or displace the *prima-facie* case by cross-examination of the witnesses after a charge, drawing his attention to the particular offence, has been framed.

So far, therefore, I regret to be obliged to disagree from my learned colleagues in the definition of "fresh enquiry", or "further enquiry" as used in ss. 436 and 437, though I agree with WILSON, J., that these terms are synonymous.

I am doubtful whether the power to order a further enquiry otherwise than under s. 437 is given to the High Court under s. 439.

I would further observe that it seems contrary to the system prescribed by the Code that in every warrant-case, *e. g.*, a case of petty theft, tried by an inexperienced Magistrate (it may be the first case he has ever tried), should, of necessity, be referred for the orders of the High Court that justice may be done,

because a perverse or ignorant finding on the evidence has been come to. Such a Magistrate cannot pass any sentence which is not subject to appeal to the District Magistrate; every Magistrate in the district is subordinate to the District Magistrate; and yet it is sought to make such an order of discharge of the same force as an order of acquittal: to declare that it can be set aside only by the High Court. It is needless to point out that in many cases this must operate as a denial of justice, for complainants will, very rarely, consent to the delay and expense of setting the High Court in motion to obtain redress. It is difficult to understand for what reason the Legislature should have conferred power in respect to cases exclusively triable by the Court of Session on certain local Courts, and yet have refused them similar powers in respect of cases of a less important character.

With respect to the third question submitted to us, I am of opinion that, under the law, no notice to the accused is necessary before an order under s. 437 may be passed. A notice certainly would not be necessary before an order to set aside an order of dismissal under s. 203 could be passed, since that order was not passed with a notice to the accused person or in his presence, and therefore is probably unknown to him. An order of discharge, which is coupled in this section with an order of dismissal, no doubt rests on a different footing, but still it is dealt with in the same terms. It may also be remarked that the new s. 436 expressly provides for notice to an accused before an order for his commitment can be made for an offence triable exclusively by a Court of Session, and it would be difficult to assign any reason for any distinction between such a case and an order of discharge in a less heinous case in which the same order was passed. But it may also be noted that, as in the section preceding s. 437, so in a section following it (s. 439), provision is made for a notice before any order prejudicial to an accused person may be passed by the High Court as a Court of Revision. We have therefore the law expressly requiring notice to be given in two matters coming up in revision, while in another and cognate matter the law is silent. It is, no doubt, an ordinary rule of our Courts that no order shall be passed to a man's prejudice without due notice to him, and as a principle the necessity is obvious. Still I find myself unable to say that, as the law stands, the fact that a man has not been served with a notice necessarily affects the legality of an order under s. 437. S. 440 makes it optional with any Court when exercising its powers of revision (*e. g.*, under s. 437) to hear any party either personally or by pleader, and this again seems to favour the view that the Legislature did not intend that a notice should be indispensable. At the same time, I am of opinion that no Court would be exercising a proper discretion in such a matter if, before proceeding under s. 437, to order a further enquiry in a case in which the accused person may have been discharged, it did not first give him an opportunity, by service of a notice, to show cause against such an order being made. If such a matter were to come before me as a Court of Revision, I would certainly feel bound either to direct the lower Court to reconsider the matter or to hear the accused myself.

GHOSH, J.—I agree generally with the judgment that has been delivered by the Chief Justice. I desire, however, to make one or two observations upon the principal question before us, *viz.*, what is the meaning of the words "further enquiry" as used in s. 437 of the Criminal Procedure Code?

It is said that these words mean the same thing as the expression "fresh enquiry," which occurs in s. 436. But it seems to me somewhat improbable that, if the Legislature intended to convey the same sense, they should have used two different expressions in two sections which immediately follow each other.

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It appears to me that, in a case which is triable exclusively by the Sessions Court, and where the Sessions Judge is of opinion that the accused has been improperly discharged by an inferior Court, he may, under s. 436, either direct a "fresh enquiry," or order that the man be committed for trial. In the former case, the inferior Court will be bound to hold a fresh preliminary enquiry, and it is in this sense I am inclined to think that the words "fresh enquiry" have been used; while in the other case no such enquiry would be necessary.

In cases not covered by s. 436, the High Court, or the Sessions Judge, or the District Magistrate, may direct "further enquiry" into any complaint which has been improperly dismissed, or where an accused has been improperly discharged.

I think that in using the expression "further enquiry" the Legislature meant it in the sense of an enquiry which has not already taken place, that is to say, an *additional* enquiry. The learned Chief Justice has pointed out instances where such a "further enquiry" may be directed. Those instances, I believe, are not exhaustive, but illustrative; for there may be, I think, other cases where "further enquiry" may well be directed. For instance, in a case where a Magistrate, after recording the whole of the evidence, considers that the facts, even if true, do not constitute an offence, the Revisional Court may direct, if it be of opinion that the Magistrate is wrong in law, "further enquiry," that is to say, a consideration of the evidence with a view to determine whether an offence has been established or not.

But where the inferior Court has taken the whole of the evidence and pronounced a judicial opinion upon it—that is to say, where a full enquiry has been made—I fail to see what the "further enquiry" would be, unless it be simply a reconsideration of the evidence which has already been considered. This I do not think was ever the intention of the Legislature.

In cases where the Sessions Judge or Magistrate thinks that there has been a miscarriage of justice, but where no "further enquiry" can properly be directed, the only course, I think, is to refer the matter to the High Court under s. 438 of the Code; and the High Court may, upon such reference, make the right order in the case.

T. A. P.

Appeal dismissed.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Tottenham.

GUNGA CHUNDER SEN AND OTHERS (PETITIONERS) v. GOUR CHUNDER BANIKYA (OPPOSITE PARTY).¹

1888.

July 4.

15 Cal. 671.

Criminal intimidation—Penal Code (Act XLV. of 1860), s. 503.

The threat referred to in s. 503 of the Penal Code must be a threat communicated, or uttered with the intention of its being communicated, to the person threatened for the purpose of influencing his mind.

THE prisoners in this case were charged by one Gour Chunder Banikya with having committed, on the 28th Aughran 1294, an offence under s. 503 of the Penal Code.

¹ Criminal Revision, No. 175 of 1888, against the order passed by W. H. M. GUN, Esq., Sessions Judge of Nowakhali, dated the 9th of May 1888, confirming the order passed by Baboo Probbhat Nath Roy, Deputy Magistrate of Nowakhali, dated the 30th of April 1888.

The evidence in the case disclosed that Gour Chunder had purchased a ryoti holding from a tenant of the three accused, who were talukdars. The accused objected to this purchase, and threatened, unless the land was given up, to beat the complainant, and burn down his house. The particular occasion on which the offence was committed was on the 28th Aughran 1294, when all three accused uttered this threat in the presence of certain persons who deposed to the fact, and further deposed that the complainant was not present on that occasion. The evidence given by them did not show in any way that the accused had intended that the threats used should be communicated to the complainant.

The Deputy Magistrate of Nowakhali convicted the accused, and sentenced them to six months' rigorous imprisonment. This conviction was upheld by the Sessions Judge, who, however, reduced the sentence to one of six months' simple imprisonment.

The prisoners then obtained this rule calling upon the complainant to show cause why these orders should not be set aside.

Baboo *Umbica Charan Bose* (with him Baboo *Aukhil Chunder Sen*), in support of the rule, contended that, inasmuch as the threat had not been uttered in the presence of the complainant, the accused could not be convicted of an offence under s. 503 of the Penal Code.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) to show cause.

PETHERAM, C.J.—This is a rule which has been obtained for the purpose of revising a conviction of three men for an offence under ss. 503 and 506 of the Indian Penal Code—that is to say, for the offence of having threatened the complainant within the meaning of those sections. The charge is a charge of having threatened him on the 28th Aughran 1294, and in support of that charge two witnesses are called who speak to what took place on that occasion.

The facts of the case up to that point are these : That the complainant had purchased a ryoti tenure within the limits of the accused's zemindari, and the accused disliked his being there, and apparently, from what the witnesses say, they intimated their dislike of that to them. Two witnesses say that on that day they were at the house of the accused, when a peada of theirs came and told them that the complainant, notwithstanding what they had done, was still in the place, and was still taking away the paddy on the land, upon which the accused said that they would beat him, and set fire to his house. Assuming that to be true, the question is, whether that is a threat within the meaning of the section.

The section which defines the offence is s. 503, and it is in these words : "Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

It is clear that the gist of the offence, as defined in that section, is the effect which the threat is intended to have upon the mind of the person threatened, and it is equally clear that before it can have any effect upon his mind it must be either made to him by the person threatening, or communicated to him in some way. In this particular case there is no suggestion that the threat was made to the person threatened. All that happened was, that in the presence of some persons the accused used the words I have quoted in their house. In

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one sense those words amount to a very bad threat, but there is no evidence on the face of them, and there is no other evidence, that they intended that the words should be communicated to the complainant for the purpose of influencing his mind. It seems to us that the evidence in the case falls far short of establishing the offence defined by this section, which is, in our opinion, a threat communicated or uttered with the intention of its being communicated to the person threatened for the purpose of influencing that man's mind. In this case there is nothing whatever to show that it was the intention of the accused that the threat should be communicated to the complainant. The complainant himself was called, and he does not say that he ever heard this particular threat. Though he speaks of a threat uttered on some other occasion, he does not say that the threat which is the subject of this charge was ever communicated to him, or that he ever heard it. Under these circumstances, we think that there is no evidence of an offence having been committed under this section, and that this rule must be made absolute.

T. A. P.

Rule absolute.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Tottenham.

1888.

May 18.

DHIKU AND ANOTHER (COMPLAINANTS) v. DENO NATH DEB *alias* DINU
AND ANOTHER (ACCUSED).¹

15 Cal. 712. *Appeal in Criminal Case—Cattle Trespass Act (I. of 1871), s. 22—Illegal seizure of cattle.*

No appeal lies from an order under s. 22 of Act I. of 1871, awarding compensation for illegal seizure of cattle.

*Queen-Empress v. Raja Lakshma*² followed.³

THE accused were charged in this case with the wrongful seizure of some cattle belonging to the complainants, and under s. 22 of the Cattle Trespass Act (I. of 1871) were fined by the Honorary Magistrate of Sylhet—Denonath Rs. 20, and Gobra Rs. 15, which fines were ordered to be paid to the complainants as compensation.

The accused appealed to the Deputy Commissioner, by whom the finding and sentence of the Magistrate were set aside.

The case was submitted by the Sessions Judge of Sylhet to the High Court under s. 438 of the Criminal Procedure Code, on the ground that the order of the Deputy Commissioner had been made without jurisdiction, as he had no power to entertain the appeal. The Judge referred to the case of *Queen-Empress v. Raja Lakshma*,² in which it was held that no appeal lay in such a case.

No one appeared on the reference.

The judgment of the Court (WILSON and TOTTENHAM, JJ.) was as follows:—

We think that the ruling of the High Court of Bombay in *Queen-Empress v. Raja Lakshma*,² to which the Sessions Judge refers, is one that should be followed, and that no appeal lay to the Deputy Commissioner. We set aside his order, and direct that the order of the first Court be restored.

¹ Criminal Reference, No. 135 of 1888, made by R. H. Greaves, Esq., Sessions Judge of Sylhet, dated the 28th of May 1883, against the order passed by G. Stevenson, Esq., Deputy Commissioner of Sylhet, dated the 6th of February 1888.

² 1 L. R., 10 Bom. 230.

³ See also *In re Gunesh Pershad*, 3 N. W. 200.

CRIMINAL MOTION.

*Before Mr. Justice O'Kinealy and Mr. Justice Rampini.*IN THE MATTER OF THE PETITION OF DIN TARINI DEBI.¹*Criminal Procedure Code (Act X. of 1882), s. 503—"Purdah-nashin" woman—
Examination by commission—Personal appearance in Court.*

1888.

Aug. 15.

15 Cal. 775.

A Hindu lady having been summoned as a witness on behalf of an accused applied under s. 503 of the Code of Criminal Procedure to be examined by commission on the ground (*inter alia*) that she was a "purdah-nashin," and that her enforced appearance in a Criminal Court would entail a forfeiture of her dignity and position in Hindu society.

Held that such application was properly made under the section, and that, under the circumstances of the case, the order prayed for could be made.

THE facts upon which the rule was issued are as follow :—

The Chief Presidency Magistrate having framed a charge of attempting to cheat against four persons arraigned before him for having committed that offence, one of the four persons so accused applied for the issue of a subpoena to one Din Tarini Debi, a Brahmini widow, as a witness on his behalf. The subpoena being duly issued was served upon the lady on the 7th of August; she thereupon on the 8th August applied to the Magistrate for an order dispensing with her attendance in his Court, and for the issue of a commission to take her evidence under s. 503 of the Code of Criminal Procedure. In support of this application it was alleged on her behalf that she was a *purdah-nashin* lady not in the habit of appearing in public, that she resided in her native village of Goverdanga at a distance of 37 miles from Calcutta, and that her attendance at the Court of the Chief Presidency Magistrate would therefore entail upon her "inconvenience" of a kind contemplated by the provisions of the section on which her application was based. It was further alleged on behalf of the applicant that, in the event of the Magistrate not feeling himself justified in granting such application, she was ready and willing to travel to Calcutta, and submit herself for examination as a witness in a house she would secure for that purpose if the Magistrate would be pleased to attend at such house for the taking of her evidence on a day to be hereafter fixed by him. The Magistrate refused to make the order prayed for, or entertain the alternative proposal made.

On the 9th of August the applicant moved the High Court (WILSON and RAMPINI, JJ.) under the provisions of s. 435 of the Code of Criminal Procedure for a rule to be issued upon the Chief Presidency Magistrate to show cause why the order for the issue of a commission for the purpose of taking her evidence under s. 503 of the Code of Criminal Procedure should not be granted. The material averments in the petition on which the motion was made were as follow :—

That your petitioner is a resident of Goverdanga in the sub-division of Baraset in the district of the 24-Pergunnahs, which is about 37 miles distant from the Court of the said Chief Presidency Magistrate of Calcutta.

That your petitioner is a Hindu *purdah-nashin* lady of rank, living on income derived from her own zemindari and other sources exceeding the sum of Rs. 5,000, and that your petitioner is connected with other respectable zemindars, and that, according to Hindu manners and customs, your petitioner never appears before the public.

¹ Criminal Miscellaneous Motion, No. 31 of 1888, against the order of summons issued by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 3rd of August 1888.

1888.

IN THE
MATTER OF
THE PETITION
OF DIN
TARINI DEBI,
15 Cal. 775.

That your petitioner has never up to this time attended any Court of Justice anywhere, either civil or criminal, to give evidence or for other purposes, and that, if your petitioner be compelled to appear in the said Presidency Magistrate's Court, she will for ever lose her dignity and position in society.

That your petitioner, should she be forced to appear in a Criminal Court of a Chief Presidency Magistrate of Calcutta, will suffer degradation in the eyes of her own associates and in the society to which she belongs, of a kind which nothing your petitioner shall hereafter do will ever remove or even modify. In running the risk of experiencing such degradation by a literal compliance with the order contained in the summons issued by the Court of the Chief Presidency Magistrate, a true copy of which is hereto appended and marked A, your petitioner submits that she, as she alleges through no fault of her own, but entirely through her misfortune, will suffer such inconvenience, as is specified in s. 503 of the Criminal Procedure Code, as will entitle her to the relief to be hereafter asked for in the prayer attached to the petition.

Upon that application the High Court (WILSON and RAMPINI, JJ.) on 9th August issued the following rule:—

In this case, as far as we can judge, it does seem to be a hardship that this lady should be required to give evidence in Court. The better course would be to issue a rule upon the Magistrate to show cause, which he will do by a letter to us, why it should not be ordered that this lady should not be required to appear in Court. We intimate to the Magistrate that we think he should not enforce her attendance under the subpoena, provided she does what she says she is willing to do, that is, comes to Calcutta, and gives her evidence in such suitable place, either within the Court-building or not, under such circumstances, to be arranged by the Magistrate, as to secure that she may be examined in the presence of the accused, and at the same time not be exposed to the inconvenience of coming into the public Court-room.

We would ask the Magistrate to let us know what arrangements he proposes to make in this matter, and if, as we have no doubt will be the case, those arrangements seem to us suitable, no further order will be necessary.

The rule now came on to be heard.

The *Advocate-General* (Sir Charles Paul) for the Crown.

Mr. Reilly, Dr. Guru Dass Banerji, and Baboo Surendro Nath Dass for the petitioner.

The Chief Presidency Magistrate, in a letter addressed to the High Court, contended that the Code of Criminal Procedure did not contemplate a Magistrate being called upon to take the evidence of a witness under commission or otherwise other than in his Court; that the expense and inconvenience which would be caused should any innovation of this rule be permitted by the High Court would be very great, and would encourage innumerable applications of a similar kind being made in the Criminal Courts. The Magistrate further alleged that the petitioner apparently was frequently in the habit of travelling between Goverdanga and Calcutta, that she was not a lady of exalted rank, and that she had been granted the privilege of attending Court and giving her evidence in a palki—a practice invariably followed in the Court of the Magistrate.

The *Advocate-General*.—S. 503 of the Code of Criminal Procedure applies to all people, whether males or females, irrespective of rank or position; it may apply to the condition of a witness as included within the term "circumstances of the case," but does not relate to the privileges and immunities of witnesses, and therefore does not apply to a *pardah-nashin* woman. Her case must depend on the general law under which she claims exemption. This exemption has not been allowed within the term of living memory either.

by the High Court in its criminal jurisdiction or in the Police Court. It has always been deemed a necessary condition to a criminal trial that the Court should hear the evidence of the witness, and no inconvenience worth consideration has been supposed to apply to the case of a woman coming into a Court of Justice in a palki and giving her evidence therefrom. The petitioner avers that the fact of her being forced into entering a Criminal Court would be degrading to her position; the Court will be careful not to encourage this belief by any undue regard for her susceptibilities. The Court should not encourage such a belief or notion, as numbers of highly respectable native ladies have given evidence in Court from palkis.

1888.
IN THE
MATTER OF
THE PETITION
OF DIN
TARINI DEBI,
15 Cal. 775.

Mr. Reilly for the petitioner.—The word “inconvenience” has already been held to apply to the case of a *pardah-nashin* lady who can furnish substantial reasons for her reluctance to appear in a Criminal Court—see *In the matter of the Petition of Farid-un Nissa*;¹ also *In the matter of the Petition of Hurroo Soondery*.² This reluctance may be a matter of mere prejudice, but is nevertheless a sentiment on which native society as at present constituted sets great store. The Legislature has expressly recognized the existence of this feeling by giving immunity to certain persons from appearing in Civil Courts. The petitioner in this case is the widow of a Brahmin, a lady of some means, and in order to give proof of the genuineness of her objections is willing to pay the costs which may be incurred in connection with the issue of the commission.

The judgment of the High Court (O’ KINEALY and RAMPINI, JJ.) was as follows:—

This was an application made by Srimati Din Tarini Debi, asking that she might be examined by commission and not examined on oath in Court under s. 503 of the Code. In her application she sets forth that she was a *pardah-nashin* and a Brahmini, connected with a family of acknowledged respectability and possessed of considerable property, and she prayed that what had been done in some previous cases might be done in her case, namely, that she might not be compelled to appear in Court. On that application a rule was issued to show cause, and cause has been shown by the Presidency Magistrate of Calcutta and by the Crown. The Crown objects, because the lady in her petition said that it was a degradation for her to appear in a public Court, and the learned Advocate-General argued that it would be intolerable to allow such a principle to receive the sanction of this Court. No doubt, the phrase is objectionable, and it would be impossible, as the learned Advocate-General says, to admit the fact that merely appearing in Court is a degradation. Yet we do not think that disposes of the case.

There is no doubt that such applications have been granted under s. 503, and granted on the principle that in matters of procedure the customs and habits of the people should be taken into consideration. The learned Presidency Magistrate has shown cause by saying that it is the invariable custom for *pardah-nashin* ladies to be examined in palkis in Court, but that is not exactly the question. The question is whether a commission ever issued in regard to *pardah-nashin* ladies in his Court. Of that he makes no mention. He also says that this lady travels from Goverdanga to Calcutta, but he does not say that she does so publicly. So far therefore as cause has been shown by the learned Magistrate, it does not seem that the facts stated by him affect the reasons upon which such commissions have been granted. Looking to the

¹ I. L. R., 5 All. 93.

² I. L. R., 4 Cal. 20.

1883.

IN THE
MATTER OF
THE PETITION
OF DIN
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15 Cal. 775.

nature of the application and to the fact that the lady has actually taken a house in Calcutta not far from the Magistrate's Court, where she can be examined; that no possible inconvenience can arise to any person; and further that the lady has volunteered to pay the expenses of the commission, and even the defence do not require her to be examined in open Court, we can see no reason why this rule should not be enforced, and we make it absolute.

We further direct by consent that the petitioner shall be bound to pay all costs consequent on the issue of the commission in Calcutta, which the learned Magistrate in the Court below shall deem reasonable and proper.

J. V. W.

Rule made absolute.

VOLUME XVI.

CRIMINAL MOTION.

*Before Mr. Justice Wilson and Mr. Justice Rampini.*IN THE MATTER OF THE PETITION OF PARBUTTY CHARAN AICH.
PARBUTTY CHARAN AICH *v.* QUEEN-EMPRESS.¹

1888.

Aug. 6.

Criminal Procedure Code, ss. 134, 144—Penal Code, s. 188—Disobeying order of Public Servant—Trader at Hât—Order prohibiting holding of Hât.

16 Cal. 9.

A District Magistrate, by an order made under s. 144 of the Criminal Procedure Code, after stating that it appeared that one "G C S has recently established a hât at S in the vicinity of K, an old-established hât, and held it on the same days, and that in consequence of the establishment of the new hât, and the endeavours made to induce or force people to frequent the new hât, instead of the old one, a serious breach of the peace or riots are imminent," ordered "that the said G C S and all other persons abstain from holding such hât" on those days. The order was duly made and promulgated, but not strictly in accordance with s. 134 of the Code, and the orders of Government made thereunder. Notwithstanding the order one P C A was found exposing goods for sale as a trader at the hât on one of the prohibited days, and he was thereupon charged with disobeying the order of the Magistrate, and convicted of an offence under s. 188 of the Penal Code. Held that the conviction was bad, as P C A did not come within the description of the persons intended by the order to be prohibited from "holding" the hât, which referred to "holding" as owner or manager, not as a trader.

Held also, that the terms of s. 134 of the Code, and the notification made by Government thereunder as to promulgation and issue of an order, are directory, but an omission to follow strictly such direction, though it is an irregularity, does not invalidate the order: where therefore it is shown that the order has been brought to the actual knowledge of the person sought to be affected by it, such omission does not prevent the case coming within s. 188 of the Penal Code.

THE appellant Parbutty Charan Aich was charged with having disobeyed an order made by the Magistrate of Backergunge, and with having in consequence been guilty of an offence under s. 188 of the Penal Code.

It appeared that one Gobinda Chunder Sahu had established a hât in a village called Singhrakati in the District of Backergunge. The Magistrate of the District, finding that such a hât interfered with the previously established hât in the neighbouring village of Krishnagunge, and that a breach of the peace was thereby imminent, issued the following order: "Whereas it appears from the report of Sub-Inspector Prosonno Coomar Mookerjee, and from the affidavit of Baikanto Chunder Gangooly filed herewith, that Gobinda Chunder Sahu has recently established a new hât at Singhrakati in the vicinity of Krishnagunge hât, an old established hât, and held it on the same days, *vis.* Tuesdays and Saturdays, and that, in consequence of the establishment of the new hât, and the endeavours made to induce or force people to frequent the new hât instead of the old one, a serious breach of the peace or riots are imminent, it is hereby ordered that the said Gobinda Chunder Sahu and all other persons abstain from holding such hât, or any hât whatever, near or within the hât at Krishnagunge on any Tuesday or Saturday. This order is made under s. 144 of the Criminal Procedure Code, and will remain in force two months."

¹ Criminal Motion, No. 238 of 1888, against the order passed by *J. Pasford, Esq.*, Judge of Backergunge, dated 21st June 1888, modifying the order passed by *F. A. Hossein*, Deputy Magistrate of Patuakhally, dated the 12th May 1888.

1888.

PARBUTTY
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EMPRESS,
16 Cal. 9.

The order was not served personally on Parbutty Charan Aich, nor was it duly promulgated in the hât by beat of drum, or as provided for by s. 134 of the Code and by Government notification made under that section. Notwithstanding this order, the hât at Singhrakati still continued to be held, and on Saturday, 21st January, Parbutty Charan Aich, being found exposing goods for sale in the hât, was charged under s. 188 of the Penal Code with disobeying the above order, and on conviction was sentenced by the Deputy Magistrate to rigorous imprisonment for three months—a sentence which was altered on appeal to the Sessions Judge to seven days' imprisonment and a fine of Rs. 30. The Judge said: "As to Parbutty Charan Aich I see no reason to doubt the propriety of the conviction; but I do not find any satisfactory proof of his being more than a trader who comes to the hât and offers goods for sale there. He does not appear to be one of the hât proprietors or managers, though he is said to have been a *tadbirkar*." Parbutty Charan Aich appealed to the High Court, on the grounds that the order of the Magistrate prohibiting the hât was not promulgated in the manner provided by law; that the order being therefore bad, the disobedience of such an order was not punishable under s. 188 of the Penal Code; and that the act imputed to him did not constitute a disobedience of the order.

Baboo *Umbica Churn Bose* and Baboo *Baikanto Nath Doss* for the appellant.

The *Officiating Deputy Legal Remembrancer* (Mr. Beeby) for the Crown.

The judgment of the Court (WILSON and RAMPINI, JJ.) was as follows:—

WILSON, J.—The conviction in this case is under s. 188 of the Indian Penal Code, which says that whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, disobeys such direction, shall be liable to certain punishment. Now, the order which the accused in the present case was charged with disobeying was an order by the District Magistrate under s. 144 of the Code of Criminal Procedure. It was an order made with relation to a hât. It appears that there was an old-established hât, and that certain persons, acting for, or with, one Gobinda Charan Sahu, opened a new hât in the vicinity of the old one, and held it on the same days. This action, in the opinion of the Magistrate, made a serious breach of the peace imminent; and therefore having made the necessary inquiries he passed this order. [After reading the order,¹ His Lordship continued]:

It has been found that, notwithstanding that order, the new hât was nevertheless held on Tuesdays and Saturdays; and the present accused has been convicted of disobeying that order. The fact found is that he sold goods in the hât, not that he was a proprietor of the hât, or was one of those who promoted or managed or had any control of it, but simply that as a trader he sold goods at the hât.

Two points have been raised before us. The first is, whether there was any such service or promulgation of the Magistrate's order as to bring the case within s. 188. With regard to that it would appear that the mode of service was not in accordance with the Criminal Procedure Code, because s. 144 says that a Magistrate may, by a written order stating the material facts of the case, and served in manner provided by s. 134, direct any person to abstain from a certain act, and so forth. And what s. 134 says is, that "the order," that is,

¹ *Ante*, p. 879.

an order under s. 133, "shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons. If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person." In the present case, there was evidence probably that there was personal service on Gobindo Chunder Sahu. But there was no personal service on the present accused; nor was the service or promulgation in accordance with s. 134. The Bengal Government has gazetted an order to the effect that, when personal service cannot be made, the order shall be notified by beat of drum at the place in question. That was not done in the present case. Therefore the notice was not served according to the directions of the Criminal Procedure Code as amplified by the order in the Gazette. But I do not think that *that* is fatal in the present case, because I do not think that it is necessary for us to read the direction as to the mode of service as going absolutely to the validity of the order. I think we may fairly say that the terms of s. 134 and the notification in the Gazette are directory, and ought to be followed, and that it is an irregularity when they are not; but it does not follow that the order is a nullity in consequence, and I think that, when the order has been duly made and promulgated, although not strictly in accordance with the terms of the law, and has been brought to the actual knowledge of the person sought to be affected by it, that is sufficient to bring the case under s. 188 of the Indian Penal Code. The first objection therefore seems to me to fail.

The other objection is more serious, and goes much more to the solid merits of the case. It is this, that what the present accused is found to have done is no breach of the Magistrate's order. It is obvious that, before you can proceed criminally against a man for breach of an order, you must show that the order clearly and unequivocally prohibits the thing which he is said to have done. If the order be ambiguous and open to two interpretations, you must adopt the one most favourable to the accused, and not the other. In the present case the earlier part of the Magistrate's order shows, we think, pretty clearly what he was thinking of when he came to the conclusion that the new *hât* should be prohibited. He was thinking of the action of Gobinda Chunder Sahu, and of the people who were acting for or with him, that is to say, he was thinking of the conduct of persons who established the *hât*, opened it, managed it, and tried to bring people to it to buy and sell; and, having described their action as likely to induce a serious breach of the peace, he proceeds to prohibit Gobinda Chunder Sahu and all other persons from *holding* the *hât*. In that connection it is almost impossible to read the words "holding the *hât*" in any other sense than that which we have described, that is, in the sense of holding as owner or manager. It is almost impossible to read the words as including the conduct of people who do not hold the *hât* as owners and managers, but who frequent it as buyers or sellers. But if we are wrong in this interpretation of the words, at any rate it is clear that the order, looking at it in the most favourable light for the prosecution, is ambiguous, and does not clearly and unmistakably prohibit traders from buying and selling in the *hât*.

That being so, the conviction cannot stand, and must be set aside.

J. V. W.

Conviction set aside.

1888.

PARBUTTY
CHARAN
AICH
Z.
QUEEN-
EMPRESS,
16 Cal. 9.

CRIMINAL MOTION.

*Before Mr. Justice Mitter and Mr. Justice Macpherson.*ABAYESWARI DEBI (PETITIONER) *v.* SIDHESWARI DEBI
(OPPOSITE PARTY).¹

1888.

Nov. 26.

16 Cal. 80.

*Superintendence of High Court—Criminal Procedure Code (Act X. of 1882, s. 144)
—Charter Act, 24 & 25 Vic., c. 104, s. 15—Order to abstain from certain act.*

A Deputy Commissioner passed an order, under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or through any of her officers or servants, from the ryots of two specified pergunnahs. And also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or erecting any *adda* or *kuchari* in such pergunnahs, for a period of two months. Upon an application to set aside such order :

Held that the High Court had jurisdiction, under s. 15 of the Charter Act, to set it aside if it were made without jurisdiction.

Held, further, that the acts which the petitioner was directed to abstain from were not acts which come within the meaning of the words "a certain act" as used in s. 144 of the Code of Criminal Procedure, and that the order should be set aside.

THIS was an application to set aside an order passed by the Deputy Commissioner of Goalpara, under s. 144 of the Criminal Procedure Code, prohibiting the petitioner from collecting any rents, either herself or through her servants, from the ryots of certain pergunnahs, and doing other specified acts in the Bijni estate.

The order complained of was made on the 1st October 1888, and was as follows :—

"To

RANI ABAYESWARI DEBI,

Goalpara.

"WHEREAS it has been known from various police-reports, which are received in numbers every day, that many persons are being deputed and sent from your side to collect rents from the ryots of pergunnahs Habraghat and Khutaghat, and also to get possession of and to sell the timbers collected from the forest of the Bijni Estate :

"And whereas, on an inspection of the Register of the Collector of this District, it is seen that Rani Sidheswari Debi, as successor of the late Raja Kumud Narain Bhup, is the sole present proprietor (by the virtue of the registration of her name according to law) of the Bijni zemindari, and you have not yet got your name registered as proprietor of the whole or part of the said zemindari, and you have not yet established your possessory right and interest to the whole or part of the said estate :

"And whereas, on perusing the aforesaid several police-reports, I have clearly understood that, if there be any collection of rent or attempt for collecting rent in this way, or if your officers, servants, or followers, have anything to do with the timbers collected and stocked on your behalf from the Bijni estate, then owing to the rivalry between your people and the people of the legally registered proprietor, Rani Sidheswari, which cannot be checked, the breach of peace, riots, and bloodshed, will unavoidably ensue. I, therefore, prohibit you by this from collecting any rent or attempting to collect rent, either yourself or through any of your officers and servants, from the ryots of pergunnahs Habraghat and Khutaghat, and also from effecting any sale, or put in your hands any transaction

¹ Criminal Motion, No. 371 of 1888, against the order passed by *M. A. Gray, Esq.*, Deputy Commissioner of Goalpara, dated the 1st of October 1888.

with regard to standing trees or collected timbers in the Bijni estate, or erecting any *adda* or *kuchari* in the aforesaid two pergunnahs within the period of two months from date, or until the final decision of the case under s. 145 of the Criminal Procedure Code, or until further orders."

The petitioner applied under s. 15 of the Charter Act and s. 439 of the Criminal Procedure Code to have the order set aside. The petition on which the application was made was in the following terms:—

1. That the Deputy Commissioner of Goalpara made an order on the 14th June 1888, purporting to have been made under s. 144 of the Code of Criminal Procedure, prohibiting your petitioner's *naiib*. Brojo Nath Dass, from making collection of rent on behalf of your petitioner from her extensive zemindari pergunnah Khutaghat in the district of Goalpara.

2. That against the said order your petitioner moved this Honorable Court on the 21st June 1888, and your Lordships were pleased to issue a rule to show cause why the same should not be set aside.

3. That again on the 28th June 1888 the said Deputy Commissioner made a similar order against your petitioner personally, and your petitioner moved this Honorable Court against the said order on the 9th July 1888, when a rule was granted by the Chief Justice and Mr. Justice Rampini to show cause why the same should not be set aside.

4. That both the rules, Nos. 201 and 227 of 1888, were eventually heard by Mr. Justice Wilson and Mr. Justice Rampini on the 3rd and 10th of August 1888, and the following order was passed: "With regard to the order complained of, we entertain the greatest doubt whether it is a legal order, that is, an order which the Deputy Commissioner had any right to make under s. 144; but inasmuch as it expires within a very few days we think it is not necessary for us to make any order on the subject."

5. That your petitioner has been peacefully collecting rent from such ryots of her extensive zemindari as willingly paid her any, but, notwithstanding the aforesaid order of this Honorable Court, the Deputy Commissioner of Goalpara has again made an order, and issued a notice upon your petitioner on the 1st October instant, a copy whereof is herewith annexed, purporting to have been made under s. 144 of the Criminal Procedure Code, and prohibiting your petitioner from receiving any rent and forest-dues which your petitioner can get without the least probability of the breach of peace.

Your petitioner begs to submit that the said order is quite contrary to law, and ought to be set aside on the grounds:—

(a) That the said section does not empower any Magistrate to prevent any person from collecting rents from the tenants of any estate, or issuing passes for selling forest-produce.

(b) That the effect of such an order is to deprive your petitioner of all possession in the property.

Upon the application being made, a rule was issued, calling on the opposite party to show cause why the order complained of should not be set aside.

The rule now came on for hearing.

Mr. *M. Ghose* and Baboo *Umbica Churn Bose* in support of the rule.

1888.

ABAYESWARI
DEBI

7.

SIDHESWARI
DEBI,
16 Cal. 80.

1888.

Baboo Iswar Chunder Chuckerbutty and Baboo Bassunt Comar Bose for the opposite party.

ABAYESWARI

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DEBI,

16 Cal. 80.

Mr. Ghose.—The order is without jurisdiction. *Firstly*, because it is vague and indefinite in its character; *secondly*, because it interferes with the manifest legal rights of the petitioner to receive rents, which her ryots might willingly pay her; and, *thirdly*, because it is practically a repetition of an expired order and an evasion of the restriction imposed by the last clause of s. 144. The High Court has jurisdiction to set aside under s. 15 of the Charter orders professedly made under s. 144 of the Criminal Procedure Code, but not really coming within its scope. The question of this Court's powers to interfere was fully considered in *Gopi Mohun Mullick v. Taramoni Chowdhurani*.¹ Since then it has been held that this Court has power to set aside orders made under s. 144, but without jurisdiction. In *Shurut Chunder Bannerjee v. Bama Churn Mookerjee*² it was contended that this Court could not interfere with orders made under s. 144, but White, J., decided against that contention. In *Bradley v. Jameson*,³ and *In re Prayag Singh*,⁴ orders made on the corresponding section of the old Code were set aside as being in excess of the Magistrate's power.

[MITTER, J.—I think we can interfere if you satisfy us that the order itself is one which the Magistrate had no power to make. The terms of s. 144 are very wide.]

The section gives power to make a certain order, which must mean a definite and precise order, and not a general one, forbidding a man to refrain from doing a series of acts which he has ordinarily a right to do. The section must be very strictly construed. It could scarcely have been intended to invest Magistrates with power to interfere with the legal rights of persons. Could a Magistrate make an order directing a person to refrain from taking his food or from sleeping at night, or from living in his own house, on the ground that the Magistrate thought that such an order was needed for the purposes specified in the section? Even if the Magistrate has such a power, the order must be *one specified act* which must be complete in itself and of a definite character. Here the order is not to collect rents from the ryots of two pergunnahs. "Collection of rent" is not a definite act in itself, as it involves payment and receipt by several persons. Receipt of rent from different ryots is not a single act, and therefore does not come within the scope of the section.

Baboo Iswar Chunder Chuckerbutty contended that s. 144 was very comprehensive in its terms, and that the High Court had no power to interfere with an order made under that section.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The order complained of in this case was passed under s. 144 of the Criminal Procedure Code. The authorities are clear upon this point that, if the Magistrate had no jurisdiction to make the order, this Court can interfere under s. 15 of the Charter Act. Therefore the only question that we have to consider is whether the order complained of is one which the Magistrate could make under s. 144 of the Code. The section says that: "In cases where, in the opinion of a District Magistrate, a Sub-Divisional Magistrate, or of any other Magistrate

¹ I. L. R., 5 Cal. 7.

² 4 C. L. R. 410.

³ I. L. R., 8 Cal. 580.

⁴ I. L. R., 9 Cal. 103.

specially empowered by the Local Government or the District Magistrate to act under this section, immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order, stating the material facts of the case, and served in manner provided by s. 134, direct any person to abstain from a certain act," &c., &c. Now, by the words "a certain act" we understand that it must be a definite act. We have considered the order passed in this case, and we are of opinion that the acts which the petitioner is directed to abstain from are not acts which come within the meaning of the words "a certain act." She is directed not to collect rents from the ryots of two pergunnahs; no particular ryots are mentioned, but the rent is not to be collected from the ryots of two pergunnahs generally. We do not think that such an order as this comes within the words "certain act." Upon this ground alone we set aside the order, and make the rule absolute.

H. T. H.

Rule made absolute and order set aside.

CRIMINAL REVISION.

Before Mr. Justice Macpherson and Mr. Justice Trevelyan.

IN THE MATTER OF MADHUB CHUNDER MOZUMDAR (PETITIONER) v.
NOVODEEP CHUNDER PUNDIT (OPPOSITE PARTY).¹

Criminal Procedure Code (Act X. of 1882), s. 487—Judicial proceeding—Sanction to prosecute—Criminal Appeal, Hearing of, by District Judge, who has granted sanction to prosecute—Penal Code, s. 210.

A complainant applied to a Munsif for sanction to prosecute a decree-holder for an offence under s. 210 of the Penal Code, and, upon the Munsif's refusing such application, preferred an appeal to the District Judge, who granted the sanction asked for. The decree-holder, having been prosecuted and convicted before a Deputy Magistrate, preferred an appeal, which came on for hearing before, and was disposed of by, the same District Judge, who had granted the sanction.

Held that the words, "shall try any person," as used in s. 487 of the Code of Criminal Procedure, include the hearing of an appeal, and that the hearing of the appeal from the order of the Munsif refusing sanction was a judicial proceeding within the meaning of the Code, and consequently that, under the provisions of s. 487, the District Judge had no jurisdiction to entertain the appeal against the judgment and sentence passed by the Deputy Magistrate.

THE facts which gave rise to this application were as follow: On the 15th September 1885 the petitioner, Madhub Chunder Mozumdar, obtained a decree for Rs. 44-7-6 against Novodeep Chunder Pundit and his brother in the Chandpur Munsif's Court. On the 12th December 1887 the petitioner took out execution of the decree against his judgment-debtors; and, although they declared that the decree had been already satisfied, they were compelled to pay the amount decreed into Court, as satisfaction of the decree had never been certified to the Court.

On the 9th January 1888 Novodeep and his brother preferred a complaint before the Magistrate against the petitioner, charging him with offences under ss. 210 and 417 of the Indian Penal Code in respect of the execution of the decree, and were ordered by the Magistrate to procure the Munsif's sanction to prosecute within seven days. On the 20th January the complainants applied for permission to withdraw the charge, on the ground that they were about

1888.

ABAYESWARI
DEBI

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SIDHESWARI
DEBI,
16 Cal. 80.

1888.

Nov. 10.

16 Cal. 121.

¹ Criminal Revision No. 351 of 1888.

1888.

IN THE
MATTER OF
MADHUB
CHUNDER
MOZUMDAR
v.
NOVODEEP
CHUNDER
PUNDIT,
16 Cal. 121.

to take proceedings against the petitioner in the Civil Court. They at the same time stated in their application that they would come forward at a future time with the Munsif's sanction for the prosecution of the petitioner. The Magistrate thereupon dismissed the complaint under s. 203 of the Criminal Procedure Code. Some time afterwards the judgment-debtors obtained a decree for the refund of their money against the decree-holder (the petitioner), and applied to the Munsif for sanction to prosecute him. Sanction was refused by the Munsif, but was granted by the District Judge upon an application being made to him.

Thereupon the present prosecution was instituted, and resulted in the conviction of the petitioner under s. 210 of the Indian Penal Code by the Magistrate, who sentenced him to six months' rigorous imprisonment and a fine of Rs. 100, or, in default of payment of such fine, to a further period of 1½ month's rigorous imprisonment.

Against that conviction and sentence the petitioner appealed to the District Judge, who dismissed the appeal.

The following is the material portion of the judgment of the District Judge :—

It is contended in appeal that the Magistrate, having once dismissed the case under s. 203 of the Criminal Procedure Code, had no power to take it up again of his own motion. I have carefully considered the arguments on this point advanced by the learned pleader for the defence, but I am unable to accept them. It is not at all clear from the terms of s. 437 of the Criminal Procedure Code, that it is only the District Magistrate who can of his own motion take up again a complaint already dismissed under s. 203 of the Criminal Procedure Code, and I do not think it can have been the intention of the Legislature to tie the hands of Subordinate Magistrates, and especially Sub-Divisional Magistrates, in the manner contemplated by such a very strict interpretation of the section. Even allowing, however, that the proceedings of the Magistrate in the present case were irregular, I think the irregularity is cured by s. 537 of the Criminal Procedure Code, as the accused does not appear to have been in any way prejudiced in his defence by the action of the Magistrate. On the legal ground, therefore, this appeal must fail.

The other ground taken by the appellant is that the evidence for the prosecution is untrustworthy. I am unable to agree in this view. The evidence of the prosecutor and of his nephew, Rukini, as to the voluntary payment in Falgoon 1292 B. S., of the decretal amount by the judgment-debtors to the decree-holder (appellant), is corroborated by the certified copy of the decree, which bears an endorsement in what clearly appears to be the appellant's handwriting, to the effect that the decree has been satisfied. The appellant fails to show that this document came into the hands of the prosecutor in any other way than that alleged by the prosecutor, *vis.*, that he received it from the appellant; and, this being so, and considering that the handwriting of the endorsement so closely resembles the admitted handwriting of the appellant, I believe that the prosecutor is speaking the truth in saying that he had already paid the money when the appellant took out execution against him.

On the whole, after careful consideration of the case, I have no doubt that the appellant has been rightly convicted. The sentence is severe, but I am not prepared to say it is excessive. The appeal is dismissed.

The petitioner thereupon applied to the High Court under its revisional powers to send for the record, and to set aside the conviction and sentence upon, amongst others, the following grounds :—

(1) That, as the complaint of the complainant had been once dismissed under s. 203 of the Criminal Procedure Code, the Deputy Magistrate had no

jurisdiction to entertain the complaint unless empowered by the High Court or Court of Session, or District Magistrate, in accordance with the provisions of s. 437 of that Code.

(2) That the Court of appeal had erred in law in holding that the said defect of jurisdiction was cured by s. 537 of the Criminal Procedure Code.

(3) That, as the question raised on the merits related to the discharge or satisfaction of a decree, and as the complainant, the judgment-debtor, did not admittedly raise this objection in the execution department, the Courts below had erred in law in having recognised such alleged private adjustment, and in having allowed him to adduce oral evidence on that point.

(4) That the learned Judge having granted sanction ought not to have heard the appeal under s. 487 of the Criminal Procedure Code.

Upon that application a rule was issued which now came on to be heard.

Mr. *M. Ghose* and *Baboo Kashi Kant Seal* for the petitioner.

Baboo Surendro Nath Mully Lall for the opposite party.

The judgment of the High Court (MACPHERSON and TREVELYAN, JJ.) was delivered by

TREVELYAN, J.—Two main questions have been argued before us. In the first place it is contended that the Judge had no jurisdiction to entertain the appeal, and secondly that no offence had been committed.

The first question turns upon the construction of s. 487 of the Code of Criminal Procedure. The Sessions Judge, who tried the case, Mr. Cameron, had given sanction for the institution of the charge. The charge was one under s. 210 of the Indian Penal Code for causing a decree to be executed against the complainant after it had been satisfied. The Munsif had refused sanction; the Judge had given it. A prosecution was accordingly instituted, and the case was heard by a Deputy Magistrate, and then came up on appeal before the Judge who had given sanction.

S. 487 provides that, except as provided in certain of the preceding sections, no Judge of a Criminal Court or Magistrate other than a Judge of the High Court shall try any person for any offence referred to in s. 195 when such offence is committed before himself, or is brought under the notice of such Judge or Magistrate in the course of a judicial proceeding.

In the first place, there can be no doubt, we think, that the trial of an appeal is included in the expression "shall try any person." The offence which is charged was undoubtedly an offence referred to in s. 195, and the offence charged here is one of the offences mentioned in that section. The only real question as to the applicability of s. 487 is, whether the offence was brought under the notice of this Judge in the course of a judicial proceeding.

With regard to that there can be no doubt that the hearing of the appeal from the order refusing the sanction was a judicial proceeding within the meaning of the Code of Criminal Procedure. That Code defines "judicial proceeding" as any proceeding in the course of which evidence is or may be legally taken. On the appeal from the order of the Munsif refusing sanction, the Judge undoubtedly had power to take evidence, and therefore it was a judicial proceeding, and it was in the course of that proceeding that the offence was brought under his notice, because the appeal was with reference to the refusal to sanction the prosecution. When that offence is established, s. 487 applies, and the Judge had no jurisdiction to entertain the appeal.

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With regard to the second objection, inasmuch as there will be a fresh trial, we think it undesirable to prejudge the question now. It will be open to the defendant to argue it when the appeal is heard and all the facts have been gone into.¹ Under the circumstances we think it would be better that the appeal should be heard in this Court, and we direct that it be so heard, and that notice thereof be given to both parties and to the Magistrate. The prisoner to be released on bail to the satisfaction of the Magistrate pending the hearing of the appeal.

H. T. H.

Rule made absolute.

CRIMINAL APPEAL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

1888.

Dec. 18.

MADHUB CHUNDER MOZUMDAR v. NOVODEEP
CHUNDER PUNDIT.²

16 Cal. 126.

Penal Code (Act XLV. of 1860), s. 210—Civil Procedure Code (Act XIV. of 1882), s. 258—Satisfaction of decree—Execution of decree—Fraudulently executing decree after it has been satisfied when satisfaction has not been certified to Court.

A decree-holder having proceeded to execute his decree against his judgment-debtor, the latter objected, stating that the decree had been already satisfied, although the adjustment thereof had not been certified to the Court as required by s. 258 of the Code of Civil Procedure. The judgment-debtor, being under the circumstances compelled to deposit the amount of the decree in Court, applied for and obtained sanction to prosecute the decree-holder for an offence under s. 210 of the Penal Code. It was contended that the case did not fall within that section, as the satisfaction, not having been certified to the Court, could not be recognised by the Court executing the decree, and that consequently no offence had been committed.

Held that the words, "after it has been satisfied," used in s. 210 of the Penal Code, indicate only the *fact* of the satisfaction of the decree. The fact that the satisfaction is of such a nature that the Court executing the decree could not recognise it does not prevent the decree-holder from being properly convicted of an offence under that section.

THIS was an appeal from the order of a Deputy Magistrate convicting the appellant and sentencing him to rigorous imprisonment and a fine, which came on to be heard by the High Court under the circumstances stated in the preceding case—[*In the matter of Madhub Chunder Mozumdar, petitioner*³].

The facts of the case are fully stated in the report of that case.

Mr. *M. Ghose* and Baboo *Kashi Kant Sen* for the appellant.

Mr. *Kilby*, for the Crown, appeared in support of the conviction.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The evidence has been placed before us, and we think that the conclusion to which the lower Court has come on that evidence is right. As regards the question of law which has been argued, *viz.*, that the present case does not come within the purview of s. 210 of the Indian Penal Code, because the satisfaction of the decree was of such a nature as could not be recognized by

¹ See next case.

² Criminal Appeal, No. 852 of 1888, against the order passed by *D. Cameron, Esq.*, Sessions Judge of Tipperah, dated the 31st of August 1888, affirming the order passed by Baboo Bugola P. Mozumdar, Deputy Magistrate of Chaundpore, dated the 8th of August 1888.

³ *Ante*, p. 885.

the Court executing the decree, we do not think that that contention is valid. The words of the section are: "Whoever fraudulently causes a decree to be executed against any person after it has been satisfied," &c. The words "after it has been satisfied" indicate, in our opinion, the fact of its satisfaction. Merely because the satisfaction is of such a nature that the Court executing the decree could not recognise it, would not take the case out of the purview of the section. We therefore dismiss this appeal.

H. T. H.

Appeal dismissed.

CRIMINAL REVISION.

*Before Mr. Justice Pigot and Mr. Justice Macpherson.*GANOURI LAL DAS (AND OTHERS) v. THE QUEEN-EMPRESS.¹

Rioting—Unlawful Assembly—Right of Private Defence of Property—Penal Code (Act XLV. of 1860), ss. 97, 103, 104, 105, 141, and 147.

A party of persons, consisting of some five peadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of M for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel on to the lands of their master T. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not, during the subsequent occurrence, use force. Having arrived at the spot about 10 A.M., they proceeded to work at the *bund* until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with *lathies*, and headed by the prisoners, who were servants of M, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked T's men, some five of whom were more or less severely wounded with the *lathies*.

The occurrence resulted in the conviction of some of M's servants for rioting under s. 147 of the Penal Code.

M's people wholly denied any right on the part of T to construct or repair the *bund*, and had previously denied the existence of such right, and refused permission to T to exercise it. It was contended that the assembly of M's people was not an "unlawful assembly;" that the interference by T's people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so.

Held that the prisoners had been rightly convicted.

Held, further, that, as no right of private defence of property is conferred by the Penal Code, except as against the perpetrators of offences under the Penal Code, and that, as, upon the facts of the case as found, no offence had been committed by T's people, their acts amounting merely to a civil trespass, and that, as there was no pressing or immediate necessity of a kind, shewing that there was not time to have recourse to the protection of the public authorities, no question as to the right of private defence arose in the case.

It was further contended that M's people did not assemble to enforce a right or supposed right within the terms of s. 141 of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one.

Held that they were members of an assembly, the common object of which was, by show of criminal force, and by criminal force, if necessary, to enforce the right to keep the river channel clear by preventing the construction of the *bund*, and by demolishing it so far as it was constructed, and that the case came within s. 141, para. (4).

Queen v. Mitto Sing,² *Shunker Singh v. Burmah Mahto*,³ and *Birjoo Singh v. Khub Lal*,⁴ referred to and commented on.

¹ Criminal Revision, No. 405 of 1888, against the order passed by C. A. Wilkins, Esq., Sessions Judge of Bhagulpore, dated the 6th of November 1888, affirming the order passed by Baboo Poorno Chunder Mitter, Deputy Magistrate of Bhagulpore, dated the 24th of September 1888.

² 3 W. R. Cr. 41.

³ 23 W. R. Cr. 25.

⁴ 19 W. R. Cr. 66.

1888.

MADHUB
CHUNDER
MOZUMDAR

v.

NOVODEEP
CHUNDER
PUNDIT,

16 Cal. 126.

1889.

Jan. 14.

16 Cal. 206.

1889.

GANDURI
BALL DASSv.
THE
GOVERN-
MENT,
16 Cal. 206.

In this case the petitioners were convicted by the Deputy Magistrate of Bhagulpore of rioting under the provisions of s. 147 of the Indian Penal Code, and sentenced to undergo one year's rigorous imprisonment each, and to enter into recognisance-bonds in the sum of Rs. 200 each to keep the peace for a period of two years, or in default to undergo two years' simple imprisonment.

Against that conviction and sentence they appealed to the District Judge, who confirmed the conviction and sentence. On the 28th November they applied to the High Court under its revisional powers to send for the record, and to set aside the conviction and sentence on grounds which appear sufficiently in the judgment of the High Court.

On that application a rule was issued calling on the District Magistrate to show cause why the conviction and sentence should not be set aside, and the prisoners were released on bail pending the hearing of the rule.

The rule now came on to be heard.

Mr. Woodroffe, Mr. Evans, Mr. Bonnerjee, Mr. M. Ghose, and Mr. M. P. Gasper, Baboo Mohesh Chunder Chowdhry, Baboo Taruck Nath Palit, Baboo Jogesh Chunder Dey, Baboo Jogendra Chunder Ghose, and Baboo Monmotho Nath Mitter, in support of the rule.

Mr. Phillips and Baboo Umakali Mookerjee for the prosecution.

The facts of the case appear fully stated in the judgment of the High Court, and in that of the District Judge, the material portion of which was as follows :—

"The facts are these. Some three years ago, in 1293 F. S., the Thakurs' family of Barari in Bhagulpore purchased a six-annas odd share in village Fazilpore. The lands of this village are irrigated by a water-course, known as the Sanis Daur, which issues from the river Karalya. On both banks of this river lie the lands of a native lady, whose husband is known as the "Mohashoyji;" her brother is Baboo Surjya Narain Singh, a leading pleader of this Court; and it is a matter of public notoriety, and has been more than once asserted at the hearing of the appeal without denial, that this pleader is the general adviser of the Mohashoy and of the latter's wife, who rarely acts without his advice.

"The Thakurs' family claim to have acquired by their purchase the right to erect or keep in repair a *bund* or embankment across the Karalya river, just at its junction with the Sanis Daur, with the object of diverting the waters of the stream into the water-course, and thus to irrigate the lands of Fazilpore. Accordingly, on the 24th June last, their local agents took a body of coolies to the spot to repair or renew this embankment. Whilst they were at work, they noticed that a number of men were being collected together. They appear to have come at once to the conclusion that the Mohashoy's people were about to oppose them in force; and I cannot help thinking that they knew that they had reason to believe that such a result might ensue. A messenger was at once sent up to Bhagulpore, a distance of some twelve miles. He came first to Barari, and thence went to the thannah, where he arrived at 11 P.M., and lodged his information.

"In the meantime, the threatened attack had been delivered; a large body of men, said to amount to some 1,200 in all, advanced to where the work was going on, headed by the appellants. After the usual preliminary discussion, the order was given to attack, and some 25 or 30 of the rioters detached themselves from the main body and fell upon the Thakurs' men, five of whom were more or less severely wounded with *lathi* blows; then the rioters dispersed.

"The Sub-Inspector, who had been in the interior when information had been lodged the previous night, was on the spot next day. He commenced his investigation. On the 2nd July a counter-charge was laid by the appellant Ganouri, this also was investigated, and ultimately members of both parties were sent up for trial under charges of rioting. The result is the conviction against which the present appeal is lodged.

"On these allegations, the Deputy Magistrate drew up what he calls three "issues" for determination. The first issue raises the point as to whether the Thakurs' men had any right to build a *bund* in the river? The Deputy Magistrate acknowledges that a Criminal Court has no power to determine this issue, and yet, in the same breath as it were, proceeds to answer it, for reasons given, in the affirmative. The question is one purely for a Civil Court to decide; and I may dispose of it in these words, and also by saying that, so far as the record discloses, there does not appear to be any legal evidence to show that it has ever been decided by a competent Court.

"The second issue deals with the question as to whether the Thakurs' men came to repair an existing *bund*, or to build a new one? The Deputy Magistrate has decided that they came to build a new one. But, so far as the evidence goes, it seems to me to establish that what they went to do was to erect an embankment on the spot where, as they allege, it stood in previous years; not to build one in an entirely different spot. In fact, they went to renew a *bund* which had been entirely washed away, or else to repair one which had been partially washed away; for the purposes of this case it is hardly material to enquire which.

"The third issue puts the question as to whether the Mohashoy's men used force, and, if so, whether the five appellants were of their number? No question of the right of private defence of property is raised. It is not even pleaded; but if, on the facts found, it is proved to exist, none the less will it avail the accused. [See *In re Kali Churn Mookerjee*.¹]

"The first point to ascertain is whether the acts charged by the prosecution are made out, that is, whether the appellant party did attack and beat the Thakurs' party, whilst the latter were engaged in working on the *bund*? As to this I have no hesitation in returning an affirmative. The evidence has been very lengthy, and a great deal of time has been taken up both in recording, and in commenting upon it in both Courts. It will be sufficient for me to say that, as a whole, I accept the story for the prosecution; there is no evidence to show that any persons, other than the accused and their party, inflicted the wounds which undoubtedly were inflicted on members of the Thakurs' faction; and there is ample, and it seems to me credible, evidence to show that certain members of the Mohashoy's party did inflict those wounds in the manner alleged.

"The next point to determine is which faction acted on the aggressive? A great deal has been made of the evidence of Babu S. N. Singh (W. 18), and of Sujait (W. 25), and it is contended that this evidence proves conclusively that the Thakurs were perfectly well aware of the fact that they could erect no *bund* except with the express permission of the Mohashoy. I do not agree with this contention. In the first place, the evidence of these two gentlemen does not seem to me to be wholly reliable; the first, at least, must be looked upon as personally interested in this case; and the memories of both of them must have misled them as to what actually occurred. Moreover, all that they say as to the alleged request of Babu Hari Mohun Thakur is nothing more nor less than hearsay. Mr. Ghose,

1882.
GANOURI
LALL DASS
v.
THE
QUEEN-
EMRESS,
16 Cal. 296.

¹ 11 C. L. R. 232.

1889.

GANOURI
LALL DASS
v.
THE
QUEEN-
EMPRESS,
16 Cal. 206.

indeed, urged that it was admissible as having been elicited in cross-examination. I am unaware of any rule or law which renders hearsay more admissible in cross-examination than in examination-in-chief, and in the case of *Bhatori Mushabaini* (H. C., Cal., Cr. App. No. 337 of 1882) a Divisional Bench held that hearsay evidence should not be recorded, even on the part of the accused. The evidence might perhaps have been admissible to contradict Babu H. M. Thakur had he been examined, but he was not. Moreover, the letter (Ex. S.) of the 20th October 1887 shows *prima facie* that Babu H. M. Thakur, though he wished for a settlement of the dispute as to whether he could take "earth" from the Mohashoy's zamindari in order to repair his *bund*, distinctly claimed the right of repairing it when he chose. Further, there is a great deal of oral evidence on the record, which I see no reason to disbelieve, to the effect that such repairs had been constantly made by the Fazilpore Zamindars, aided by the proprietors of adjacent villages, whose lands are equally irrigated by means of this water-course. I thereupon come to the conclusion that, whatever right may or may not exist, the Thakurs, in proceeding to repair or renew this embankment, were acting in the *bona fide* belief that they were entitled to do so. And I do not find that they proceeded to enforce this (supposed) right in the sense of s. 141, Indian Penal Code, for the repairing party were not larger in number than was necessary for the purpose; they evidently did not go to fight, for they at once informed the authorities when a breach of the peace appeared likely; and they did not go armed and ready to use force. They used no force, this is clear, because not one single wounded man has been produced from amongst the Mohashoy's faction, or from amongst any other assemblage of men.

"This being so, the acts of the Mohashoy's faction were clearly illegal. An earthen *bund* in a running stream cannot be made a permanent erection in a few hours; and there was no imminent danger to the property, for there was little or no water in the stream at the time. There was thus ample time to invoke the interference of the authorities, especially as it seems clear that the working party had been observed at an early hour of the day, before the work could have progressed far. The Mohashoy's faction, therefore, were deprived of the right of private defence (s. 99, Indian Penal Code), even if the Thakurs' faction had been the aggressors, and were trespassers. Moreover, their resistance (or attack) was not made on the spur of the moment; it was deliberate, after measures had been taken to assemble an overwhelming force. In two words, they took the law into their own hands on an occasion when the law deprives them of the right to do so."

The District Judge then proceeded to go into the question of the identity of the accused, and concluded as follows:—

"For the reasons above given, I confirm the conviction and sentence in the case of each accused. I do not think the sentence at all too severe: these open acts of violence, in defiance of the law, are of such frequent occurrence in these districts, that deterrent sentences are absolutely necessary. I have found by experience that sentences of six months' imprisonment and fine have no deterrent effect; and I have already had occasion to remark that I shall be prepared to uphold more severe sentences in all well-established cases of rioting with *lathial* weapons, such as this one. The medical evidence establishes the fact that the hurt caused to the Thakurs' people, though not "grievous" in the sense of s. 320, Indian Penal Code, was certainly severe in the case of one or two of them; in fact, they got an unmerciful and painful beating with *lathies*. The appellants will surrender to their bail in order to serve out the unexpired portions of the sentences passed upon them."

The nature of the arguments advanced at the hearing of the rule are sufficiently stated in the judgment of the High Court (PIGOT and MACPHERSON, JJ.), which was as follows :—

This case comes before us in revision.

Ganouri Lall Dass, Dursan Lall Dass, Koonjal Jetti, Murat Singh, and Moonshi Singh, were convicted, under s. 147 of the Indian Penal Code, of the offence of rioting, by the Deputy Magistrate of Bhagulpore, and sentenced to undergo one year's rigorous imprisonment each, and were further directed in the words of the sentence "to execute recognisance-bonds in the sum of Rs. 200 each for keeping the peace for a period of two years, or in default to undergo two years' simple imprisonment each."

On appeal to the District Judge the conviction and sentence were confirmed, and on the 28th November this rule was obtained in this Court, calling on the District Magistrate to show cause why the conviction and sentence should not be set aside. The prisoners were released on bail pending the hearing of the rule.

One member of the present Bench not having sat in the Bench which granted the rule, we heard the rule opened at length by Mr. *Woodroffe* for three of the petitioners, and also heard Mr. *Evans* for the other two. Cause was then shown by Mr. *Phillips* against the rule, and Mr. *Evans* was heard in reply for all the petitioners.

The case was argued at great length; we do not say at too great length, having regard to the importance of some of the questions raised before us.

The chief question discussed before us was, whether the acts of the persons convicted did, under the circumstances of the case, come within the provisions of the Indian Penal Code relating to the offence of rioting?

The disturbances, out of which this conviction arose, took place on the 24th June at a spot on the river Karalya, close to where a water-course, called the Sanis *Daur* (or otherwise the Raggahai Khurra), issues from that river.

Around this spot, and on both sides of the river, are lands belonging to Mohashoy Taruk Nath Ghose, of whose catchery Ganouri Lal is tehsildar, and Darsan Lal is patwari; the other three petitioners appear to be peadas of the same catchery; the Mohashoy is described in the petition in this case as the "master" of the petitioners.

Some distance (about two miles) from the point where the *Daur* issues from the river are the lands of Fazilpore, 6 annas of which were bought in 1293 F. S. by the Thakurs' family of Barari. These lands are irrigated by the water-course, which appears to be supplied from the river alone.

The disturbance of June 24th took place in consequence of a number of persons having on that day gone, under the direction of servants of the Thakurs, to the place where the water-course issues from the river, and having, just below the point of junction, banded up the course of the river (which was then dry or almost dry) for the purpose of diverting the waters of the stream into the water-course. It has been a matter of dispute in the case whether or not there was there at the time a *bund* partially washed away, which these persons repaired or attempted to repair; or whether what they went to do was to construct a *bund*, there being none actually there at the time; and it was denied on the part of the Mohashoy's people that a *bund* had ever been at this spot. The Deputy Magistrate (whose finding we refer to only because it is referred to by the District Judge) holds that the Thakurs' people went "to construct a

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new *bund* as the one which stood there before was washed away." The District Judge says "they went to renew a *bund* which had been entirely washed away, or else to repair one which had been partially washed away:" adding, for the purposes of this case, "it is hardly material to enquire which."

The District Judge finds that such repairs had been before the Thakurs' purchase constantly made by the Fazilpore zamindars, aided by the proprietors of adjacent villages, and that the Thakurs in proceeding to repair or renew the embankment were acting in the *bond-fide* belief that they were entitled to do so. The Thakurs' people went in considerable numbers, apparently coolies, save five or six peadas. The District Judge finds that they were not more in number than was necessary for the purpose of repairing the *bund*, for which purpose they went; that they did not go to fight; that they did not go armed and ready to use force; and that they did not use force on this occasion.

Upon these findings, it follows that the acts of the Thakurs' party did not constitute an offence under the Indian Penal Code.

The party arrived at the spot at about 10 A.M. (two ghurries of the day), and worked at the *bund* until the afternoon, by which time they had raised it to a considerable height, and also made it of considerable width. While they were engaged on the work, different bodies of men in large numbers were seen gathering in the neighbourhood, and marching towards the spot with drums or tom-toms beating. The Thakurs' men sent a messenger to Bhagulpore Thannah, about 10 or 12 miles off, who, however, did not reach it until 11 P.M.

At about 4 P.M. the bodies of men, previously seen gathering, came together to the number, as stated, of 1,200 in all, many of them armed with *lathies*, to where the work was going on, headed by the petitioners. Most of the Thakurs' party had either left, or then fled, and very few were left. Twenty-five or thirty men detached themselves from the main body, and fell upon the Thakurs' men, five of whom were more or less severely wounded with *lathi* blows, and three left senseless on the ground. The assembly then dispersed. It is contended that these acts do not amount to rioting under the Indian Penal Code in the present case.

The Mohashoy's people wholly denied any right on the part of the Thakurs to construct or repair, or to have in existence, in the river bed, any *bund* such as the Thakurs claimed. They had expressly denied the existence of any such right, and refused permission to the Thakurs to exercise it. They had done so in communications which passed between the two zamindars in October and November 1887.

The District Judge thought the evidence of these communications inadmissible as hearsay. We think they were admissible; although we do not think that, upon the fair construction of them, they at all negative the existence of that *bond-fide* belief on the part of the Thakurs in the right in respect of the *bund* which the District Judge finds they had.

It is plain that, on the part of the petitioners' master, the Mohashoy, the Thakurs' alleged right was strenuously denied; or, to put in different words his contention, his right to have the channel of the river free and unobstructed by any *bund* was strenuously asserted by him—a right in which, it may not be improper to remark, his villagers probably were interested as well as their landlord.

It is contended, under these circumstances, that the assembly of which the petitioners were members was not an unlawful assembly.

It is pointed out, with perfect justice, that they have not, nor has any one of them, been found guilty of inflicting the wounds, or any of the wounds inflicted on members of the Thakurs' party; so that, if they were not members of an unlawful assembly, they must go free.

It is argued that the interference by the Thakurs' people with the channel of the river justified the assembly in coming to stop them from working there, and the show and the use of force in compelling them to do so. It was not expressly contended that the amount of injury inflicted on the persons wounded was, such as it was, within the right of the assembly to inflict; it was argued that it would not be fair to use the violence employed as evidence of an unlawful purpose in the coming of the assembly.

But the right under the law to use force was asserted in argument.

This contention was founded, partly on the words of the Indian Penal Code, and partly on some of the decisions on that enactment.

It could hardly be supported, we venture to think, upon any supposed policy contemplated by the framers of the Code. The intention can hardly be imputed to the eminent persons who framed, or to the Legislature which enacted, the Code of legalising, in certain cases, the levying of private war. We apprehend there can be no doubt that, according to English law, the assembly in this case would be an unlawful assembly, or that, executing their purpose as they did, there would have been a riot, for which every member of the assembly would be liable.

Dalton's Justice of the Peace, in a passage constantly cited (as, for instance, in Burns, J. P., "Riot"), pp. 445-446, Ch. 137: "Every man in peaceable manner may assemble a meet company (and may come) to do any lawful thing; or to remove or cast down any common nuisance done to them. Every private man, to whose house or land any nuisance shall be erected, made, or done, may, in peaceable manner, assemble a meet company with necessary tools, and may remove, pull, or cast down such nuisance, and that before any prejudice received thereby; and for that purpose, if need be, may also enter into the other man's ground. A man erects a weir across a common river, where people have a common passage with their boats, and divers did assemble with spades, crows of iron, and other things necessary to remove the said weir and made a trench in his land, that they did erect the weir, to turn the water, so as they might the better take up the said weir, and they did remove the same nuisance. This was holden neither any forcible entry, nor yet any riot.

"But in the cases aforesaid, if in removing any such nuisance the persons so assembled shall use any threatening words (as to say they will do it in spite of the other; or they will do it though they die for it, or such like words), or shall use any other behaviour, in apparent disturbance of the peace, then it seemeth to be a riot; and, therefore, where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only without disturbance of the peace or threatening speeches. For the manner of doing a lawful thing may make it unlawful."

Russell, 4th Edition, Vol. I., 380: "But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful;

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from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry ; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. And if in removing a nuisance the persons assembled use any threatening words (such as, they will do it, though they die for it, or the like), or in any other way behave in apparent disturbance of the peace, it seems to be riot..... If a large body of men assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in a turbulent manner, either accompanied with acts of violence, or with threats and intimidation calculated to excite the terror and alarm of the Queen's subjects, this is in itself a riot, whether the end and object proposed be a just and legitimate one or not."

The latter part of this passage is taken from Chief Justice Tindal's charge to the Stafford Grand Jury in 1842.¹

We have, of course, to consider whether the Indian Penal Code has by omission or expression made a sort of violence or threat of violence lawful in India, which is criminal in England. The sections of the Code relating to the right of private defence of property were referred to.

S. 97, para. 2, is that which recognises in certain cases this right ; and ss. 103, 104, and 105, lay down the limitations of it.

The first and leading characteristic of the right is, that it exists as against an act of theft, robbery, mischief, or criminal trespass, or an attempt to commit one of those offences. No such right is conferred, by any words in these sections, save as against the perpetrators of offences under the Penal Code. The Code confers a right of private defence, not as against mere trespass, but as against crime. That is the general scope of it. There may perhaps arise cases of difficulty ; cases *inter apices juris* must always, from time to time, arise, and, when they do, be dealt with. But this is not such a case. Upon the findings of the District Judge, we must take it that no offence was committed by the Thakurs' people. The matter does not rest there. The District Judge says that no case was made for the petitioners in the first Court of the exercise of the right of private defence. Nor was it. The defence made was, so far as it touched this question at all, one of civil trespass only. Again, it is shown, and was on another aspect of the case pressed upon us by Mr. Woodroffe, that, long after the disturbance, the *bund* remained as it was when the attack took place. There was no water in the river to be then diverted. There was no pressing immediate necessity of a kind showing that there was not time to have recourse to the protection of the public authorities. Even apart from this, the District Judge finds it clear that the working party had been observed early in the day before the work could have progressed far ; but in place of having recourse to the authorities, the Mohashoy's party, acting with deliberation, assembled, after preparation, in great force, and went to stop the work at the *bund*. We do not think the right of private defence arose in this case.

Then it is argued that the assembly did not assemble to enforce a right or supposed right within the terms of s. 141.

On the morning of the 24th the Mohashoy was, it is said, in the enjoyment and possession of the right claimed, namely, to have the river channel free.

¹ C. & M. 663.

When the assembly went there in the afternoon, they went, not to enforce a right, but to defend a right. They went to prevent the continuance of acts which altered the *status quo ante*. It was not intended by the Code to make assemblies which are assembled in support of the *status quo* unlawful. An assembly to alter is unlawful; an assembly to defend is not. This, as we understand, is the argument.

This argument possesses some attractive subtlety. But we do not feel able to accept it. It is dangerous to attempt to lay down any general rule, and there may perhaps be cases in which an assembly to defend a right may not be unlawful; at least, we shall not now affirm that there cannot be. But to accept the general proposition enunciated would be a very different matter. There are many rights of which it may be affirmed that, when they are interfered with, the defence of them consists in exercising them in despite of the interference, that is or may be, in enforcing them. There are modes of enforcing a right which are not prohibited by s. 141. What it prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of five or more persons. And rights, the defence of which can only be effected by enforcing them, may come within its provisions.

The section refers to "right or supposed right." This would seem to make a division into: (*1st*) rights in actual enjoyment when interfered with; (*2nd*) rights claimed, though not in actual enjoyment when interfered with. And this would again indicate that the section, in some cases at any rate, makes unlawful an assembly which by force, &c., defends the right by restoring the *status quo ante* and with it the actual enjoyment.

If the proposition contended for be true, then, not merely the right to the actual occupation of property in physical possession, but a right of way, a right to draw water from a well, a right to enjoy ancient lights, and many others, may, if interrupted, be vindicated by force or show of force. So long as they are uninterrupted, they are in possession so far as such rights can be. To defend them by force against interruption is to enforce them; and this, if done by five or more, is, in many if not in most cases, forbidden by the law.

This proposition, in truth, embodies the view which was expressed by Campbell, J., sitting alone, in the case of *Queen v. Mitto Sing*¹ in the passage at page 43 beginning with—"I think that the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession." It is not the judgment of a bench of this Court; and with great respect we dissent from this passage and from that which follows it, and decline to be bound by either.

Leaving the discussion of this general proposition which, if established, would be a defence in this case, we must refer to the judgment of Phear, J., in the Pachgachia case [*Shunker Singh v. Burmah Mahto*²] which was much relied on.

The Court there held that the right of private defence existed. The Pachgachia people were in "the enjoyment of the use of water which they were then having at the very time." The Amba people came to stop the water by force, if necessary. Phear, J., says: "They" (meaning the Pachgachia people) "were not bound under all circumstances to stand quietly by while their opponents wrongfully and by force committed serious mischief." We think we must take this as a finding upon the character of the act committed

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¹ 3 W. R. Cr. 41.² 23 W. R. Cr. 25.

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by the Amba people; and, that being the finding, the right of private defence arose, there not being time to have recourse to the authorities. The act of the Amba people was held to be an attempt to cause such a change in the property (the actual taking of the water then flowing being treated as property) as to affect it injuriously, and so to be an attempt to commit mischief.

Further, it appears on reference to the papers in the case that the Pach-gachia people had gone to keep their channel clear, and had remained on the spot during the night previous to the disturbance: they were actually in possession of the flow of water so far as that was possible; and the Amba people then came to stop it, and on the finding of the lower Court were the aggressors. Some of the language used in the case, no doubt, affords ground for the argument properly pressed upon us, that it decides in general terms that the maintenance of the actual subsisting enjoyment of a right is not the enforcement of a right within the meaning of s. 141. If the case could only be read as supporting that proposition, we should think it our duty to refer it to a Full Bench. We think, however, that it does not go so far as to decide that.

We understand the case of *Birjoo Sing v. Khub Lall*,¹ also relied on to include a finding to a similar effect. Couch, C.J., says: "He (the petitioner) went there to do what persons had a right to do, *viz.*, endeavour to prevent mischief being done to property which belonged to them; and I think that he cannot, under the circumstances that have been stated, be considered to have been a member of an unlawful assembly so as to be answerable for any acts of violence which were committed by the assembly or any member of it in prosecution of the common object."

In this case, therefore, also, the defence of what was held to be property, against what was held to be mischief, constituted the justification accepted by the Courts.

In the present case, if the right claimed by the Thakurs does exist, their people were lawfully engaged upon the *bund*, and the *bund* was lawfully there. The petitioners were members of an assembly, the common object of which was, by show of criminal force, and by criminal force, if necessary, to enforce the right to keep the river channel clear, by preventing the construction of the bund, and by demolishing it so far as it was constructed: though the demolition was not carried out after the effects of the violence used became apparent—a not unusual circumstance in this country. We think the case comes under s. 141, para. 4.

We see no reason for holding that any omission in the charge occasioned a failure of justice in the course of the three months' trial which took place.

As to the *alibi* set up on behalf of prisoners 2 and 3, we see no reason to doubt that the District Judge fully considered the evidence bearing upon that question; and, so far as we may allow ourselves to express an opinion on the question of fact before him, we should say that we entirely agree with him. The letters are not satisfactory, and even if these accused were present at the well where the bodies are said to have been searched for on the day in question, that would not be inconsistent with their having been, as they are sworn to have been, at the riot afterwards.

We must discharge the rule to set aside the conviction.

But we think we are at liberty to diminish the severity of the sentence imposed. There was a serious question of right raised between the parties.

¹ 19 W. R. Cr. 66.

The Thakurs' people stayed quiet after the refusal of permission in October-November until just before the rains were nigh; they were the persons to come on the ground with good reason to know they might be opposed. This does not furnish a justification for the accused; but it does, we think, entitle us to refrain from treating the case as one fit for the exemplary sentence imposed. We quite feel the importance of the District Judge's observations. But, under the circumstance, we think a sentence of six months' imprisonment will meet the ends of justice. We are happy that a line of argument in reply, which we feared might have rendered it impossible for us to reduce the sentence, was not pursued.

Subject to this reduction, we let the sentence stand as it is.

H. T. H.

Rule discharged.

ORIGINAL CRIMINAL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Wilson, and Mr. Justice Norris.

QUEEN-EMPRESS v. BARTON.¹

Merchant Shipping Act, 1854 (17 and 18 Vic., c. 104), s. 267—Trial of British Seamen for Offences committed on British Ship on the High Seas—Procedure at such trial—Murder—Admiralty Courts—British Seamen on British Ship—Letters Patent, High Court, 1865, cl. 26—Case certified by Advocate-General.

A British seaman, who stood charged with the murder of a fellow-sailor on board a British ship on the high seas, was tried by a Judge of the High Court, under the Code of Criminal Procedure; the chief evidence against the prisoner being that given in the depositions of the captain and second officer of the ship, taken on commission; this evidence was admitted in evidence, and the prisoner was convicted and sentenced.

It was objected that, under s. 267 of the Merchant Shipping Act of 1854, the prisoner ought to have been tried in every respect as though the trial had been held at the Central Criminal Court in London, and that the law of evidence to be applied was that prevailing in England. *Held*, on a case certified by the Advocate-General under cl. 26 of the Letters Patent, that the prisoner had been properly tried according to the ordinary practice of the High Court, and that the evidence was admissible against him.

CASE certified by the Advocate-General (Sir Charles Paul) under cl. 26 of the Letters Patent of 1865.

"William Barton was indicted before Mr. Justice Norris at the 6th Criminal Session of 1888 for the murder of one William Malone on board the British ship *Desdemona* on the high seas on the 2nd July 1888.

"The indictment, as originally framed, was to the following effect:—

"That the said William Barton, on or about the 2nd July 1888, upon the high seas, and within the Admiralty jurisdiction of this Court, on board the British ship *Desdemona*, feloniously, wilfully, and of malice aforethought, did kill and murder one William Malone, a seaman of the said ship, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and Dignity.'

"An objection was taken at the trial that the indictment ought to be amended by inserting the words 'being then a British seaman on board a British ship, to wit, the *Desdemona*,' after the words 'William Barton' in the said indictment. The amendment was acceded to by the Crown, and the indictment altered accordingly.

¹ Original Criminal Case, No. 2 of the 6th Criminal Session of 1888.

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"The Counsel for the prosecution, having opened the case, proposed to put in evidence—

(1.) "The return of a commission directed to the Chief Presidency Magistrate for the examination of the captain, chief, and second officers of the said ship who were not present in this country.

(2.) "The deposition taken at the Police Court of one Benjamin Moram, sail-maker on board the said ship, who had been permitted by the Crown to leave with the said vessel.

"Such commission had been directed by Mr. Justice Trevelyan to issue under s. 503 of the Code of Criminal Procedure.

"It was objected by the Counsel for the prisoner that, under s. 267 of the Merchant Shipping Act of 1854, he ought to be tried in every respect as if he was being tried at the Central Criminal Court in London, and more especially that the law of evidence to be applied to this case was that prevailing in England. Under the law prevailing in England, both these pieces of evidence would have been inadmissible against the prisoner.

"The 267th section of the Merchant Shipping Act of 1854 is as follows: 'All offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions, by any master, seaman, or apprentice, who, at the time when the offence is committed, is, or, within three months previously, has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged, in the same manner, and by the same Courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England, and the cost and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.'

"The learned Judge admitted the evidence subject to further discussion, and such evidence was read on behalf of the prosecution accordingly.

"The prisoner was found guilty of manslaughter by the jury, and was sentenced by the Court to penal servitude for life; the learned Judge refused to reserve the point, but referred Counsel for the prisoner to myself under the 26th clause of the Letters Patent.

"The Counsel for the prisoner has appeared before me, and represented the above facts, and upon them I am of opinion that the question, whether the prisoner should have been tried under the provisions of s. 267 of the Merchant Shipping Act of 1854 (17 and 18 Vic., c. 104) according to the English law, and whether the evidence so given was admissible against him, is a doubtful one, and one that should be further considered by the High Court, and I do certify.

(Sd.) G. C. PAUL,
Advocate-General."

At the hearing

Mr. *Graham* appeared for the prisoner.

The *Standing Counsel* (Mr. *Phillips*) for the Crown.

Mr. *Graham*.—Under s. 267 of the Merchant Shipping Act, 1854, the prisoner should have been tried as he would have been tried had the trial been held at the Central Criminal Court in London. That section has never been

amended in any way, and is still in force. There has never been a case of a seaman having been tried by a High Court in India for an offence committed on the high seas, and I submit he should have been tried as though the trial were being held at the Old Bailey.

[NORRIS, J.—No objection was taken to any part of the proceedings save the reading of the commission and the deposition put in by the Crown.]

[WILSON, J.—Jurisdiction is not affected by procedure.]

Then I say that there was jurisdiction, but the prisoner was not tried according to s. 267 of the Merchant Shipping Act. The words “heard and determined” mean “heard and determined according to the common law of England.” *Bacon's Abridgment, Tit. Statute.*

In *Queen v. Thompson*¹ the majority of the Court held that, in prosecuting a British subject for an offence committed on board a British ship upon the high seas, the procedure must be that of the local Court trying the case; but Phear, J., stated that s. 267 of the Merchant Shipping Act, 1854, did not apply to the case, but agreed that s. 21 of 18 and 19 Vic., c. 91, did apply, and that under that Act the procedure referred to therein meant the procedure of the ordinary original criminal jurisdiction of the Court. But it seems that s. 21 does not apply to “master, seaman, or apprentices,” as that section uses the words “any person” instead. In the case of *Queen v. Thompson*¹ he was not described as a master, seaman, or apprentice. The case of *Reg. v. Elmstone*² follows Phear, J.’s decision, and lays down that s. 267 applies only to seamen of British ships.

[NORRIS, J.—Neither of these sections says that when a British seaman is in Calcutta, and when the Legislature say that he shall be tried by nine jurymen, that the Court shall break the law and try him by twelve jurymen as in England.]

Where there are general and particular statutes, the general statute cannot derogate from the particular.—*Hawkins v. Gathercole*,³ *Garnett v. Bradley*.⁴ S. 267 has been on the Statute book since 1844, being substantially s. 58 of 7 and 8 Vic., c. 112, the preamble of which states its object, *viz.*, to afford merchant seamen all due encouragement and protection. This is an Act passed for the benefit of a particular class.

[PETHERAM, C.J.—The only question is how to construe the words “in the same manner” in s. 267. Do they not mean in the same manner as if the offence had been committed within the jurisdiction of the Court of Admiralty in England?] S. 267 controls the act of this Court.

[WILSON, J.—Does not 12 and 13 Vic., c. 96, affect the section?] That is a general statute, and meets the case of persons who are not provided for by any other statute. In *Queen v. Anderson*⁵ the whole argument was an endeavour to show that s. 267 did not apply to an American seaman on a British ship, and the offence was committed 70 miles up the Garonne. S. 21 of 18 and 19 Vic., c. 91, s. 11 of 30 and 31 Vic., c. 124, must be read together, they were all discussed in *Reg. v. Elmstone*,³ and Westropp, J., held that the effect of the Act of 1855 was to provide for British subjects other than seamen committing crimes on British ships, and that the Act of 1867 was to provide for British subjects committing offences on board foreign ships to which they did not belong.

¹ 1 B. L. R., O. Cr., 1.

² 7 Bom. Cr. 89.

⁵ L. R., 2 Cr. Cas. Res. 161.

³ 24 L. J. Ch. 332.

⁴ L. R., 3 App. Cas. 952.

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The *Standing Counsel* (Mr. Phillips) for the Crown was not called upon.

The following opinions were delivered by the Court (PETHERAM, C.J., WILSON, J., and NORRIS, J.):—

PETHERAM, C.J.—The facts are stated in the case certified by the Advocate-General, and it is not necessary to re-state them here.

It was argued before us that, under the provisions of the Merchant Shipping Act, 1854, s. 267, the prisoner should have been tried in every respect as if he had been tried at the Central Criminal Court in London, and the cases of *Queen v. Thompson*¹ and *Reg. v. Elmstone*² were cited and relied on on behalf of the prisoner. As to those cases, I think it enough to say that the words relied on were *obiter dicta* only, and that in the result the Court held in each case that the prisoners were properly tried according to the procedure of the Court before which the trial took place, so that both cases are authorities against the view which was pressed upon us.

The question, however, depends upon the true construction of the statutory law. The Merchant Shipping Act, 1854, by no means contains the whole of the legislation on the subject, and when the whole of the enactments are considered, I think the matter is free from doubt.

The first statute in point of time which it is necessary to notice is 12 and 13 Vic., c. 96, s. 1. That Act provides that, if any person is charged in any colony with an offence committed on the seas, he shall be dealt with there, as if the offence had been committed within the limits of the local jurisdiction of the Courts of Criminal Justice of such colony.

Next in order of time comes the Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, s. 267. That section, so far as it is material to the present question, provides that all offences committed afloat against a person, by any seaman employed in any British ship, shall be inquired of, heard, and tried *in the same manner* as if such offences had been committed within the jurisdiction of the Admiralty of England.

The next statute on the subject is the Merchant Shipping Amendment Act, 1855, 18 and 19 Vic., c. 91. S. 21 provides that, if any British subject charged with having committed any crime or offence on board any British ship on the high seas is found within the jurisdiction of any Court of Justice within Her Majesty's dominions, which would have had jurisdiction to try the case if the offence had been committed within its jurisdiction, shall have jurisdiction to try the case as if the offence had been committed within its jurisdiction.

The next enactment is 23 and 24 Vic., c. 88. It extends the provisions of 12 and 13 Vic., c. 96, to India.

The last enactment on the subject is contained in the Merchant Shipping Act, 1867, 30 and 31 Vic., c. 124. S. 11 of this Act provides that, if any British subject commits any offence on board any British ship or on board any foreign ship to which he does not belong, any Court of Justice in Her Majesty's dominions, which would have had cognizance of such offence, if committed on board a British ship within the limits of its ordinary jurisdiction, shall have jurisdiction to hear and determine the case.

If the whole of these enactments apply to the case of an offence committed by a British seaman on board a British ship on the high seas, it is clear that the case must be tried by the Court before which the trial takes place

¹ 1 B. L. R., O. Cr., 1.

² 7 Bom. Cr. 89.

according to its own procedure, as both the 12 and 13 Vic., c. 96, and the Merchant Shipping Amendment Act, 1855, expressly provide that the Court to which the jurisdiction to try the case is given shall have the same jurisdiction as if the offence had been committed within the limits of its local jurisdiction. And it has not been argued before us that this would not be the case, but it has been contended that, as s. 267 of the Act of 1854 is for the benefit of, or at least has reference to, a particular class, the general legislation contained in the other statutes cannot operate to control the effect of that section. I cannot accede to this argument, because I think that the section is only a part of the legislation intended to give various Courts in Her Majesty's dominions jurisdiction to try offences committed on the high seas, and is not for the benefit of any particular class. I think, however, that, even if s. 267 is read alone, it does not bear the construction sought to be placed upon it by Mr. *Graham*. If the section is read without any portion of it, except those which relate to the expression "*in the same manner*," it will read that offences committed by seamen employed in a British ship afloat, out of Her Majesty's dominions, shall be tried *in the same manner* as if the offence had been committed within the jurisdiction of the Admiralty of England. This, in my opinion, must mean, shall be tried by the same Court which would have tried the case if the offence had been committed within the jurisdiction of the Admiralty of England, but does not in any way affect the practice of the Court to which the jurisdiction is given. For these reasons I think that the prisoner was properly tried according to the ordinary practice of this Court, and that the evidence was properly admitted.

WILSON, J.—I am of the same opinion, and I think that, when the statutes are looked at in their natural connection, there cannot be any doubt about the matter.

The question before us is, whether the prisoner ought to have been tried, not according to the course of procedure followed by our own Court, but by such a course of procedure as would have been followed by the Courts which ordinarily exercise criminal jurisdiction in England in cases within the jurisdiction of the Admiralty.

There are two Acts which deal with the general question as to how criminal offences, committed within the jurisdiction of the Admiralty, are to be tried here and elsewhere. The first is 12 and 13 Vic., c. 96, which, in its first section, provides in substance that criminal offences committed within the jurisdiction of the Admiralty are to be tried in any Colonial Court, in the same manner as if the offence had been committed within the ordinary jurisdiction of such Court. Then there is Act 23 and 24 Vic., c. 88, which extends this provision to India, declaring that India is to be regarded as a colony within the meaning of the earlier Act.

These Acts have been construed both by this Court in *Queen v. Thompson*¹ and by the Bombay High Court in *Reg. v. Elmstone*,² and it seems to me that the effect of these cases, so far as procedure is concerned, is to say that offences committed within the jurisdiction of the Admiralty are to be tried by the Indian Courts according to the course of their own procedure.

Having thus ascertained the general rule for the trial of offences committed within the jurisdiction of the Admiralty, we come next to the particular provisions in the several Merchant Shipping Acts which deal with cases which either do not or may not fall within the ancient jurisdiction of the Admiralty.

1889.

QUEEN-
EMPRESS

v.

BARTON,
16 Cal. 238.¹ 1 B. L. R., O. Cr., 1.² 7 Bom. Cr. 89.

1889.

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The first of these is the section of the Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, upon which reliance has been placed, namely, s. 267. This section deals with cases which might or might not fall within the Admiralty jurisdiction. It deals with offences committed by British seamen either ashore or afloat out of Her Majesty's dominions. The next Act is the Merchant Shipping Act, 1855, 18 and 19 Vic., c. 91, s. 21, which goes a step further, and deals with offences committed by any British subject on board a British ship on the high seas or in a foreign port, or by a foreigner on board a British ship on the high seas. And s. 11 of the Merchant Shipping Act, 1867, 30 and 31 Vic., c. 124, goes on to create a further extension, because it includes cases, not only of offences committed on board British ships, but offences committed by British subjects on board foreign ships to which they do not belong. It seems to me that the real intention of these sections is not to interfere with the course of procedure laid down in the General Act, 23 and 24 Vic., c. 88, but to secure that, in cases analogous to those of offences committed within the jurisdiction of the Admiralty, though not strictly within it, the same rules of procedure shall apply.

NORRIS, J.—I am of the same opinion, and substantially for the reasons given by my brother Wilson.

T. A. P.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Trevelyan.

1889.

Feb. 13.

16 Cal. 281.

JAGAT KISHORE ACHARJYA CHOWDHURI (1ST PARTY) v. KHAJAH
ASHANULLAH KHAN BAHADUR (2ND PARTY).¹

Criminal Procedure Code (Act X. of 1882), s. 145—Possession, Inquiry into—Time at which Magistrate has to determine who was in possession—Undisturbed possession immediately before dispute.

In an enquiry under s. 145 of the Criminal Procedure Code, where the property in dispute was forest-land, the right to possession of which was exercised by cutting and removing timber from time to time, the Magistrate found that the men of the first party had been driven away by those of the second, and had been unable to enter the forest and remove the timber alleged to have been cut by them; that this happened before the time of the initial proceedings, and continued to the date of the hearing; and that the men of the second party had been able to bring out of the forest the timber which had been cut. Upon these findings he came to the conclusion that the possession of the second party had been established, and made an order under the section in their favour.

Held that, having regard to the nature of the property in dispute, these facts could not constitute legal possession of the second party at the time the proceedings were instituted.

Held, further, that in like cases, having regard to the nature of the property in dispute, and the mode in which possession may be exercised over it, in order to find which party was in possession when the proceedings were instituted, it is necessary to inquire which party was in undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one on which the dispute arose; and whichever party be found to have been in possession on that occasion should be presumed to have possession at the time when the proceedings were commenced.

THIS was a reference made by the Sessions Judge of Mymensingh for the purpose of having an order made by the Joint-Magistrate of that District, under

¹ Criminal Reference, No. 17 of 1889, made by H. P. Peterson, Esq., Sessions Judge of Mymensingh, dated the 11th of January 1889, against the order passed by C. W. E. Pittar, Esq., Officiating Joint-Magistrate of Mymensingh, dated the 24th of September 1888.

s. 145 of the Criminal Procedure Code, set aside, the Sessions Judge being of opinion that the order was not justified upon the findings of fact by the Magistrate. The circumstances which gave rise to the proceedings being taken under that section and the order being passed were as follows:—

The subject-matter of the dispute was a tract of forest-land claimed by the first party as a part of Rangamatia-gur, and by the second party as a part of Atia-gur.

In the month of March 1888, a number of trees had been cut in the forest by labourers, having authority to do so from one or other of the parties, and a dispute arose between the parties with reference to the right to remove the timber, and a police-enquiry was held. On the 3rd April, the head-constable submitted a report, stating that the dispute was regarding a plot of land extending over two-and-a-half miles, and that there was a likelihood of a breach of the peace, as both parties were endeavouring to remove the timber.

On that, proceedings were taken under s. 107 of the Criminal Procedure Code, which resulted in an order being passed on the 7th June, binding down Tarini Prosad Chuckerbutty, who was a lessee of the second party, to keep the peace.

That enquiry and the police-report formed the basis of these proceedings, which were instituted on the 9th June. Both parties appeared, and numerous witnesses were examined on behalf of both sides.

On the 24th September 1888, the Joint-Magistrate passed the order complained of. The material portion of his judgment was as follows:—

“The subject-matter of dispute between the two parties to these proceedings is a tract of forest-land claimed by the first party as the Rangamatia-gur, and by the second party as part of the Atia-gur. The Eastern and Western boundaries are in dispute. . . . In March last, a number of trees were cut in this forest by labourers having authority from one or other of the parties. A dispute arose in consequence of these acts, and a police-enquiry was held. A report was submitted by the head-constable on the 3rd April. On that, proceedings under s. 107, Civil Procedure Code, were taken, and decided on the 7th June. That enquiry and the report of the police-officer formed the basis of these proceedings, which were initiated on the 9th June. It is necessary to decide which party was in possession on that date. Possession of property of this nature is exercised whether by the landlord or by his lessee by allowing the public to cut the timber, who are assessed proportionately to the amount of timber which they cut. As a rule, no written authority is given to individuals to cut timber, in which case the arrangements described are made by the person who acquires such a right. In this case, however, it is asserted that licenses were given on the last and previous occasions of cutting timber. Each party has given evidence of possession having been exercised on previous occasions, and evidence of title has been given as corroboration and explanatory of the evidence of possession. In deciding the fact of actual possession, I dismiss from my mind all considerations of the legal title of either party. In *Ambler v. Pushong*¹ it has been laid down that the Magistrate has to find which of the parties is in possession of the subject-matter of the dispute at the time when he is enquiring into the matter, which, in the contemplation of the law, is identical with the time of the institution of the proceedings, and not at any time previous thereto, and he has no concern as to how the party then in actual possession obtained possession, but has only to pass an order retaining him in pos-

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¹ I. L. R., 11 Cal. 365.

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session. It appears from the evidence of the witnesses produced by the first party that they were driven away by the men of the second party, and have been unable to enter the forest and remove the timber which they alleged to have been cut by them. This happened before the time of the initial proceedings, and that state of things still continues. Further, it appears that the men of the second party have been able to bring out the timber which was cut, with the exception of a few trees, which were cut, as is alleged, by a man who has since died. Neither party can bring that timber away now, as the cut timber in the forest is under attachment; but it does not appear that the first party brought away a single tree. It is, therefore, perfectly clear that the second party has retained the possession which it had at the commencement of these proceedings. This being so, it is unnecessary to go into any of the circumstances previous to the institution of this case, and it also becomes unnecessary to deal with the objection raised by the second party as prejudicial to them."

The Joint-Magistrate then went into the question as to whether the lessees should have been made parties to the proceeding, and, deciding that question in the negative, declared the second party to be entitled to retain possession until evicted therefrom in due course of law. The first party thereupon petitioned the Sessions Judge, who referred the case to the High Court. In his order of reference, the Judge stated his reasons for disagreeing with the Magistrate's order as follows:—

"In submitting the case for the inspection of the Court, I beg to report that, in my opinion, the order was not justified on the limited finding of the lower Court. The finding on the question of possession refers to a period commencing with the entry by the men of the second party and forcible exclusion of the first party from the disputed forest. There is no finding regarding any earlier period, and as the Officiating Joint-Magistrate, on the commencement of the quarrel, bound down, under s. 107, Criminal Procedure Code, a lessee of the second party, yet on the authority of *Ambler v. Pushong*¹ he has restricted his enquiry on the point of possession to the interval between the receipt of the police-report regarding a probable breach of the peace, and the proceeding drawn up in June under s. 145, Criminal Procedure Code, on disposal of the inquiry under s. 107, Criminal Procedure Code. It will be further noticed that there is no decision regarding the persons who cut the wood; and, this being the initial proceeding in the dispute, the enquiry appears to me defective, and judgment thereon incomplete.

An additional enquiry, under the circumstances disclosed of one party cutting the timber, and the second removing it, as to possession *before* the actual cutting of the trees and opposition against entry or re-entry as the case may be, and order thereon, would appear to me more conformable to the law on this section of the Criminal Procedure Code as set forth in rulings subsequent to that relied on by the Joint-Magistrate."

The case now came on for hearing before the High Court.

Mr. Woodroffe, Mr. Gasper, Baboo Grish Chunder Chowdhry, and Baboo Pramatha Nath Sen for the first party.

Mr. Garth and Baboo Basanta Kumar Ghose for the second party.

The judgment of the High Court (MITTER and TREVELYAN, JJ.) was as follows:—

The Magistrate in this case, following the decision in *Ambler v. Pushong*,¹ has maintained the second party in possession of a piece of forest-land. It

¹ 1. L. R., 11 Cal. 365.

appears not to be disputed that the right of possession upon the forest-lands in question is exercised by cutting timber from time to time, and removing that timber, upon a certain price being paid therefor. It further appears that in Falgun last year (or March 1888), a number of trees was cut in the forest by labourers who had authority to do so either from the first party or the second party. It also appears that there was a disturbance of the peace consequent upon attempts being made by the parties respectively to remove the timber. The result was that, on the 7th of June last, a lessee of the second party was bound down to keep the peace, and, on the 9th June, the present proceedings were instituted between the parties, the lessee not being made a party to these proceedings. All that the Magistrate finds in this case is this. He says: "It appears from the evidence of the witnesses produced by the first party that they were driven away by the men of the second party, and have been unable to enter the forest and remove the timber which they alleged to have been cut by them. This happened before the time of the initial proceedings, and that state of things still continues. Further, it appears that the men of the second party have been able to bring out the timber which was cut, with the exception of a few trees, which were cut, as is alleged, by a man who has since died." Upon these two facts being found, the Magistrate came to the conclusion that the possession of the second party was established when these proceedings were instituted. Having regard to the nature of the property in dispute, these two facts, found in favour of the second party, could not constitute legal possession of the second party at the time the proceedings were instituted. The first party is entitled to assume that, on the occasion preceding the one in which the dispute arose, his men were allowed to cut and remove timber in the forest without any disturbance of peace. There is evidence adduced by him on this point which has not been disbelieved by the Deputy Magistrate. He is, therefore, entitled to say that, for the purposes of the question of law which has been raised before us, and for that purpose only, this fact should be assumed in his favour. If this contention be conceded, it seems to us to follow that what happened in March last could not have the effect of putting the first party out of possession; they would only be acts disturbing the possession of the first party. Having regard to the nature of the property in dispute, and the mode in which possession may be exercised over the property, we think that, in order to find which party was in possession when the proceedings were instituted, it is necessary to enquire which party was in the undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one in which the dispute arose; and whichever party be found to have been in possession on that occasion, should be presumed to have possession at the time when the proceedings in this case commenced.

We desire to guard ourselves from being understood to express any opinion on the question of possession—that question is left to be decided by the Joint-Magistrate. We simply make the assumption of fact, which the first party contended should be made, in order to decide whether the finding of the Joint-Magistrate is sufficient *in law* to dispose of the case.

We set aside the order of the Joint-Magistrate, and remit the record of the case to him, in order that it may be decided, on the evidence now on the record, with reference to the observations made above.

H. T. H.

Order set aside, and case remanded.

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CRIMINAL APPEAL.

Before Mr. Justice Macpherson and Mr. Justice Trevelyan.

1888.

THE GOVERNMENT OF BENGAL *v.* UMESH CHUNDER MITTER
AND OTHERS.¹

Nov. 6.

16 Cal. 310. *Attempt to commit offence—Attempt to cheat—Currency Office—Application for payment of lost halves of currency notes.*

A man may be guilty of an attempt to cheat, although the person he attempts to cheat is forewarned, and is therefore not cheated. *R. v. Hensler*² referred to.

M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office, having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves, and that the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying M in respect of the notes. The form was filled up and signed by M, and returned by him to the Currency Office.

Held that, although there was no intention on the part of Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat.

This was an appeal from an order of acquittal passed on the 7th September 1888 by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta. Umesh Chunder Mitter was charged under s. 511 of the Penal Code with having, in the month of May 1888, at the Government Currency Office in Calcutta, attempted to cheat the Assistant Comptroller-General, in behalf of the Government of India in charge of the Paper Currency Department, by attempting to deceive him, and thereby fraudulently and dishonestly induce him to deliver to him (the said Umesh Chunder Mitter) the sum of Rs. 40, the value of two Government currency notes, Nos. $\frac{A}{73}$ 21687 and $\frac{A}{74}$ 61346 for Rs. 20 each, and Hem Chunder Chatterjee and two others were charged under s. 116 of the Penal Code with having, at or about the time and place aforesaid, aided and abetted the said Umesh Chunder Mitter in the commission of the offence of cheating.

After the examination of one witness on behalf of the defence, the Magistrate stopped the case, and acquitted the prisoners.

The Crown appealed to the High Court.

The facts of the case are fully stated in the judgment of the High Court.

The *Advocate-General* (Sir G. C. Paul) and Mr. Roberts for the Government of Bengal.

Mr. Palit for Umesh Chunder Mitter.

Mr. M. Ghose for Hem Chunder Chatterjee and Haran Chunder Chatterjee.

Mr. Allen for Jadub Chunder Gangooly.

The judgment of the Court (MACPHERSON and TREVELYAN, JJ.) was as follows:—

This is an appeal from an acquittal. The first accused was charged with attempting to cheat. The other prisoners were charged with aiding and abetting him in the commission of the offence of cheating.

¹ Criminal Appeal, No. 3 of 1888, against the order of acquittal passed by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 7th of September 1888.

² 11 Cox C. C. 570.

After one witness had been examined for the defence, the Magistrate stopped the case, and acquitted the prisoners.

When we first heard this appeal, the Advocate-General appeared for the Crown. At the conclusion of his opening address, we held that there was no case against Haran Chunder Chatterjee, and accordingly we discharged him. We then heard Counsel for the other accused, and the Advocate-General in reply. After consideration we discharged the accused Jadub Chunder Gangooly, and expressed our opinion that the Magistrate ought not to have stopped the case for the defence so far as the remaining two accused were concerned. We gave them an opportunity of calling evidence before us. We have since heard such evidence as has been produced on behalf of the accused Umesh Chunder Mitter and Hem Chunder Chatterjee, and must now deal with the case as completed.

Although we are told that in dismissing the case the Magistrate made some statement, he did not record his reasons for acquitting, and therefore we have not the advantage of knowing the nature of, or the grounds for, his opinion.

There is no serious difficulty about the facts of this case. The chief questions depend upon the effect to be given to those facts, and the inferences to be derived from them.

It is contended that the facts proved do not disclose an offence, and therefore it is desirable to see what are the undoubted facts of this case.

On the 23rd of May last the principal accused Umesh Chunder Mitter sent in to the Currency Office a letter (Exhibit A), enclosing two half currency notes for Rs. 20 each, stating that the other halves were lost from his box where he kept them, and asking what steps should be taken for the recovery of the money.

On receipt of this letter, Mr. Keene, the Assistant Comptroller-General in charge of the Currency Office, caused a search to be made in the Registration Branch of his office to see if there was any other claim against the two notes. On such search it was found that the amount of the notes had been paid to the holder of the other halves.

Mr. Keene then caused a document, which is marked Exhibit D, to be sent to Umesh Chunder Mitter. This was sent on the 28th of May, with a covering letter which treated Umesh Chunder's letter as an application for the payment of the value of the notes, and requested him to answer the questions embodied in the claim.

D is a form of claim with questions to be answered by the claimant.

As to his sending this form Mr. Keene states: "My object in sending out D was, believing these men were attempting to cheat, I wanted them to commit themselves." It is clear that, when he sent out D, Mr. Keene did not contemplate paying Umesh Chunder Mitter in respect of the notes. Within Mr. Keene's experience no notes had been paid a second time, and, as he says, it ought not to happen that they are paid a second time. He was examined as to what he would do, in case, after payment to one applicant, a second applicant were to make out his title, but, as such an event had not happened within his experience, his answer is purely hypothetical.

The questions contained in this form of claim were filled in, signed by Umesh Chunder Mitter, and returned to the Currency Office on the 11th of June. This document, as filled up, is, in form and intent, an application for the payment of the money.

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In answer to the questions contained in this form, Umesh Chunder Mitter stated that he was proprietor of the entire notes, that he received them from Haran Chunder Chatterjee of Gobardangah about October 1887, that he himself divided them in halves for the purpose of forwarding them to his cousin, that in December 1887 he lost the halves from his box, and that the persons who could give evidence as to his possession of the entire notes, or as to the circumstances of the loss, were Hem Chunder Chatterjee and Jadub Chunder Gangooly.

The Currency Office had paid in respect of the other halves in 1871. On the 17th of November 1871, those half notes were withdrawn from circulation, and on the 18th of the same month they were cancelled. It follows from this that the statement made by Umesh Chunder that he received the entire notes from Haran Chunder Chatterjee in October 1887, and divided them himself, is untrue. On the 13th of June another printed form is sent to Umesh Chunder Mitter. It asks for a certificate from the party from whom the claimant received the whole notes, of his having paid the notes to the claimant, and also for a declaration of the persons named in the form Exhibit D, setting forth what they know as to the whole notes having been the property of the claimant and in his possession, and also as to the subsequent loss of the half notes in question. In answer to this letter Umesh Chunder Mitter sends in the certificate and declaration asked for.

The certificate purports to be signed by Haran Chunder Chatterjee, and is as follows :—

"I do hereby certify that about seven or eight months ago I have sent two full notes of Rs. 20 each to Baboo Umesh Chunder Mitter of Areadah, the numbers of which are stated below $\frac{A}{73}$ 21687 for Rs. (20) twenty, $\frac{A}{74}$ 61346 for Rs. (20) twenty.

GOBARDANGAH : }
The 28th June 1888. }

HARAN CHUNDER CHATTERJEE."

These numbers correspond with the numbers of the half notes sent in with the first letter. The statements in this certificate were unquestionably untrue to the knowledge of Umesh Chunder Mitter.

The declaration was written out by the accused Hem Chunder Chatterjee, and was signed by him and the accused Jadub Chunder Gangooly, and was as follows :—

"We declare to the best of our knowledge that two full notes, viz., $\frac{A}{73}$ 21637 and $\frac{A}{74}$ 61346 of rupees twenty each, were handed over to Baboo Umesh Chunder Mitter of Areadah about eight months ago when we were present there.

AREADAH : }
The 2nd July 1888. }

HEM CHUNDER CHATTERJEE.
JADUB CHUNDER GANGOOLY."

The statements in this declaration were unquestionably untrue to the knowledge of Umesh Chunder Mitter and Hem Chunder Chatterjee.

On the 10th of July, Mr. Keene wrote to Umesh Chunder Mitter, asking him to come and see him at the Paper Currency Office on the 12th of that month at 1 P.M. He came at the appointed time. Mr. Hume, the Government Prosecutor, then questioned him. He was asked if the answers in D were true. He said they were. He was asked if he filled in the answers personally.

He said no, but by his nephew Jagadish Chunder Gangooly. He further said that the answers were filled in under his orders and in his presence at his dictation, and signed by the witnesses named in the form, which was also signed by himself. He was then specially asked about answer No. 2. He said: "Yes, I am the proprietor of the entire notes, and I received them from Haran Chunder Chatterjee of Gobardangah in October 1887." Mr. Hume then asked Umesh if he had cut the notes in half. He said: "I think I must have, but am not sure. I have had many notes." Mr. Hume then showed him the certificate and declaration. He said that he knew them, and had received the certificate from Haran Chunder Chatterjee, and the declaration from Hem Chunder Chatterjee and Jadub Chunder Gangooly, and that he had sent the certificate and declaration to the Currency Office through Jadub Chunder Gangooly. Mr. Hume then said to him: "Baboo, would you be surprised to hear that the other halves of the notes mentioned in your application were cancelled in the Currency Office in November 1871?" He said nothing then, but began to tremble. Mr. Hume said: "Baboo, you are in a great mess. This is an attempt to cheat." He said: "I did not intend to cheat." Mr. Hume said: "You must explain that before a Magistrate." Mr. Hume said: "Why did you tell a lie in your application?" He said: "I did wrong, sir." Mr. Hume then went with him into Mr. Keene's room, and in Mr. Keene's presence said: "Baboo, can you explain this matter?" He said: "I am a poor man. I have no money. I received the half notes from Haran Chunder Chatterjee, who told me to try and get the money from the Currency Office." There the interview ended.

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On the next day warrants were issued; when arrested Hem Chunder Chatterjee produced a Bengali letter to which we shall hereafter refer.

This is the case for the prosecution.

There was no evidence against Haran Chunder Chatterjee, and the only evidence against Jadub Chunder Gangooly was that he had signed the certificate to which we have referred. His defence was that he signed that document without reading it, and at the request of Umesh Chunder Mitter. It appears that he has always borne a good character, and although it rarely happens that a man signs a short document of this description without reading it, it is possible that his story may be true, and therefore we thought we could discharge him. As far as the remaining two accused are concerned, their defence is identical. We have heard a most elaborate argument, consisting of two main contentions. In the first place, it is said that the acts committed at the most amount to a preparation to commit an offence, and in the second place it is said that it was the duty of the prosecution to show that the defendants in what they did acted dishonestly, and that that has not been proved.

We do not think there can be any doubt that, apart from the second question to which we shall presently refer, the facts here amount to an attempt, and not merely to preparation. The letter written on the 23rd of May is merely a letter of enquiry, and does not amount to an attempt. It is only a step in the preparation for the attempt. In sending it the writer did not commit himself. The document D, however, is an application for the payment of the money, and is the usual form in which such applications are made. An application for money is surely an attempt to obtain money. The application for money under a false pretence, as a rule, concludes the acts of the offender; unless anything occurs to prevent the payment he gets the money. Whether he gets the money or not does not necessarily depend upon any future act of his.

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If authority were necessary for this proposition, the case cited to us of *Reg. v. Hensler*¹ is only distinguishable by the circumstance that this particular question was not argued in that case. But that case, we think, disposes of another branch of the same contention raised by the respondents. It is said that because Mr. Keene, before the application was made to him, knew that the other halves were in the Currency Office, and knew that the matters stated by the applicant were untrue, and would not have paid the money to the applicant, the offence of cheating could not have been committed, and therefore the attempt to cheat could not have been committed. What Mr. Keene says only shows that the offence of cheating could not have been committed. A man may attempt to cheat, although the person he attempts to cheat is forewarned, and is therefore not cheated. The case we have cited is on this question undistinguishable from the present case.

There the prisoner was indicted for attempting to obtain money by false pretences in a begging letter. When he paid the money, and apparently when he received the letter, the prosecutor knew its contents to be untrue. In his judgment the Chief Baron says: "This is an attempt by the prisoner to obtain money by false pretences which might have been so obtained. The money was not so obtained, because the prosecutor remembered something which had been told him previously. In my opinion, as soon as ever the letter was put into the post, the offence was committed." In the present case the money was withheld, because of the information which Mr. Keene obtained in his office.

Mr. Gay, who is Mr. Keene's official superior, says that, if the claim, the declaration, and the certificate, had come to him, he would, in the ordinary course, have ordered payment.

In *Reg. v. Hensler*,¹ as in the present case, Counsel for the prisoner argued that, as the statutable offence could not have been committed, the prisoner could not be convicted of attempting to commit it. This argument was answered by two of the Judges in the following words: "*Blackburn, J.*—You may attempt to steal from a man who is too strong to prevent you. *Mellor, J.*—Or an attempt may be made to steal a watch that is too strongly fastened by a guard. Here the prosecutor had the money, and was capable of being deceived, and the prisoner attempted to deceive him."

One more point was raised on this question of attempt. It appears from Mr. Gay's evidence that before money is paid on a currency note it is usual to take a bond of indemnity from the claimant.

It is argued that in this case the attempt was not completed, because the bond was not signed. We do not think there is anything in this argument. The application for the money is, we think, the attempt, or at any rate sufficient to constitute an attempt. The execution of the bond of indemnity is not a portion of the application. It is a precaution taken by the person sought to be cheated, and is an act which would ordinarily take place before the offence of cheating could be completed. As far as the applicant is concerned, he would be willing to take the money without the indemnity. His offence is making the false pretence and asking for the money.

It seems to us that the execution of the bond of indemnity is not an act of the accused forming any portion of the acts which constitute the commission of the offence. The offence would be just as complete whether an indemnity

¹ 11 Cox C. C. 570.

was or was not insisted upon. The Currency Office authorities may, if they like, dispense with the indemnity. The object of the bond is to secure the re-payment of the money if it has been wrongly paid. The object of it is not to prevent the payment, but to indemnify the Government in case any one else claims the money. We have carefully examined the English cases cited by Counsel for the accused, and we do not think that they have any application to the present case. We think it quite clear that an attempt was made.

Before considering the second question it will be desirable to examine the evidence for the defence. It is unquestionably untrue that the whole notes ever belonged to Umesh Chunder Mitter, or that they ever came into his hands. This is the case both for the prosecution and for the defence. According to the evidence for the defence, it is untrue that the halves ever came from the hands of Haran Chunder Chatterjee into his hands. The defence trace the half notes back. They call in the first place a lady named Din Tarini Dabee, who is said to have had them in her possession.

Almost at the beginning of her examination-in-chief, the Counsel examining this lady plied her with leading questions and other questions of a nature only allowable in cross-examination. There seems to us to have been no excuse whatever for this course, and the result is that, so far as her examination-in-chief is concerned, it is difficult to use it at all as evidence on behalf of the defendant calling her, though it may be used as evidence against him. It is, however, clear from the other evidence that these half notes, which were afterwards sent to the Currency Office, came from this lady. She says that she found them in her box about a year and a half ago, and we do not think that there is any doubt that she gave them to her niece, the wife of the defendant, Hem Chunder Chatterjee. There is some conflict of testimony between the aunt and the niece as to what took place when the half notes were handed over. The aunt says: "One day we were seated together, and I told my niece that there was some *goolmal* in respect of the numbers of a 20-rupee note. She asked me if I had shown this note to any one. I said yes, I showed it to a person who had called a few days previously to receive money. My niece said if you give the note to me I will show it to my husband. Five or six days later, when my niece came home, she took the note away from me; nothing further took place.

"One day I met her in Calcutta. She spoke to me about this note, and asked me whence I got the note. I said I did not remember, but I believed I got it in the course of my money-lending business."

She is then asked in examination-in-chief some questions, most of which are objectionable in form. They are as follows:—

Q. What else did your niece say to you or you to her?

A. Nothing.

Q. Did you want to get money on these pieces of note?

A. No mention was made about obtaining money.

Q. Did you wish to get the money?

A. If the note was cashed, and the money paid to me, I would have taken it.

Q. By whom was the note to be cashed?

A. I gave no direction to my niece as to by whom the note was to be cashed. I made the note over to her that she might show it to her husband.

Q. Why did you want the note to be shown?

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A. Because my niece said, 'Give it to me, and I will show it to my husband.'

Q. But what did you understand by your niece's wanting to show the note to her husband?

A. I understood that it was taken to be shown to her husband.

Q. For what purpose?

A. Because he is a man of education, and knows how to read and write. I have a sircar in the house; he can read and write Bengali."

The niece has been called before us, and she now says :—

"When she gave me the notes, she said, 'These notes have been lying with me; I don't know for how long, and I don't know what has become of the other halves of the notes.' She said, 'Give these notes to your husband, and ask him to change these notes, and send me Rs. 40.'"

Of these two statements we have no hesitation in preferring that given by the aunt. The husband of the niece is one of the accused, and she is therefore much interested. The aunt's story was told at the time when the details of the events must have been fairly fresh in her memory, and it is pretty clear that her story is substantially accurate.

On getting the notes the niece says that she handed them to her husband, saying: "Your aunt-in-law has asked me to hand over to you these two notes: you change them, and send her 40 rupees. Her husband addressing Umesh Chunder Mitter, who was then present, said: "I have hardly any leisure to go out of my office. Will you change these notes, and send the money to me at my house?" The application seems then to have been made.

It does not appear that the aunt ever said that she had had the corresponding halves in her possession. The niece does not say that she or her husband told Umesh Chunder Mitter that Din Tarini had ever had the whole notes in her possession, or indeed said anything about the whole notes.

In spite of this, Umesh Chunder Mitter, in the letter which he first wrote, said that the other halves were lost from his box where he kept them. This was untrue, as far as he was concerned, and, as far as Din Tarini was concerned, it does not appear whether it was true or not. He was apparently aware that he could not recover the money unless he satisfactorily accounted for the loss of the other halves of the notes. It was for this reason that he invented this falsehood.

The inference from this falsehood is that Umesh Chunder Mitter knew that Din Tarini had never had the other halves. If he had known, or learnt of it, there is no real reason why he should not have told the truth. The form D is then sent to Umesh Chunder Mitter, and then occurs an incident which has been much relied upon by the defence. It is said that a letter was written to which the Bengali letter, produced by Hem Chunder, was an answer. The Bengali letter produced appears to have been written in the name of the aunt to her niece in answer to a letter addressed to Din Tarini, and therefore, although the evidence of the sending and of the contents of such letter is of a most suspicious character, we do not think we ought to repudiate such letter, and we accept the story as true.

The witness who speaks to it refers to the contents as follows :—

"The writer of the letter was enquiring in reference to the notes which had been given to her as to how long they were with the person who sent it, and where he or she got it from. I don't remember anything more than this."

In answer to this letter, the following letter was written at Din Tarini's request to her niece :—

"I have received the particulars of your letter. The note (or notes) about which you wrote to me, that note (or those notes) I received in the course of my money-lending business. Who gave it (or them) I don't know. It has (or they have) been with me for many days, that I know."

After the receipt of this letter D was filled up and sent to the Currency Office. There is nothing in the letter which gives the smallest colour for the false statements in the claim, in the certificate, and in the declaration. This is the whole of the evidence. It is noticeable that Din Tarini never claimed to have possessed the other halves, and that no one ever told either Hem Chunder Chatterjee or Umesh Chunder Mitter that she possessed them. On the contrary, the falsehood of their statements shows that these persons were aware that Din Tarini never possessed the other halves, and it was necessary for them to tell these untruths in order to account for the other halves.

On this state of facts it was contended that no case has been made out. It was said that, although the false pretence was made out, it was necessary for the prosecution to show that the attempt had been made dishonestly. There is, we think, no doubt that the prosecution must show that the act was done dishonestly.

"Dishonestly" is defined in the Penal Code as follows :—

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly."

The definitions of "wrongful loss" and "wrongful gain" show that what the prosecution has to prove is that the Government was as against the applicant legally entitled to the 40 rupees, or that the applicant was not entitled. Unquestionably the means used by the applicant were unlawful within the meaning of the Penal Code. If the applicant had any real reason to suppose that he or the person for whom he was acting was legally entitled to the rupees 40, he would not have committed the offence charged. We do not think there can be any doubt that Government is entitled to retain the 40 rupees, that is to say, is entitled in law to the money until it is claimed by a person who has been the holder of the full notes. They are not obliged to pay the money to the holder of the half notes except as being the person entitled to the whole notes. It was contended that the prosecution should show that somebody, other than Din Tarini, was the owner of the full notes. This argument might possibly apply if "dishonestly" only included "wrongful gain," but it includes in the alternative "wrongful loss." Government being entitled to retain the money, in the absence of proof of ownership of the full notes, the definition of "wrongful loss," and consequently the definition of "dishonestly," is here satisfied. In this case the statement that the applicant owned the whole notes is unquestionably false, and false to his knowledge.

The accused have both borne a good character for some time. If they were to profit at all by the offence—and of this there is some doubt—the profit would have been small as far as these notes were concerned. Both these are circumstances which, in criminal cases, have occasionally great weight, but neither of them can dispose of clear and undisputed facts. So far as the evidence of good character is concerned, the false statements seem to us to dissipate at once the effect of that evidence, except so far as the question of punishment is concerned. A man who has to his credit an unblemished character may, of course, claim that it be considered on the question of punishment. It is sad to see men who have by honest work earned the respect of their em-

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1888. ployers, and of those associated with them, inconsiderately bringing themselves within the grasp of the criminal law, but the record of many of such cases is to be found in Criminal Courts. We do not think that there is any real distinction between the cases of the two accused. Hem Chunder Chatterjee wrote out the certificate, and there is reason to suppose that he induced Umesh Chunder Mitter to make the application.

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There is one more contention with which we must deal: It is argued that we ought not in an appeal lightly to set aside the order of the Magistrate. We agree with this contention. We do not think we ought to interfere unless we are fully satisfied from the evidence that the crime has been proved, and are also satisfied that the Magistrate had no reasonable ground for acquitting the prisoners.

Assuming that the reasons which actuated the Magistrate in discharging the prisoners coincide with the arguments which have been addressed to us by Counsel for the respondents, we think that the Magistrate had no reasonable ground for acquitting the prisoners, and that the crime was fully proved. We convict the accused Umesh Chunder Mitter under ss. 420 and 511, Indian Penal Code, and convict Hem Chunder Chatterjee of abetting the offence committed by Umesh Chunder Mitter.

As to sentence, we think that, considering all the circumstances of the case, and especially the good character which the accused have heretofore borne, the ends of justice will be satisfied by the infliction of a fine. We sentence each of the accused to pay a fine of Rs. 200; in default to suffer simple imprisonment for the period of two months.

C. D. P.

Order of acquittal set aside.

CRIMINAL REFERENCE

Before Mr. Justice Mitter and Mr. Justice Macpherson.

THE EMPRESS v. BAIKANTA BAURI.¹

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Mar. 4.

16 Cal. 349.

False Evidence—Alternative Charges—Statement made to Police Officer investigating case—Penal Code (Act XLV. of 1860), ss. 191, 193—Criminal Procedure Code (Act X. of 1882), s. 161.

An accused was charged with giving false evidence upon an alternative charge, one statement having been made to a police-officer investigating a case of arson, and the other having been made when he was examined as a witness before the Joint-Magistrate when the case was being inquired into. The two statements were contradictory, and no evidence was given to show which of them was false. It was not proved that the statement made to the police-officer was made in answer to questions put by him, and the only evidence given at the trial with regard to the inquiry upon which the police-officer was engaged was to the effect that an inquiry was being made about the burning of a house. The jury acquitted the accused, and the case was referred to the High Court by the Sessions Judge, who disagreed with the verdict of acquittal. *Held* that the verdict was right.

Before a conviction in such a case can be sustained, it must, having regard to the provisions of s. 161 of the Criminal Procedure Code, be clearly proved by the evidence that the statement made to the police-officer was a statement in answer to questions put to the accused by the investigating police-officer, and in the absence of such evidence, even though the statement were proved to be false, a conviction could not be sustained.

Held, further, that in such a case it is also necessary for the prosecution to establish that the police-constable was making an investigation under Ch. XIV. of the Criminal Procedure Code.

¹ Criminal Reference, No. 2 of 1889, made by R. F. Rampini, Esq., Sessions Judge of Burdwan, dated the 26th of January 1889.

THIS was a reference made by the Sessions Judge of Burdwan under the following circumstances :—

On the 24th November 1888, in the course of a trial before the Joint-Magistrate of Ranigunge, in which one Rambandhu Ghose and others were charged with mischievously destroying a house by fire, the accused in this case, Baikanta Bauri, and two other persons, named Dinonath Ojha and Kalpa Bauri, gave evidence, during the course of which they stated that they had not seen the house set fire to. The Sessions Judge, in his letter referring the case, stated that these three witnesses had previously stated to a head-constable of police, who had inquired into the case against Rambandhu Ghose and the others charged with him, that they had seen the house set fire to, and had given full details of the occurrence which they said they had witnessed.

The Joint-Magistrate, having regard to the provisions of s. 161 of the Criminal Procedure Code, under which all persons are bound to answer truly all questions put to them by a police-officer relating to a case into which he is inquiring, being of opinion that the three witnesses had given false evidence either before the police-officer or before him, committed them separately to the Court of the Sessions Judge to be tried on alternative charges of giving false evidence.

Three separate trials were held by the Sessions Judge with the aid of the same jury, which resulted in the jury acquitting Baikanta Bauri, and convicting the other two. The Sessions Judge disagreed with the verdict of acquittal, and referred this case to the High Court, giving his reasons for so doing in his letter of reference as follows :—

"I tried the case of Dinonath Ojha on the 24th instant with the assistance of a jury, and the jury unanimously found the accused guilty of the offence with which he was charged. I proceeded, on the 25th instant, to try the case of Baikanta Bauri with the assistance of the same jury, and though the circumstances of his case were similar to those of Dinonath Ojha, and though the evidence in the two cases were exactly the same, except that in Baikanta Bauri's case one additional witness was examined by the prosecution, and no witness was cited for the defence, whereas one witness was cited on behalf of Dinonath Ojha, the jury acquitted the accused. I at first thought that the jury acquitted Baikanta Bauri, because I had sentenced Dinonath Ojha to six months' rigorous imprisonment, and it occurred to me that this punishment may have seemed to them to be excessive. But on my proceeding, later in the day, to try, with the assistance of the same jury, the case of the third accused person, namely, Kalpa Bauri, they unanimously convicted this man, though the evidence for the prosecution was the same as the evidence for the prosecution in the case of Baikanta Bauri, with the exception that there was one witness for the prosecution less.

"I can see no distinction between the cases of these three accused persons, two of whom the jury have found guilty, and one of whom the jury have acquitted. I approve of the unanimous verdict of the jury in the cases of Dinonath Ojha and Kalpa Bauri, and entirely disagree with the verdict of the jury in the case of Baikanta Bauri. I can see no reason for it whatever, and consider it to be illogical and whimsical in the extreme. I submit the records of all three cases for the inspection of the High Court, and recommend that the verdict of the jury in the case of Baikanta Bauri be set aside, and that, like Dinonath Ojha and Kalpa Bauri, he be convicted of an offence under s. 193, Penal Code."

No one appeared on the reference.

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The charge framed against the accused, together with the nature of the evidence admitted during the trial before the Sessions Judge, and the charge of the Sessions Judge to the jury, appear sufficiently from the judgment of the High Court (Mitter and Macpherson, JJ.), which was as follows:—

The Sessions Judge of Burdwan, dissenting from the verdict of acquittal of the jury, has referred this case under s. 307 of the Code of Criminal Procedure. The charge against the accused was, under s. 193 of the Indian Penal Code, of giving false evidence, and is to the following effect: "That he, on or about the 31st day of October 1888, at Purulia, Thannah Ranigunge, in the course of the inquiry into the case of arson of *Empress v. Rambandhu Ghose and others*, before Anadinath Bundopadhya, head-constable of outpost Faridpore, stated in evidence that he had seen Rambandhu Ghose set fire to the house, and that he, on or about the 23rd day of November 1888, at Bharrā, Thannah Assensole, in the course of the inquiry into the case of arson—*Empress v. Rambandhu Ghose and others*—before the Sub-Divisional Magistrate of Ranigunge, stated in evidence: "I did not see anybody set fire to the house. I was a mile off at home," one of which statements he either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of the Court of Session."

The evidence that was given in this case does not show which of these statements is false, but the Sessions Judge is of opinion that the two statements are contradictory, that one of them must be false, and therefore that the accused should be found guilty under s. 193 of the Indian Penal Code. Now, the statement made by the accused on the 31st day of October 1888 was made before one Anadinath Bundopadhya, head-constable of an outpost called Faridpore. It appears to us that the Sessions Judge, in his charge to the jury, has not at all referred to the question whether, if this statement be false, the accused would be guilty of giving false evidence under s. 193. In his charge to the jury he says: "The jury had therefore to consider (1) whether he had made such a statement before the head-constable; (2) whether he had made such a statement before the Joint-Magistrate; and (3) whether the two statements were so contradictory as that one or other of them must be false, and both could not be true." Then, in another part of his charge, he says: "I then said on this evidence the jury must make up their minds on the three points previously alluded to. If they believed the witnesses, and thought the two statements said to have been made by the accused were directly contradictory, so that both could not be true, the jury would be justified in convicting him under s. 193." It seems to us that the Sessions Judge has overlooked a very important point in the case, *viz.*, accepting that the statement made before the head-constable was untrue, whether the accused could be found guilty of giving false evidence under s. 193. S. 193 says: "Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine." Now, it is evident that the statement before the head-constable, if it at all comes within the section, must fall within the last part of it, *viz.*, "Whoever intentionally gives or fabricates false evidence in any other case shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine." S. 191 of the Indian Penal Code says:

"Whoever, being legally bound by an oath or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence." Now, the question is whether in this case the statement before the head-constable was such as would bring it within the definition of false evidence given in s. 191 of the Indian Penal Code. The answer to this question will depend upon the construction we put upon s. 161 of the Code of Criminal Procedure. The second paragraph of that section declares that a person examined by a police-officer under the provisions of it "shall be bound to answer truly all questions relating to such case put to him by such officer." Before an accused person can be held guilty under s. 193, it is, therefore, necessary that it should be shown by the evidence that the statement which is set out in the charge was a statement in answer to questions put by the investigating police-officer to the accused. That this statement was made in answer to any question put by the investigating police-officer is not established by any evidence. The head-constable before whom this statement was made only says: "I examined the accused Baikanta Bauri as a witness in that case. He came to the outpost with the complainant. I examined him on the 31st October. I wrote down what he said. I wrote down exactly what he said. I produce the record of his statement, exhibit C." But he does not say that this statement, *viz.*, exhibit C, was in answer to any questions put by him to the accused. There is no other witness to establish that fact. That being so, we cannot say that the statement in question is covered by para. 2 of s. 161 of the Code of Criminal Procedure. It is true that the record of the statement is headed: "On being questioned said;" but that would be no evidence of the fact that the accused was questioned, and in answer to a question the statement was made, until that fact was proved by oral evidence. The statement in question is therefore one which upon the evidence we find was made by the accused to the head-constable, Anadinath Bundopadhyaya. Upon the establishment of this fact alone, without any proof that the statement was in answer to questions put by the head-constable, we are of opinion that the accused cannot be convicted of giving false evidence under s. 193 even if that statement be proved to be false. This is the main ground upon which we think that the verdict of acquittal is correct, but we desire also to point out that the evidence in this case is very meagre upon another point which it was necessary for the prosecution to establish, *viz.*, that the aforesaid head-constable, Anadinath Bundopadhyaya, was making an investigation under Ch. XIV. of the Criminal Procedure Code. The charge, set out above, states that this statement before the head-constable was made in the course of an inquiry in a case of arson of *The Empress v. Rambandhu Ghose and others*. A case of arson is certainly a cognizable case; but that Anadinath Bundopadhyaya was making an inquiry under Ch. XIV. when the statement in question was made, and that the case in which that inquiry was being made was a case of arson, is not at all clearly established by the evidence recorded in the case. All that the witnesses who speak upon that point say, is that an inquiry was being made in the case of *Buloram Roy v. Rambandhu Ghose* about the burning of a house. This evidence is not in our opinion sufficient to show that the inquiry was being made into a cognizable case, *viz.*, arson. We are, therefore, of opinion that the verdict of the jury was right. We therefore acquit the accused of the charge framed against him, and direct his release from custody.

H. T. H.

Acquittal upheld.

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FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, and Mr. Justice Tottenham.

1889.

Mar. 21.

NILMONY PODDAR AND OTHERS (APPELLANTS) *v.* QUEEN-EMPRESS (RESPONDENT).¹

16 Cal. 442. *Sentence—Separate sentences for rioting and grievous hurt—Penal Code, ss. 71, para. 1, 144, 147, 148, 324—Act VIII. of 1882—Criminal Procedure Code (Act X. of 1882), s. 35.*

Per Curiam (TOTTENHAM, J., dissenting).—Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code. *Empress v. Ram Partab*² approved: *Loke Nath Sarkar v. Queen-Empress*³ overruled.

REFERENCE to a Full Bench made by Mr. Justice Mitter and Mr. Justice Macpherson under the following order:—

The question reserved by us in this case is, whether separate sentences passed upon the appellants, Nos. 1, 3, 4, and 5, for offences of rioting and hurt, are legal.

The finding of the lower Court which we have upheld is that these appellants, who are guilty of rioting, did not individually commit any acts which amounted to voluntarily causing hurt; but they are guilty of that offence, because their co-appellants, Charan and Nobin, with whom they were associated as members of an unlawful assembly, committed certain acts which amounted to voluntarily causing hurt in prosecution of the common object of that assembly. The appellants, Nos. 1, 3, 4, and 5, were, therefore, found guilty of the offence of hurt under s. 149 of the Indian Penal Code.

In appeal No. 38 of this year this question arose, and following *Empress v. Ram Partab*² we held that separate sentences for the two offences are not legal. At that time we were not aware that in *Empress v. Loke Nath Sarkar*³ the contrary view was taken.

We, therefore, refer the following question to a Full Bench: whether separate sentences passed upon appellants 1, 3, 4, and 5 for offences of rioting and hurt are legal, it being found that they individually did not commit any act which amounted to voluntarily causing hurt, but are guilty of that offence under s. 149 of the Indian Penal Code.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown.—In the prosecution of the common object of the unlawful assembly, which was to take possession of certain lands, several huts were broken down; one man, Bhagidhar, was badly beaten by one of the rioters not under trial, and by other rioters not identified. Another man, Miajan, was wounded with a spear by one of the accused, and with a *lathi* by another accused. Force and violence having been used in pulling down the huts and in beating Bhagidhar, the accused have all been found guilty of rioting, and sentenced to the full punishment awardable; and the two men who wounded Miajan have also been separately punished for causing hurt to him, but the four other accused not having individually caused

¹ Full Bench on Criminal Appeal, No. 78 of 1889, against the judgment of Mr. B. L. Gupta, Officiating Sessions Judge of Faridpore, dated the 8th December 1888.

² I. L. R., 6 All. 121.

³ I. L. R., 11 Cal. 349.

hurt to any one, the question whether they may be separately punished for the hurt has been referred to the Full Bench. It is conceded that all the prisoners were punishable for rioting, and that two of them were separately punishable for the hurt they caused in prosecution of the common object of the riot. If these two, as is conceded, were guilty of an offence punishable separately for the punishment awarded for the riot, all the others are, it is submitted, also punishable in a like manner; for, by s. 149 of the Penal Code, if an offence is committed by any member of an unlawful assembly in prosecution of a common object, every member is guilty of that offence. If the offence is separable in the one case, it is a separable offence in the other. S. 71 of the Penal Code does not apply to a case of this nature. Ill. *a* to that section shows what was in contemplation by the words "an offence made up of parts." This refers to one offence, in regard to which there can, in the nature of things, be only one trial; as where hurt is caused by several blows with a stick, the several blows make out one offence, and could only be tried and be punishable as one offence. The second illustration applies to the present case. The hurt inflicted on Bhagidhar is no part of the offence against Miajan. Each might have insisted on a separate trial, and, although the facts in evidence in the two cases, *viz.*, that the accused took part in the riot, but could not be identified as having struck any particular blow, might be the same, the offences for which they were responsible as rioters would be separate and distinct, and they would be equally responsible to Miajan as to Bhagidhar. S. 35 of the Criminal Procedure Code, which relates to convictions for separate and distinct offences at one trial, governs this case, and not s. 71 of the Penal Code.

Rioting is an offence against the public tranquillity, and is dealt with in a different chapter of the Penal Code from offences affecting the human body. Examples of "more offences than one" are given in ill. *a* to *h*. In s. 235 of the Criminal Procedure Code, ill. *g* shows that the offences of rioting and hurt are separate. If they are separate offences, s. 71 of the Penal Code cannot apply to them. The illustration given in *Empress v. Ram Partab*,¹ as applicable to the first part of s. 71, is not appropriate to that part, but comes under part 3 of that section. A person cannot be punished both for being a member of an unlawful assembly and for riot, because, when force is superadded to the first, it becomes the second, and the combination of unlawful assembly and force constitute a different offence. The illustration regarding the man who holds up his fist, then strikes, and then stabs, is of the same character as the several blows in one beating are one offence; but the causing of grievous hurt to three people, which were the facts found in that case, did not culminate in the riot for which the accused was punished. If the riot, on the other hand, culminates in murder, or, as in the above case, in grievous hurt, the rioters become liable, it is submitted, for those separate offences under s. 149. The other cases against my contention followed and accepted the arguments in the above case. They are, however, dissented from in *Queen-Empress v. Dungan Singh*;² *Loke Nath Sarkar v. Queen-Empress*;³ *Queen-Empress v. Pershad*;⁴ *Queen-Empress v. Sakham Bhau*;⁵ *Queen-Empress v. Nirichan*.⁶

No one appeared for the prisoner.

The following opinions were delivered by the Court (PETHERAM, C.J., MITTER, PRINSEP, WILSON, and TOTTENHAM, JJ.):—

¹ I. L. R., 6 All. 121, on p. 124, line 26.

² I. L. R., 7 All. 29.

³ I. L. R., 11 Cal. 349.

⁴ I. L. R., 7 All. 414.

⁵ I. L. R., 10 Bom. 496.

⁶ I. L. R., 12 Mad. 36.

I. L. R., Cal. 116.

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PETHERAM, C.J., MITTER, PRINSEP, and WILSON, JJ.—We are of opinion that the questions referred in this case should be answered in the negative.

The appellants Nos. 1, 3, 4, and 5, were found guilty of rioting, armed with deadly weapons, under s. 148 of the Indian Penal Code, and each of them was sentenced to three years' rigorous imprisonment for that offence. Two of their co-appellants, whose appeals are not before us, are found to have committed, in prosecution of the common object of the unlawful assembly of which they were all members, acts which amounted to voluntarily causing hurt under s. 324 of the Indian Penal Code. The appellants Nos. 1, 3, 4, and 5, were, therefore, also found guilty of voluntarily causing hurt under s. 324 of the Indian Penal Code, coupled with s. 149 of the Indian Penal Code. For this offence each of them was sentenced to a further period of rigorous imprisonment for one year. We think that under the first paragraph of s. 71 of the Indian Penal Code these separate sentences are not legal.

Para. 1 of s. 71 of the Indian Penal Code is to the following effect:—

“Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences unless it be so expressly provided.”

In this case the offence of voluntarily causing hurt under s. 324, coupled with s. 149 of the Indian Penal Code, of which these appellants have been found guilty, is primarily made up of two parts, *viz.*: (1) of their being members of an unlawful assembly, by which force and violence was used in prosecution of its common object, and the members of which were armed with deadly weapons; and (2) of the offence of voluntarily causing hurt being committed by two other members of the unlawful assembly in prosecution of its common object. The first of these two parts is itself an offence, *viz.*, rioting, armed with deadly weapons, under s. 148 of the Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part respectively. Therefore we find that all the conditions laid down in para. 1 of s. 71 of the Indian Penal Code are present here. Consequently the infliction of separate punishments for the two offences is illegal under it.

The following cases were cited before us: *Empress v. Ram Partab*; ¹ *Lok Nath Sarkar v. Queen-Empress*; ² *Queen-Empress v. Dungar Singh*; ³ *Queen-Empress v. Pershad*; ⁴ *Queen-Empress v. Ram Sarup*; ⁵ *Queen-Empress v. Sakharam Bhau*; ⁶ *Queen-Empress v. Nirichan*.⁷

With the exception of the first two, the other cases do not appear to us to be any authority upon the question under our consideration. In some of the Allahabad cases Mr. Justice Brodhurst expressed his opinion upon it; but we do not find that this question legitimately arose in them.

For the reasons set forth above, we agree with the view expressed by Mr. Justice Straight in *Empress v. Ram Partab*.¹

The result is that the sentence of one year's rigorous imprisonment passed upon each of the appellants Nos. 1, 3, 4, and 5, under s. 324, coupled with s. 149 of the Indian Penal Code, will be set aside.

TOTTENHAM, J.—In my opinion the separate sentences passed upon the appellants Nos. 1, 3, 4, and 5 for offences under ss. 148 and 324 of the Penal

¹ I. L. R., 6 All. 121.

² I. L. R., 11 Cal. 349.

³ I. L. R., 7 All. 29.

⁴ I. L. R., 7 All. 414.

⁵ I. L. R., 7 All. 757.

⁶ I. L. R., 10 Bom. 496.

⁷ I. L. R., 12 Mad. 36.

Code are legal. The legality of the convictions is not in dispute before us, and it seems to me that the prisoners are each liable under s. 35 of the Code of Criminal Procedure to receive sentences in respect of each of these offences, unless s. 71 of the Penal Code protects them from being punished for each offence.

S. 71, as amended by Aft VIII. of 1882, provides for three cases in which the offender shall not be liable to be punished for more than one of two or more offences of which he may have been convicted.

The first clause of that section is the only one that need be considered in this case; for that is the one, if any, which may be applicable to this case.

The first clause then is in these words: "When anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided."

The prisoners have been convicted of offences punishable under ss. 148 and 324 of the Penal Code. It is true that the offence punishable under s. 148 is made up of parts, either of which parts is itself an offence, *viz.*, being a member of an unlawful assembly, armed with a deadly weapon (s. 144), and rioting (s. 147); but s. 148 expressly provides a higher punishment than could be awarded for either of those two offences.

The offence under s. 324, of which also the prisoners have been convicted, is not necessarily made up of parts, any of which parts is itself an offence: so that s. 71 does not very clearly affect the liability of the prisoners to be separately sentenced for each offence.

But an opinion has been expressed that, because the conviction of the prisoners of the offence punishable by s. 324 is justified only by the provisions of s. 149, therefore that offence is in this case made up of parts, any of which parts is itself an offence, the parts being offences under ss. 143 to 147 and 148 by the prisoners themselves, and an offence under s. 324 committed by another person.

I am unable to adopt this view. I could perhaps do so if s. 149 defined and made punishable any specific offence: but it does not do this. It simply declares that under certain circumstances every person, who is a member of an unlawful assembly, is guilty of the offence committed by some other member of it, whatever that offence may be; and, if he is guilty, I apprehend he is liable to be punished for it.

He is not convicted of an offence punishable under s. 149, but of an offence punishable under whatever section such offence is made punishable. S. 149 simply makes the participators in an unlawful assembly equally liable with the actual perpetrator for any offence committed by him in prosecution of the common object.

The actual perpetrator is unquestionably punishable both for rioting and for any further offence he commits; and, if such further offence is committed in prosecution of the common object of the rioters, s. 149 declares that each one of these is guilty notwithstanding that he did not do the act or abet it. It places each member of the unlawful assembly in the same position as the actual perpetrator of the further offence. This seems to me to be the plain meaning of the law, and I cannot agree in holding that the offence punishable under s. 324 is made up of several parts upon the ground that it is s. 149 which declares the guilt of the prisoners.

I think the sentences passed are legal.

T. A. P.

Sentence varied.

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CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

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ABRAHAM (PETITIONER) v. MAHTABO AND ANOTHER (OPPOSITE PARTIES).¹

Criminal Procedure Code (Act X. of 1882), s. 551—Unlawful detention for an unlawful purpose—Infant, Custody of.

A Hindu girl, under the age of 14 years, went of her own accord to a Mission House, where she was received and allowed to remain. The mother and husband of the girl thereupon applied to the Magistrate, who took proceedings under s. 551 of the Criminal Procedure Code. The Lady Superintendent of the Mission House denied that the girl was legally married, and alleged that she was practically being brought up with the connivance of the mother to a life of prostitution. The Magistrate, after recording evidence, found that the girl was legally married; that the other allegation was not established; and that, although she went to and remained in the Mission House of her own free will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that there were no facts established which would disentitle the husband or the mother to the custody of the girl, and passed an order under the section directing the girl to be restored to her mother.

Held, upon the facts as found by the Magistrate, as it was immaterial whether the girl did or did not consent to remain at the Mission House, there was an unlawful detention within the meaning of these words as used in the section, as the girl was kept against the will of those who were lawfully entitled to have charge of her.

Held, also, that s. 551, applying only as it does to women and female children, must not be construed so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian, but that the purpose, whether entertained towards a woman or a female child, must be in itself unlawful.

Held, consequently, that, in the circumstances of the case, there was no detention for an unlawful purpose, and that the Magistrate had no power to make the order.

Held, further, that, although the Magistrate had no power under the section to make the order he did, it did not follow that the Court should direct the girl to be restored to the custody of the Lady Superintendent, even if it had the power to do so, and that, having regard to the circumstances of the case, there was nothing to justify such an order being passed.

THIS case arose out of an application made by Mahtabo and Radhakissen to the Magistrate of Patna, under s. 551 of the Criminal Procedure Code, for an order that Ellen Abraham, who was the Lady Superintendent of the Patna Zenana Mission, should restore to their charge a girl Luchminia.

Radhakissen claimed to be entitled to the custody of the girl as her husband, and Mahtabo, who was her mother, was quite willing that her daughter should be made over to him; throughout the proceedings the two petitioners were regarded as forming one party. On the application being made to the Magistrate, an order was passed on the 30th October, directing Miss Abraham to produce the girl in Court, and show cause why she should not be made over to her husband or mother, and thereafter cause was shown, both parties heard by the Magistrate, and several witnesses examined before him. On the 6th December, the Magistrate passed an order to the effect that the petitioners were entitled to the charge of the girl, and that, as they were willing that she should be made over to one or other of them, she should be made over to the charge of the mother Mahtabo, which was accordingly done.

The facts of the case are fully stated in the judgment of the Magistrate, the material portion of which was as follows:—

¹ Criminal Motion, No. 25 of 1889, against the order passed by C. C. Quinn, Esq., Magistrate of Patna, dated the 6th of December 1889.

The admitted facts of the case are that the girl Luchminia had been living with Radhakissen, either as his wife or his mistress, for several months, and that, on the night of the 16th October, she left his house in the company of a woman named Sundari, who was the kept mistress of Radhakissen, and went to the Mission House, where she is now living.

There is, in my opinion, nothing to show that the girl was abducted in the sense in which "abduction" is used in the Penal Code. To constitute such abduction, the use of force or deceit is essential, and there is no reason to believe that either force or deceit was used in this instance. I am also of opinion that if the word "abduction" include "kidnapping," there is nothing in this case to justify the inference that the girl was kidnapped. I am satisfied that the girl went to the Mission House of her own free will, and that she remains there of her own free will.

The only ground on which the provisions of s. 551 can be applied is that the girl is unlawfully detained. If, as is contended by the respondent, the girl has completed the age of 14 years, it is clear that under this section she must be regarded as a "woman" and not as a "child," and the only order that I could pass would be an order to set her at liberty, and, at the same time, it is evident, from the girl's own statement, that she is already at liberty. If then the girl has completed the age of 14 years, the order cannot take effect, and must be discharged, and it is, therefore, necessary to determine whether the girl has reached this age or not. I do not intend to discuss this question at length; I will only state that the mother and uncle of the girl, who are good witnesses, if trustworthy, depose that she is between the age of eleven and twelve years; and that the pundit who prepared her horoscope deposes to the same effect, and has produced the horoscope itself, which bears out this statement as regards her age. I should add, however, that there is no independent evidence that the horoscope was prepared at the time alleged, and it is possible that it may have been fabricated for the purpose of this case. On the other hand, there is the deposition of the girl herself, which, however, I do not consider to be very good evidence in a case of this kind, and I may add that, though her statement, if relied on, shows that she must be more than 12 years of age, it does not clearly establish the fact that she has completed her fourteenth year. The only other evidence, if it can be considered evidence at all, is the testimony of Matangini Bose, that the girl's mother stated her age to be fourteen years. Assuming the evidence to be true, it is clear that, under the circumstances described, the mother had an object in exaggerating the girl's age, and it might also be fairly inferred that the girl's appearance and demeanour were such as to suggest that she was younger than her mother represented her to be. Considering the whole evidence on this point, I have come to the decision that the girl is a female child under the age of 14 years. The next point is whether she is unlawfully detained for an unlawful purpose. It is argued that there is no detention whatever, because the girl is free to go or stay; but, in my opinion, a child, who is kept or allowed to remain in any place, against the wish of his or her lawful guardian, is detained, the child having no voice in the matter as regards assent or dissent. The detention, however, must be unlawful and for an unlawful purpose. The term unlawful is not defined, but a similar word '*illegal*' is defined in the Penal Code, and includes everything which furnishes ground for a civil action. I have no doubt that the detention of a child, by a person having no legal claim to the charge of such child, if maintained against the wish of the lawful guardian, would furnish ground for a civil action, and I am also of opinion that the detention of a female child, under circumstances calculated to induce her to abandon the religion of her parents and family, and to enter another community, which would involve her being outcasted, would be detention for an unlawful purpose. The truth or falsehood of the religion is a matter of which the law takes no cognizance, and cannot affect the question. There is no doubt that, if the girl remain in the respondent's charge, she will be instructed in the Christian religion, and will be encouraged to become a Christian, and I hold that the respondent cannot lawfully detain the girl against the will of her lawful guardian for such a purpose. The next point that has been raised is that Radhakissen is not entitled to the charge of the girl, as he is not her lawful husband. It is, I think, fully proved that Radhakissen went through a form of marriage with the girl, which is recognised as a legal

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form of marriage by members of his caste, and that he subsequently lived with her, and treated her as his wife, and it is not proved that the marriage was invalid by reason of the fact that the girl is of a superior caste, and was a widow at the time of the marriage. I think that a good deal of time has been unnecessarily taken up in examining so-called experts on this point, and I have declined to postpone the case, in order to have further evidence of this kind produced; as regards the mother, the only ground on which any serious attempt has been made to dispute her right to the charge of her daughter is that she made over the girl to Radhakissen, knowing that no lawful marriage had taken place, and that virtually the girl was made over to Radhakissen to live with him as his mistress, and that, having acted in this immoral manner, she has forfeited the right to have charge of her daughter. Even assuming, for argument's sake, that the marriage was invalid, there are, in my opinion, no grounds for inferring that the mother knowingly abetted in the celebration of a mock marriage, and intentionally surrendered her daughter to a life of immorality.

I cannot, therefore, hold that Mussammat Mahtabo has forfeited her natural rights.

I am of opinion that both Radhakissen and Mussammat Mahtabo are entitled to the charge of Mussammat Luchminia, and, as their pleader states that they are willing that the girl should be made over to one or other, I direct that she be made over to the charge of Mussammat Mahtabo.

On January 17th, Mr. *M. P. Gasper*, on behalf of Miss Abraham, applied to the High Court (Mitter and Macpherson, JJ.) for a rule calling on the Magistrate to produce the records in the case, and to show cause why his proceedings and order should not be set aside, and the girl Luchminia be allowed to return to the custody of Miss Abraham, if she were desirous of doing so.

The application was made on a petition by Miss Abraham, the material portion of which was as follows:—

1st.—That your petitioner is the Superintendent of the Zenana Mission established at Patna, and residing at Goolzarbah in that city.

2nd.—On the 16th day of October 1888, a woman named Luchminia, accompanied by another woman, Sundari by name, came to the Mission House. Both women had an interview with your petitioner, and, having expressed a desire to reside in such Mission House, were permitted to take up their residence there.

3rd.—On the 30th day of October 1888, one Mussammat Mahtabo, the mother of the said Luchminia, and one Radhakissen, alleging himself to be the husband of the said Luchminia, put in separate petitions to the District Magistrate of Patna, praying for the restoration of the said Luchminia to them under the provisions of s. 551 of the Code of Criminal Procedure. These petitions, on the face of them, are unverified documents, and, moreover, contain no allegation that the detention complained of was for an unlawful purpose. On the back of the petition, put in by the said Radhakissen, the District Magistrate made an order, directing that a summons should issue on your petitioner to produce the said Luchminia before his Court on the 6th day of November 1888.

4th.—On the 6th day of November 1888, your petitioner, in obedience to the order contained in the said summons, appeared in the Court of the District Magistrate, accompanied by the woman Luchminia. On the same day the said Magistrate examined, under solemn affirmation, sundry witnesses, *vis.*, Mussammat Mahtabo, the mother of the said Luchminia, Gurmukh Narain, Radhakissen, the said Luchminia, and the said woman Sundari. After taking the evidence of those witnesses, the Court adjourned the case to the 14th day of November for further evidence.

5th.—On the application made by Mr. Thompson on behalf of your petitioner, a further adjournment was granted till the 23rd day of November 1888. During the interval which occurred pending this adjournment, and upon the application of the said Gurmukh Narain, the alleged uncle of the said Luchminia, it was arranged that the said Luchminia should, pending final orders to be passed in the case, be

made over to the safe custody of Mr. Sherfuddin, Barrister-at-law, practising in the Patna Courts, and, in accordance with this arrangement, your petitioner, on the 16th day of November 1888, handed over the said Luchminia into the custody of the said Mr. Sherfuddin, and the said Luchminia continued to reside in the house of the said Mr. Sherfuddin for one day. On the 17th day of November 1888, the said Mr. Sherfuddin being unable to continue to take further charge of the girl, the said Luchminia, with the permission of the Magistrate, was handed back to your petitioner, and thenceforward continued under her care till the 6th day of December 1888, when, under the order of the said Magistrate passed on that date, she was forcibly carried off from the precincts of the Court.

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6th.—On the 22nd day of November 1888, during the interval between the adjournments of the case at Bankipur, an application was made on behalf of your petitioner to the High Court of Judicature in Calcutta, in its revisional jurisdiction, for a transfer of the case from the file of the said District Magistrate of Patna to the file of the High Court. This application was rejected by this Hon'ble Court on the same date.

7th.—On the 25th day of November 1888, the case coming on for further hearing before the said District Magistrate of Patna, it was ordered, as your petitioner understood, that the same should be adjourned, and heard on some day after the 1st day of December 1888.

8th.—On or about the 26th day of November 1888, Mr. Thompson, on behalf of your petitioner, applied for summons for the attendance of three witnesses, Pundit Sukhobasi Tewari, Pundit Behari Singh, and Pundit Protap Narain, to be called for the purpose of supporting the case put forward by your petitioner, and, on the 28th day of November, an order, directing an issue of the said summons, was passed by the Magistrate ordering the attendance of the said witnesses for the 5th day of December.

9th.—On the 28th day of November, your petitioner is informed and believes that the said Magistrate took further evidence on behalf of the complainants, but such evidence was taken in the absence of your petitioner, who was informed by her legal adviser Mr. Thompson, having regard to the order above-mentioned, that the case would not be proceeded with on that day.

10th.—By an order dated the 28th of November 1888, the date of the further hearing of the case was fixed for the 5th day of December 1888.

11th.—On the 5th day of December 1888, a further hearing of the case was held by the same Magistrate, and sundry witnesses on behalf of the complainant in the case were re-called and further examined, as also were Matangini Bose and Pundit Sukhobasi Tewari and Pundit Behari Singh, the two last being two of the three witnesses summoned on behalf of your petitioner.

12th.—On the same day, it appearing that the said Protap Narain, a priest from Benares, already summoned on behalf of your petitioner, was not present in Court, a petition was presented to the Court, on your petitioner's behalf, praying that a fresh summons should issue to the said witness, but the Court, by an order made on the back of the said petition, refused to grant a further postponement of the case, and rejected the application.

13th.—Your petitioner submits that the said Magistrate in issuing a summons upon your petitioner, under the provisions of s. 551 of the Code of Criminal Procedure, upon the materials as set forth on the 3rd paragraph of this petition, acted illegally and without jurisdiction.

14th.—Your petitioner further submits that the Magistrate was in error in treating the proceeding as contentious, and the procedure adopted by him was not warranted by the words of the section.

15th.—Your petitioner further submits that upon the facts found by the Magistrate, as indicated in his judgment, he was in error in holding that the woman Luchminia was detained by your petitioner, and that such detention, if any, was unlawful or for an unlawful purpose, and that the said Magistrate, in so holding, acted

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without jurisdiction, and in error of the proceedings contemplated under the provisions of s. 551 of the Code of Criminal Procedure.

16th.—Your petitioner further submits that the said Luchminia was a Hindu woman, a Khetri by caste, and the widow of one Durbari Lall, who died about 14 months before the alleged second marriage with Radhakissen, a man of inferior caste to herself. Upon these facts which appear in the depositions, and which have since been accepted by the said Magistrate, your petitioner contended that the so-called second marriage could be no marriage at all, and relied chiefly upon the evidence of her witness, the said Pundit Protap Narain, in support of her contention. The Court was in error, and, as your petitioner submits, acted in prejudice of the case she was desirous of setting up, in refusing to adjourn the case for the examination of the said material witness.

17th.—Your petitioner submits that the said Radhakissen had established no right to the custody of the said Luchminia, and that the said Mahtabo had no right, or, if she possessed such right, had forfeited her claims to such custody.

18th.—Your petitioner submits that the said District Magistrate ought to have held that the evidence adduced did not establish the fact that the said Luchminia was under the age of 14 years, or that she had been unlawfully detained by your petitioner, or that she had been so detained for an unlawful purpose.

Mr. *Gasper*, in applying for a rule, pointed out that s. 551 was introduced into the Code for the first time in 1882, though it had previously found a place in the Presidency Magistrate's Act; that it dealt exclusively with women and female children under the age of 14, and that the inference this gave rise to was obvious. It did not deal with general detention, but only with unlawful detention for an unlawful purpose of women and female children; and it was, therefore, obvious that the class of cases to which it was intended to apply was not intended to include a case like the present. He further contended that the first complaint should have been made on oath, which, in the present case, had not been done. And that, although the subsequent proceedings might have been on oath, this did not cure the defect. He also contended that the section contemplated a proceeding of a summary character to prevent an impending injury to a woman or female child, and not a long contentious proceeding like the present for the purpose of obtaining the custody of a minor for which other provisions of the law existed.

The Court stopped Mr. *Gasper*, intimating that the words "unlawful purpose," contained in the section, must probably be taken to mean an "immoral purpose," and granted a rule against the Magistrate in the terms asked for.

On the 13th February, the rule came on for argument before a Bench of the High Court consisting of Mitter and Trevelyan, JJ.

Mr. *Gasper* and Baboo *Kali Churn Bonnerjee* in support of the rule.

Mr. *Garth*, instructed by the Deputy Legal Remembrancer, for the Magistrate.

Mr. *Gasper*.—S. 551 contemplates that complaint should be made on oath to the District Magistrate, but here there was no such complaint. The Joint-Magistrate examined the complainant, but he was not the proper person to do so, and the District Magistrate had no power whatever to delegate his power under the section to a subordinate. The whole proceedings are, therefore, irregular and bad. In the next place, the section contemplates summary action being taken, and not the elaborate enquiry which has been made in this case, when no less than 13 witnesses have been examined. No provision is made in the Code for the examination of any witnesses under this section, and the object of the section is plainly to prevent immediate and irreparable mischief

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from being done to the persons of females. Then there was no unlawful detention, because the Magistrate has found that the girl was at perfect liberty to rejoin her people if she so desired. Nor was there any "unlawful purpose," for certainly the education of a girl in the principles of Christianity is not unlawful. [Mr. *Gasper* was then stopped by the Court.]

Mr. *Garth*.—The complaint made by the girl's husband and another to the Magistrate was sufficient, and this case comes within the provisions of s. 551. The words of the section are certainly not as clear as they might be, but there can be no doubt that "unlawful detention for an unlawful purpose" must be taken to mean for an illegal purpose.

[MITTER, J.—It seems to me that, having regard to the fact that the section only refers to females, "unlawful purpose" must be taken as meaning an "immoral purpose."]

Mr. *Garth*.—If that was so, the legislature might easily have so enacted; but the word used is unlawful, and that cannot be read as meaning anything else but "illegal." In this case the girl was detained from the lawful guardianship of her husband and mother, in order that her religion might be changed, and that must surely be held to be unlawful detention for an unlawful purpose.

The decision of the Magistrate on this point is correct, and there can be no question as to his *bona fides*.

[TREVELYAN, J.—No one has raised any.]

Mr. *Garth*.—If the Court is of opinion that the Magistrate has not taken the right view of the matter, it is not for me to appear to press such view on your Lordships.

[MITTER, J.—The whole question seems to be this: Can the Court say that the detention was an unlawful detention in the first place, and, if it was, was it for an unlawful purpose? The Magistrate appears to think that unlawful detention means detention which furnishes grounds for a civil action, and unlawful purpose as something which would furnish similar grounds; but could a guardian maintain a civil action only upon the ground that his word was being instructed in the precepts of Christianity without his consent?]

Mr. *Garth*.—A civil action would lie for the custody of a child by its guardian against the person unlawfully detaining it.

During the argument the following cases were cited by Mr. *Garth*: *In the matter of Mahin Bibi*¹ and *Dowlath Bee v. Shaik Ali*.²

[MITTER, J.—The only question we need decide in the case is whether there has been an "unlawful detention for an unlawful purpose," and upon that point we are with you Mr. *Gasper*.]

It then appeared that the rule had not been issued against or served upon the husband or the mother, but only on the Magistrate; the Court therefore intimated that it could make no order on the former as to the restoration of the girl to Miss Abraham. Mr. *Gasper* accordingly applied for a rule on them, and a rule was issued, calling on Radhakissen and Mahtabo to show cause why the proceedings should not be set aside, and why an order should not be made to the effect that the circumstances, which existed before the order complained of was made, be restored; or why an order should not be made directing them to produce the girl in the Court of the Magistrate of Patna for the purpose of restoring her to the custody of the petitioner; or why any such other order should

¹ 13 B. L. R. 160.² 5 Mad. H. C. 473.

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not be passed as the facts of the case might warrant or justify. That rule came on to be heard before a Bench consisting of Mitter and Macpherson, JJ., on the 20th March.

Mr. *Gasper* and Baboo *Kali Churn Bonnerjee* for the petitioner.

Baboo *Umbica Churn Bose* for the opposite party.

Baboo *Umbica Churn Bose* contended that the order of the Magistrate was right, but whether it was so or not, the girl having now gone to her lawful guardians, viz., her husband and mother, the Court could not interfere to deprive them of her custody. There was, moreover, no power given in the Code to compel the production of the girl, and the only course left was for the Court to say that it had no power to remove the girl from her lawful guardians, and that it had no power to grant that portion of the prayer of the petitioner.

Mr. *Gasper*.—There is no order made by a Subordinate Court which this Court, exercising its revisional powers, cannot set aside. The order of the Magistrate under s. 551 being illegal, this Court can set it aside, and order the production of the girl. There can be no doubt that, when an illegal order has been made, this Court has the power, in setting it aside, to restore the *status quo ante*, so that the party against whom the order has been made can be in no way injured thereby. *Rodger v. The Comptoir D'Escompte de Paris*.¹

[MITTER, J.—I have grave doubts whether under the circumstances of this case we can order the mother to produce the girl for the purpose of her being removed from her custody.]

Mr. *Gasper*.—There can be no doubt your Lordships have the power; the only question is, whether you should exercise it. For that purpose we must look into the circumstances of the case. I am prepared to show from the evidence that the girl was, at the date of the Magistrate's order, in the Patna Zenana Mission House, a house of respectability, where she was cared for, both as far as her comforts and morality were concerned. From there she was taken to Radhakissen, with whom her marriage was a sham, and she was being kept for an immoral purpose. The Court, having the power, should exercise it, and not permit the mere fact of the mother having the custody of the child to prevent that being done.

[MITTER, J.—Under such circumstances proceedings might be taken under s. 100 of the Criminal Procedure Code.]

Mr. *Gasper*.—On the facts it is clear that the mother has taken the child for an immoral purpose, in order to obtain a living by it.

[MITTER, J.—The evidence having been taken by an officer who had no jurisdiction, can we refer to it, and take action on it? The matter must first surely be enquired into by a competent Court.]

Mr. *Gasper*.—But the evidence has been recorded, and, if the facts are as I represent, this Court, having the power to undo the action of the Magistrate, can also restore the position of affairs to that which existed before the illegal order, and this should be done.

[MITTER, J.—The same object may be attained under s. 100. If the girl was unwilling to remain with her mother, it might be unlawful detention; if she was being detained for an unlawful purpose, and the mother would not be justified in detaining her.]

¹ L. R., 3 P. C. 465.

Mr. *Gasper*.—There might be difficulties in the way of such a course being adopted. All we desire is that, if the girl is being detained for an immoral purpose, the Court should direct that it be open to her to go to a place where she would be protected.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was delivered on the 28th March, and was as follows:—

S. 551 of the Criminal Procedure Code empowers a District Magistrate, upon complaint made on oath of the abduction or unlawful detention of a woman or of a female child under the age of 14 years for any unlawful purpose, to make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian, or other person having the lawful charge of such child, and to compel obedience with such order, using such force as may be necessary.

In pursuance of an order made under that section, the girl Luchminia was taken from the petitioner, who is the Superintendent of the Patna Zenana Mission, and made over to her mother Mahtabo.

The case comes before us in the exercise of our revisional powers on a rule to show cause why that order should not be set aside, and why the girl should not be restored to the charge of the petitioner, or such other order made as the facts of the case may warrant and justify.

The rule was granted mainly on the ground that the order was made without jurisdiction, as the facts found did not disclose "an unlawful detention for an unlawful purpose."

The complainants are Mahtabo, the mother, and Radhakissen, the alleged husband of the girl. They made separate complaints, but they are really acting together. Their case is that the girl is under 14 years of age; that she was legally married to Radhakissen, with whom she lived; and that she was taken away by the petitioner and others, and detained in the Mission House.

The facts are undisputed to this extent that the girl had lived with Radhakissen for a period of 9 or 10 months, and that, on the 18th October, she left his house, and went to the Mission House, where she remained.

It also appears that, while she was living with Radhakissen, she was visited by and received instruction from the petitioner, and a native teacher attached to the Mission.

On the part of the petitioner, it was denied that the girl was under 14 years of age, and that she was legally married to Radhakissen, and it was alleged that she was practically being brought up, with the connivance of the mother, to a life of prostitution.

The Magistrate took evidence, and found that the girl was under 14; that she was legally married; and that, although she went to and remained in the Mission House of her own will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that no facts were established which would disentitle the husband or the mother to the charge of the girl. An order for restoration was accordingly made, and, with the consent of Radhakissen, the girl was made over to her mother. There is no reason to suppose that the facts have been wrongly determined by the Magistrate. There is ample evidence to support his conclusions, and the only question which we have to consider in connection with the order is whether, on the facts found, there was an unlawful detention for an unlawful purpose. Obviously the Magistrate is only empowered to act when the detention and the purpose are both unlawful.

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Undoubtedly there was an unlawful detention. It was immaterial whether the girl did or did not consent; she was kept against the will of those who were lawfully entitled to have charge of her, and this keeping and the refusal to give her up amounted to detention which was unlawful.

The question whether the purpose was unlawful is, however, more difficult to determine. Admittedly the only purpose was that the girl should become a Christian, and the Magistrate, finding that this involved destruction of her caste and severance from her proper home, held that detention for such a purpose against the will of her guardian was a detention for an unlawful purpose. It is not easy to say what is the meaning of the words "unlawful detention for an unlawful purpose" as used in this section, but their effect clearly is to limit the Magistrate's power of interference to particular cases. It might seem at first sight that the detention of a child, against the will of her parent or guardian, with a view that she should be brought up in a religion which such parent or guardian disapproved of, and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child, would come within the meaning of the words as well as within the mischief which they were intended to provide against.

But we think it is not so; and that the purpose, whether entertained towards a woman or towards a female child, must be in itself unlawful.

The purpose of forcing a woman to sexual intercourse would certainly be unlawful; the purpose of having sexual intercourse with a girl under 14, even with her consent, would, I take it, be equally unlawful within the meaning of this section, because the girl's consent would be immaterial. But it cannot be said that the purpose of enabling or persuading an adult woman to become a Christian would be in itself unlawful. If it is not unlawful in the case of an adult woman, it could only be unlawful in the case of a child by reason of its being done without the guardian's consent. But we think it is impossible to construe the section, so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian.

The section was not enacted for the protection of children only or of children generally. It applies to women and to female children only, and this combination and the exclusion of male children goes to show, not only that some definite purpose, unlawful in itself, was contemplated, but that the purpose had some special reference to the sex of the person against whom it was entertained. This view is supported by the earlier legislation on the subject. The sections of the earlier Acts, corresponding to s. 551 of the Procedure Code, empowered the Magistrate to act when a woman or female child was detained for specified purposes; *viz.*, adultery, concubinage, prostitution, deflowering, or disposing of her in marriage. The words "any unlawful purpose" were first substituted in Beng. Act IV. of 1866 for the specified purposes mentioned in the previous Acts, and those words have been used in all the subsequent Acts, but the Magistrate's power has always been restricted to the case of women and female children. It may be that the effect of the alteration was to extend the scope of the section, and to include some purposes other than those which were before distinctly specified, but it is unnecessary to consider whether this is the case; it is enough to say that the purpose which is here found to have been entertained is not an unlawful purpose within the meaning of the section.

It follows that the Magistrate had no power to make the order which he did. The question remains whether, in setting it aside, we should undo what

was done in giving effect to it, and replace the girl in the charge of the person from whom she was taken. We have no hesitation in saying that, if the Magistrate had the power which he supposed he had, he, in our judgment, exercised it very properly on the facts before him. It does not, therefore, follow that, because we now find he had not the power, we should, as a matter of course, restore the state of things which existed when the order was made.

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We are, in fact, asked to take this child from the charge of her mother or husband, in the custody of one or other of whom she is, and either of whom the law regards as her natural and proper guardian and make her over to a stranger whose detention of the child, against the will of her husband or mother, would be, *prima facie*, unlawful. It is, we think, very questionable whether we have the power to do this; but, assuming that we have the power, we could only with propriety exercise it if the proper guardian is shown to be in some way disqualified, or if, at the least, the guardian's character is so bad and mode of life so immoral that it would not be proper to leave the child in his or her charge. Nothing of the sort is established. It is not even alleged that the mother has led or is now leading an immoral life. All that is charged is that, by giving her daughter to a man to whom she was not married, she abandoned her, and left her to lead a life of prostitution. The truth of this charge depends upon the fact whether there was or was not a marriage. The Magistrate has found, on ample evidence, that there was a marriage, which would be valid if the parties were not incapable of contracting, and that there is no ground for holding that they were incapable. The marriage is said to be illegal, because, according to caste custom, widows are not allowed to marry, and because one of the parties is of higher social status than the other. It is only necessary to point out that widow marriages are now legalised, and that, although a marriage may be improper according to caste custom, it is not on that account illegal.

But the whole charge of immorality against the mother falls to the ground, when it is found, as the Magistrate has found, that, even if there was any legal defect in the marriage, this was unknown to the mother and Radhakissen, both of whom believed that a valid marriage had taken place.

With the religious aspect of the case we have, of course, nothing whatever to do. It matters not whether the case is one of a Hindu child leaving her parents, and being received and detained against their will in a Christian institution, in order that she may become Christian, or of a Christian child leaving her parents and being received and detained against their will in a Mahomedan institution, in order that she may become a Mahomedan.

There are no circumstances which would justify us in ordering that the child should be made over to the petitioner, and the rule must, so far as it relates to this, be discharged.

H. T. H.

Rule made absolute in part.

CRIMINAL MOTION.

Before Mr. Justice Miller and Mr. Justice Macpherson.

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Mar. 13.

ABHAYESSARI DEBI (PETITIONER) *v.* SHIDHESSARI DEBI (OPPOSITE PARTY).¹

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Criminal Procedure Code, Act X. of 1882, s. 145—Dispute as to right to collect rents—Tangible immoveable property.

A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Criminal Procedure Code, and the operation of that section cannot be limited by any rule which would depend upon the area of the property in dispute.

Where, in such a dispute, which related to two pergunnahs comprising more than three hundred distinct villages, it was admitted by the petitioner that the opposite party had been in possession by receipt of rent from the tenants up to a period some three months anterior to the institution of the proceeding, but she alleged that she had succeeded in inducing the tenants to attorn to her by payment of rent to the officers appointed by her since such period; and where the Deputy Commissioner, after recording a certain amount of evidence, refused to examine any more witnesses, on the ground that the enquiry would extend to an inordinate length and be extremely expensive, and passed an order under the section:

Held that, even though it might be established that the Deputy Commissioner's action in excluding evidence was illegal, it did not follow, having regard to the circumstances of the case, that the High Court would be justified in exercising its revisional powers.

Held, further, that a payment of rent for a short time to the petitioner, even if proved, would not amount to dispossession of the opposite party. *Sarbananda Basu Mesumdar v. Pran Sankar Roy Chowdhuri*² followed.

THIS application arose out of a proceeding under s. 145 of the Criminal Procedure Code, instituted in the Court of the Deputy Commissioner of Goalpara, between the two Ranis of the late Raja of Bijni, the property in dispute consisting of two pergunnahs, Habraghat and Khotaghat, in which there were several hundred villages with a population of over 100,000 persons, and of which the assessment at one time appeared to have been about two lakhs of rupees. The pergunnahs formed a substantial portion of the Bijni Estate, and each of the Ranis claimed to be entitled to succeed thereto and to possession thereof to the exclusion of the other. The late Raja died on the 9th March 1883, and these proceedings were instituted on the 23rd May 1887.

Considerable delay took place owing to various applications being from time to time made to the High Court, and owing to a Receiver of the whole estate having been appointed by the Court of first instance in a civil suit filed by the second party. Ultimately an appeal was preferred to the High Court against the order appointing a Receiver, and, as the hearing of that appeal was delayed, and numerous police-reports as to the likelihood of a breach of the peace occurring were made, the Deputy Commissioner ordered these proceedings under s. 145 to be continued. Ultimately, after other applications to the High Court, the Deputy Commissioner on the 29th of December 1888 passed an order declaring Rani Shidessari Debi to be in possession of the two pergunnahs, and entitled to retain such possession until ousted by due course of law, and forbidding any disturbance of her possession, and ordering the second party to pay the costs. The main facts of the case and the various proceedings had in the matter are sufficiently stated in the judgment of the High Court. The material

¹ Criminal Motion, No. 19 of 1889, against the order passed by *G. Godfrey, Esq.*, Deputy Commissioner of Goalpara, dated the 29th of December 1888.

² I. L. R., 15 Cal. 527.

portion of the judgment of the Deputy Commissioner, delivered when the order was passed, was as follows:—

“The case was instituted on the 23rd May 1887, and proceedings have been delayed on account of references to the High Court, on account of a Receiver having been appointed by the Judge, and the inability of the Magistrate to go on with the case, pending final orders regarding that appointment. The delay in a case, which by its very nature requires a prompt order, is very extraordinary and very anomalous.

“I am asked by the first party, Rani Shidhessari, or the elder Rani, to find that she was in exclusive possession of the pergunnahs on the date of institution of these proceedings, and I am asked by the second party, Rani Abhayessari, or the younger Rani, to find that she was in exclusive possession of the estate with the exception of a very few villages, in which possession was divided, and of a few villages in which the first party's possession is admitted. Possession I take to be in the main the enjoyment in whole or in part of the profits arising from the soil, notably the rents paid by cultivators. Evidence of receipt of rents has been adduced by both parties, and there is no doubt that, when these proceedings were instituted, many of the ryots paid rent to the first party, and many paid rent to the second party, and many of course paid no rents at all to any one.

“I have nothing to do with the means by which possession was obtained by the second party, or whether that possession was wrongful or not, so long as it was a peaceable possession.—*Ambler v. Pushong*¹ and *Bunwari Lall Misser v. Raja Radha Pershad Singh*.²

Both parties have adduced the evidence of witnesses as to the payment of rents, and both have filed masses of counterfoil cheque receipts, *amdanis*, and other papers in support of their respective contentions, and I have no reason for discrediting the papers that have been filed. Supposing the dispossession of the first party to have been followed by peaceable possession on part of the second party—that is, supposing the first party could be regarded as having been dispossessed at all—it would be necessary to ascertain the fact of possession in all the holdings and mouzahs comprised in the two pergunnahs. Such an inquiry would be impracticable and hopeless.

“Assuming, then, for the sake of argument, that dispossession in part followed by peaceable possession has taken place, I should have to look to the question of title in order to guide me to a decision, because it is quite impossible to ascertain who was *de facto* in possession of each mouzah and holding in the estate, or else I should have to attach the whole estate under s. 146.

“I will refer to the question of title later on; suffice it to say that I cannot find the second party to have any title to possession, still less to exclusive possession. It is true that the first party cannot apparently recover rents from the cultivators that fell due after 1st July 1886, when the Assam Land and Revenue Regulation came into force, because she is not registered under that Regulation, but only under Reg. VIII. of 1800.—*Brojo Nath Chowdhry v. Birmoni Singh Monipuri*.³ Still she is able to sue for rents that were due on the 30th June 1886, and so she had the legal right to recover rents for two years when these proceedings commenced. The second party had no such right at all. So far, therefore, as this right to recover rents is an index of title and of possession,

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¹ I. L. R., 11 Cal. 365.

² I. L. R., 15 Cal. 527.

³ I. C. L. R. 136.

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it certainly lies with the first party, and not with the second party. The fact of non-registration under Reg. I. of 1886 is not, I think, tantamount to an absence of possession, which is clearly something more than the legal right to recover rents due from cultivators. I have shown that such a right does vest, to some extent, in the first party, and I do not think that I should be justified in the circumstances to proceed to attachment of the two pergunnahs.

"It is admitted that, when this case was instituted, the first party was the sole registered proprietor; that all suits for or against the Bijni estate were carried on in her name; that she paid the Government revenue on the estate and the local rates; that, prior to February 1887, all the business of the estate was managed by her alone, she appointed and dismissed the officers of the estate, issued parwanas in her own name and bearing her own seal, and that the name of the second party did not enter into any of these proceedings, and that she alone was in receipt of rent from the ryots; also, that, when these proceedings commenced, she was in possession of the rajbari of all the moveable property left by the deceased Raja, and of all the old tahsil cutcherries of the estate. The second party set up her right to exclusive possession in February 1887, and without doubt many of the ryots went over to her and paid her rents, and presented her with *nuzzurs*; but these ryots had up to that time been paying rent to the first party, and the first party has never acquiesced in the change. All kinds of disturbances arose in consequence of the subversion, as far as it went, of the existing order of things; so that such possession, as the second party obtained, cannot be called a peaceable possession.

"On behalf of the second party the contention is raised that she and the first party were joint-proprietors; that they were actually joined as one party in the case under s. 145, Criminal Procedure Code, of *Empress v. Chandra Narayan Subha* (first party) and *Rani Shidhessari Debi* and *Rani Abhayessari Debi* (second party); that therefore the second party had a joint-interest in all the law-suits in which the estate was concerned; that all collections of rent were made on her behalf jointly with the first party; that in fact the first party was acting merely as manager or head of the family, and that she cannot be presumed to have been acting in her own sole interest, or to have a sole interest in the estate; and that, therefore, the possession of the second party was a lawful and proper possession, and it is immaterial whether the first party acquiesced in it or not.

"On the other hand, there are the facts already referred to in support of the position that the first party was the sole proprietor; and it may be stated that the first party has always admitted the second party's interest in the estate to the extent of a right to maintenance out of the funds of the estate, but she has never admitted the position that the second party is a co-sharer. The point was not raised, and was not in issue in the case of *Chundra Narayan Subha* above referred to, and so it cannot be taken to be *res judicata*. The two Ranis were at that time living amicably together, and, so far as the younger Rani's claim to maintenance went, of course, she had an interest in the estate. It is quite probable that the elder Rani and her advisers never supposed that the fact of the two names being joined as one party would ever give rise to a claim of co-ownership. Of course, there is the well-known presumption of Hindu law that the status of a Hindu family must be presumed to be joint till the contrary is proved, but in this case the family is that of a Raja. The registration of name was effected by the Rani Shidhessari as Pat Rani. She alone has been recognised by Government as the proprietor of the estate. She has for years appeared before the public in that capacity, and Rani Abhayessari has, so to speak, been a mere outsider. In view of all these circumstances, I am unable

to presume that the interest of the second party in the Bijni estate was that of a co-owner, and I cannot find that she had any right to possession as against the first party. To sum up, the possession of the first party has been disturbed by the second party, but that disturbance of possession has not been acquiesced in by the first party, and I am not bound to recognise the sort of dispossession that has taken place. But even if the second party has acquired partial possession, as indicated by the enjoyment of rents paid by cultivators, I cannot find that the second party has any title. I find that, so far as rents are concerned, the first party was in possession exclusively up to February 1887; that she alone was in possession on the date of the institution of these proceedings so far as the right to recover rent at all may be disputed between the parties, that is, she alone could recover the rents that fell due before the 1st July 1886. I also find that, so far as recognition by Government and the payment of Government dues, the possession of the rajbari and of all the old tahsil cutcherries, are an index of possession, the first party was in possession when these proceedings commenced.

“Lastly, I may say that the fact of ryots of the first party going over to the second party, without the consent and against the will of the first party, does not constitute an adverse possession; that, as the first party never acquiesced in this attornment of her ryots, her possession never in fact ceased.—*Sarbananda Basu Mozumdar v. Pran Sankar Roy Chowdhuri*.”

Rani Abhayessari Debi, the second party, being dissatisfied with that order, accordingly applied to the High Court, under s. 439 of the Criminal Procedure Code, to send for the record, and to set aside the order upon numerous grounds, the nature of which appears sufficiently for the purpose of this report in the judgment of the High Court.

Upon this application a rule was issued, which now came on for hearing.

Mr. Woodroffe, Mr. Evans, Mr. M. M. Ghose, Mr. A. M. Bose, Baboo Durga Mohun Dass, Baboo Ambika Charan Bose, Baboo Boikanta Nath Dass, and Baboo Chandra Kanto Sen, for the petitioner.

The Advocate-General (Sir G. C. Paul), Mr. H. Bell, Baboo Iswar Chunder Chuckerbutty, and Baboo Kretanto Kumar Bose, for the opposite party.

The nature of the arguments advanced at the hearing of the rule appear sufficiently for the purpose of this appeal from the judgment of the High Court (MITTER and MACPHERSON, JJ.), which was as follows:—

This rule arises out of a proceeding under s. 145 of the Criminal Procedure Code instituted in the Deputy Commissioner's Court of Goalpara, between the two Ranis of the late Koomood Narain Bhoop, Raja of Bijni.

It appears that the aforesaid Raja died on the 9th March 1883, when the second party, junior Rani, was about 19 years of age. The elder Rani, the first party, was allowed by the authorities to assume management of the estate left by the Raja, which consisted of two very extensive pergunnahs, *viz.*, Habraghat and Khotaghat, comprising over 300 villages. It is admitted that the first party remained in sole possession of the said two pergunnahs from the death of the Raja to the month of February 1887 by receipt of rent from the tenants of the said pergunnahs. The second party lived in the rajbari with the first party till August 1886. About that time, there having arisen a serious difference between the two Ranis, the second party left the rajbari.

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¹ I. L. R., 15 Cal. 537.

I. L. R., Cal. 118.

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It is alleged by the second party that the first party, for certain reasons to which it is not material in these proceedings to refer in detail, has no title to the Raj, which, by the law of inheritance, vested in her alone upon the death of the late Raja.

It is further alleged by the second party that she, being alone entitled to the whole Raj, took measures from the month of February 1887 to assume exclusive possession of the aforesaid two pergunnahs.

On the second party attempting to take possession of the two pergunnahs, the first party made an application to the Deputy Commissioner of Goalpara to institute proceedings under s. 145 of the Criminal Procedure Code, alleging that there was a likelihood of a serious breach of the peace in consequence of the endeavours of the *amlas* of the junior Rani to collect rents forcibly from the tenants. The statement regarding probability of the breach of peace was confirmed by many police-reports. Thereupon the Deputy Commissioner instituted the present proceeding on the 23rd of May 1887.

The second party moved this Court on the 28th May 1887 to set aside the order of the 23rd May, on the ground that there was no valid reason stated in it for initiating proceedings under s. 145 of the Criminal Procedure Code. A rule was issued by this Court upon that application, but it was discharged on the 28th June 1887, on the ground that, upon the materials then before the Court, there was nothing to show that the Magistrate had no authority to take proceedings under s. 145 of the Criminal Procedure Code.

On the 19th July 1887 the parties filed their written statements. The second party in her written statement, amongst other things, alleged that she had instituted a civil suit regarding the Raj, and that, on her application, dated the 15th July, a rule had been issued upon the first party to show cause why a Receiver should not be appointed to collect the rents, and otherwise manage the estate left by the late Raja. She further stated that she was in exclusive possession of almost the whole of the Pergunnahs Habraghat and Khotaghat, the tenants having of their own accord and without any coercion paid rent to the *amlas* appointed by her.

It appears that the rule regarding the appointment of a Receiver was disposed of by the lower Court by an order appointing a Receiver as prayed for by the second party. Against that order an appeal was preferred to this Court. The Deputy Commissioner, being of opinion that the appointment of a Receiver would do away with the necessity of the continuance of this proceeding, by an order dated 13th of August 1887, suspended all further proceedings in it till the disposal of the appeal against the order appointing a Receiver. But the appeal not having been heard in consequence of frequent applications for postponements, and the parties having in the meantime attempted to collect rents, the Deputy Commissioner, on receipt of police-reports of the likelihood of a breach of the peace occurring, by an order dated 7th of May 1888, directed that the case, under s. 145 of the Criminal Procedure Code, be proceeded with. Against that order the second party made an application to this Court on the 26th May 1888. About that time, the second party also made another application to this Court, praying that the proceeding, under s. 145 of the Criminal Procedure Code, be wholly set aside, as she had instituted a regular suit for the establishment of her title to the Raj. Both these applications were unsuccessful, and this Court directed the Deputy Commissioner to proceed with the trial of the proceeding under s. 145 of the Criminal Procedure Code.

The proceedings being resumed, both parties cited numerous witnesses to prove their respective allegations of possession over more than 300 villages. But the Deputy Commissioner, being of opinion that it was the intention of the Legislature that a proceeding like this, instituted for the maintenance of peace, should be speedily terminated, declined to examine more than a limited number of witnesses on each side. He decided on the evidence taken by him in favour of the first party. This rule was issued on the application of the second party to set aside the order of the Deputy Commissioner of Goalpara on various grounds.

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The questions argued before us, and which in our opinion are sufficient to dispose of this rule, are as follows :—

1st.—That a single proceeding under s. 145, Criminal Procedure Code, was not intended to be applicable to a case like this, in which the question of disputed possession related to more than 300 distinct villages.

2ndly.—That, on the date fixed for the filing of written statements, the second party was desirous of adducing evidence to prove that there was no likelihood of a breach of the peace, but such evidence was illegally excluded.

3rdly.—That the lower Court acted illegally in declining to examine more than a limited number of witnesses on the question of possession.

In dealing with these questions it is to be borne in mind that the inquiry, if it had not been limited in the way in which it was limited by the Deputy Commissioner, would have lasted for a very long time, and would have been extremely expensive to both parties. That in all probability the civil suit would have been decided before the termination of this proceeding. That, even if it had been decided before the disposal of the civil suit, very little advantage would have been gained thereby, as the decree in the civil suit would have made the decision on the question of possession quite ineffectual.

It seems to us, therefore, that, even if it be established that the lower Court's action in excluding evidence was illegal, it would by no means follow that we should be justified in exercising our revisional powers on the ground of illegality.

But apart from this consideration the objections noticed above are not, in our opinion, such as would warrant our interference with the order of the lower Court.

With reference to the first two objections, it is sufficient answer to them that, in more than one application, which was made by the second party to this Court, in order to set aside the proceeding of the lower Court, these objections were not taken, and the last order made by this Court directing the lower Court to proceed with the trial of this case precludes her from raising them now. It has been decided by this Court that a proceeding under s. 145 is not limited to disputed possession between parties in immediate occupation of a tangible immovable property, but is intended to apply where the disputed possession consists of receipt of rent from tenants in actual possession. That being so, we cannot limit its operation by any rule which would depend upon the area of the property in dispute.

It remains now to notice the third objection. It seems to us that, having regard to the admission made by the second party, that the first party was in possession of the two disputed pergunnahs till the month of February 1887 by receipt of rent from the tenants, it would not have affected the decision of the case at all, if it had been established that the second party, as alleged by her, had succeeded in inducing the tenants of almost the whole of the pergunnahs Habraghat and Khotaghat "to attorn to her by payment of rent to the officers

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appointed by her between the month of February 1887 and the following month of May, when the present proceeding was instituted." Such payment of rent for a *short* time would not amount to dispossession of the first party.

In this view we are supported by *Sarbananda Basu Mozumdar v. Pran Sankar Roy Chowdhuri*.¹

We are, therefore, of opinion that this rule must be discharged, and it is accordingly discharged.

H. T. H.

Rule discharged.

CRIMINAL APPEAL.

Before Mr. Justice Trevelyan and Mr. Justice Hill.

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May 7.

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BIKAO KHAN AND OTHERS (APPELLANTS) v. THE QUEEN-EMPRESS
(RESPONDENT).²

Criminal Procedure Code (Act X. of 1882), ss. 161, 172, 211—Statements of witnesses recorded by police-officers investigating under Ch. XIV. of the Criminal Procedure Code, Right of accused to call for and inspect—Police Diaries.

Statements of witnesses recorded by a police-officer while making an investigation under s. 161 of the Criminal Procedure Code form no portion of the police-diaries referred to in s. 172, and an accused person on his trial has a right to call for and inspect such statements, and cross-examine the witnesses thereon.

In this case five persons were committed to the Durbhangah Sessions by the Joint-Magistrate of that district to take their trial on charges framed under ss. 302, 147, and 149 of the Indian Penal Code. On the commencement of the trial in the Sessions Court, the Counsel for the accused applied to the Judge, before the opening speech of the Government Pleader, to call for the statements of the witnesses for the prosecution recorded by the investigating police-officer under s. 161 of the Criminal Procedure Code, on the ground that these statements formed no part of the diary referred to in s. 172 of the Code, and that the accused were entitled to see them. Counsel stated that these statements were then in the custody of the District Superintendent of Police, who might be subpoenaed to produce them without delay, so that the accused might be in a position to cross-examine the witnesses for the prosecution regarding the statements made by them to the police. The Sessions Judge disallowed the application, on the ground that, under s. 211 of the Criminal Procedure Code, the application for the production of these documents ought to have been made before the committing officer, so as to entitle the accused to call for the papers as of right. The police-officer, who had recorded the statements in question, subsequently brought them into Court of his own motion, and held them in his hands during his examination as a witness. The Counsel for the accused then applied to the Judge to compel the production of the papers then in Court, and to enable him to see them. This application was also refused by the Judge, who eventually convicted four out of five of the accused persons under ss. 304 and 149. As regards the non-production of the statements, the Sessions Judge made the following observations in his judgment:—

"In conclusion I would wish to make some remarks on an incident in the case before even the Government Pleader had commenced his opening address.

¹ I. L. R., 15 Cal. 527.

² Criminal Appeal, No. 173 of 1889, against the order passed by A. C. Brett, Esq., Sessions Judge of Durbhangah, dated the 26th February 1889.

I was asked by Mr. *Ghose* to order the production, as exhibits in the case, of the statements recorded by the police under s. 161, Criminal Procedure Code, Mr. *Ghose* said he had with him a copy of an unreported judgment of the Calcutta High Court, laying down that he was entitled to call for these documents. The point is a new one. But I am not concerned to discuss the question as to whether these papers can be treated as evidence, and whether, therefore, the defence (or the prosecution for the matter of that) can enforce their production, or produce them. The question is not free from difficulty. I disposed of the application on another ground. Under s. 211 of the Criminal Procedure Code, as soon as the committing officer has framed the charge, the accused has to apply for coercive process. I hold that he is not entitled, as a matter of right, to ask the Court of Session for the issue of such process. It may be said that I should, as a matter of equitable discretion, have ordered their production, as this could be obtained without much delay. I do not think so. But, even if I am wrong, no harm has been done, for I have read the statements which I have had translated, and there is practically no difference between what the persons examined stated, and what the witnesses have deposed before both Courts. The papers were, in fact, in Court on the second day of the trial; and, indeed, Exhibit S B is an integral portion of them. I therefore hold (1) that the defence was not entitled to enforce their production; (2) that it was a proper exercise of my discretion to refuse to order their production; (3) that my refusal has in no way damnified the defence."

The prisoners appealed to the High Court against the conviction.

Mr. *Woodroffe*, Mr. *M. M. Ghose*, Mr. *M. P. Gasper*, and Baboo *Sarada Churn Mitter*, for the appellants.

The *Standing Counsel* (Mr. *Phillips*) and Baboo *Ram Churn Mitter* for the Crown.

Mr. *Woodroffe* contended, among other matters, that there ought at least to be a new trial, as the Judge had improperly disallowed Mr. *Ghose's* application, calling for the statements, and had further prevented him from reading them when they were actually before the Court. Statements recorded under s. 161 are not privileged, and form no portion of the diary referred to in s. 172. The latter is to contain a record of the proceedings of the police and their movements, together with expressions of opinions and private matters which the Legislature probably intended should not be placed at the disposal of the parties. But it could never have been intended that the accused should be debarred from calling for the statements made by the witnesses for purposes of cross-examination, especially as under the new Code a witness is liable to be prosecuted for perjury for false statements made before the police. This question was fully argued recently before Mitter and Macpherson, JJ., in the case of *Mahomed Ali Hadji v. The Queen-Empress*¹ (Criminal Motion 422 of 1888 decided on the 30th January 1889), and those learned Judges have held that

¹ Before Mr. Justice Mitter and Mr. Justice W. Macpherson.

IN THE MATTER OF MAHOMED ALI HADJI AND OTHERS (PETITIONERS) v.
THE QUEEN-EMPRESS (OPPOSITE-PARTY).

Mr. *M. M. Ghose* and Baboo *Jogendro Nath Bose* for the petitioner. The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The facts of the case are sufficiently stated in the judgment of the High Court (MITTER and MACPHERSON, JJ.), which was as follows:—

MITTER, J.—The petitioners, Mahomed Ali Hadji, Nabi Baksh, and Bazra Sonar, were charged in the Deputy Magistrate's Court of Gaibanda with being members of an un-

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the accused were entitled to have these statements produced, and that it was an error on the part of the Magistrate not to have compelled their production. The police-authorities themselves have recognised the distinction contended for, and have laid down in Circular No. 16, of the 28th July 1883, to all District Superintendents of Police, that statements recorded under s. 161, Criminal Procedure Code, are different from the diary.

[TREVELYAN, J.—The police-circular need not be referred to in order to explain the law. It is no authority. But we are satisfied that the law is clear on the subject, and that you were entitled to call for the statements, provided you asked for them in proper time.]

The Sessions Judge is quite mistaken in supposing that s. 211 of the Criminal Procedure Code has any application. Even if that section applied, as a matter of sound discretion, the Judge ought to have granted Mr. *Ghose's* application.

lawful assembly, on the 25th day of June last, armed with deadly weapons, and that, by such unlawful assembly, force or violence was used in the prosecution of a common object: the common object being described in the charge-sheet as the forcible dispossession of Budrunnissa's party from the Sultanpore cutcherry. That is, they were charged under the first count with rioting and being armed with deadly weapons under s. 148 of the Indian Penal Code. In the second count, they were charged under s. 326, coupled with s. 149, of the Indian Penal Code, it being stated that, in the prosecution of the common object of that unlawful assembly, grievous hurt was inflicted by some of the members of that assembly. The facts, as found by the Deputy Magistrate, are as follows: One Kheraj Ali Chowdhry was the owner of Sultanpore estate, and had his family dwelling-house in the village of that name. He had also a cutcherry-baree in it. He died some time in the month of Kartick 1294, and the death of his widow Asmutunnissa followed within a few days. Moazum Hossein Chowdhry, of Shibganj, a brother of Asmutunnissa, claimed the whole estate left by Kheraj Ali, on the ground that it had been transferred by Kheraj Ali in his lifetime to his wife Asmutunnissa. Upon this allegation, Moazum Hossein had obtained a certificate under Act XXVII. of 1860 to collect the debts due to the estate of Asmutunnissa. With the assistance of two leading ryots in the village of Sultanpore, *vis.*, Kedar Ali Mir, a witness examined on behalf of the prosecution, and Noimuddeen Pundit, Moazum Hossein succeeded in obtaining possession of Sultanpore with the cutcherry-baree in it. But in Bysack last these two men went over to the party of one Budrunnissa. Budrunnissa is the paternal aunt of Kheraj Ali. She and others denied the allegation of transfer of his whole estate by Kheraj Ali to his wife, and claimed either the whole or a portion of it as heirs-at-law of Kheraj Ali. As usual, in these cases, both parties struggled to maintain possession by force. The Deputy Magistrate found that the possession by Moazum Hossein of the cutcherry at Sultanpore, with the assistance of the two leading ryots mentioned above, was maintained up to Bysack last, but on these two men going over to the other side that possession was lost, and Budrunnissa's servants occupied the cutcherry-baree from that time, and were in occupation of it at the time when the riot took place at the cutcherry-baree; that on the date mentioned in the charge, *vis.*, on the 25th day of June last, a body of latials headed by the petitioners came on behalf of Moazum Hossein to the cutcherry-baree, attacked the men occupying it, and inflicted injuries with spears on four persons, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, servants of Budrunnissa. This attack was made in the latter end of the night on that date, but Budrunnissa's party soon collected men in sufficient numbers to repel the attack, and the assailants were pursued up to another cutcherry-baree in a village called Mujlisipore, distant about three or four miles from Sultanpore, in which a cutcherry-baree had been erected by Moazum Hossein some time about the month of Bysack, when his people were ejected from the cutcherry-baree at Sultanpore.

Upon these facts, found by the Deputy Magistrate, the petitioners before us have been convicted of the offence of rioting, and of the offence of committing simple hurt, it being not proved that the injuries inflicted amounted to grievous hurt. It may be mentioned here that some of the men forming the attacking party were also wounded during the riot, and one of them has since died in hospital.

[TREVELYAN, J.—As at present advised, we are with you on this point.]

Mr. Woodroffe then proceeded to argue the case on its merits.

The *Standing Counsel*, in support of the conviction, conceded that the accused probably had a right to call for the papers, and to look at them, but they were not prejudiced, as the Judge had himself looked at them, and given the accused the full benefit of their contents.

The judgment of the High Court (TREVELYAN and HILL, JJ.) was as follows:—

In this case the prisoners have been convicted by the Sessions Judge of Durbhangah, agreeing with one of the assessors, of offences under s. 304 read with s. 149, and under s. 147 of the Penal Code.

Each of these petitioners has been sentenced to two years' rigorous imprisonment. The witnesses for the prosecution were examined on the 5th and 6th of July last. On this last-mentioned date, the two charges mentioned above were framed against the petitioners. The witnesses were fully cross-examined by the pleader engaged on behalf of the petitioners before these charges were framed. The case was then fixed for trial on the 17th of July, but it was postponed in consequence of Counsel from Calcutta, who was engaged on behalf of the petitioners, not arriving on that date. It was taken up on the following day, *vis.*, on the 18th. In the meantime, certain witnesses had been cited by the petitioners to establish their defence, but none of the witnesses for the prosecution had been cited to be re-called.

On the 18th of July, when the case was taken up, the Counsel for the petitioners put in the witness-box the Inspector of Police of Sadullapore, who was conducting the prosecution in this case, and it appears from the drift of the examination that the Counsel intended to establish that four of the witnesses examined on behalf of the prosecution, *vis.*, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, who had received injuries in the course of the riot, had given evidence before the police-officer, who investigated the case under s. 161 of the Criminal Procedure Code, not agreeing with the version of the story told by them at the trial.

It appears from the examination of the aforesaid Inspector that these four men had at first denied that they were sleeping in the cutcherry on the night when the riot took place, but that they subsequently admitted that fact on being further questioned by the investigating police-officer. Upon some points the Inspector, from his memory, could not answer the questions put to him by the Counsel for the defence regarding the statements made by these witnesses. Thereupon an oral application was made by the Counsel for the production of the diaries kept by the investigating officer. A note made by the Court of this application, and the order made thereupon, is to the following effect: "Mr. Gregory asks the Court to require the Inspector to produce the diaries, and as I find the witness has admitted almost everything required by the defence, and because police-diaries cannot be used as evidence, nor can they be called for by the accused, the Court declines to call for the diaries at the instance of the Counsel for the defence." This evidence of the Inspector was taken on the 18th July. There were some more witnesses examined on behalf of the defence on the next day, and the trial was concluded, but judgment was reserved, and not delivered till the 27th of July. On the 20th of July, we find that an application was made on behalf of the petitioner before us, embodying the purport of the oral application made by Counsel on the 18th of July referred to above. In this application, it was stated that the four witnesses, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, had made statements to the Police Inspector contrary to those which had been made by them in their depositions in Court, and that to a certain extent this fact had been established by the evidence of the Police Inspector; but it was not established to the full extent, and therefore they prayed that that portion of the police-diary in which the statements of these four witnesses had been recorded be sent for, and then, after inspection of the said portion of the diaries, if it be considered proper to send for any witnesses, such witnesses might be sent for. An appeal was preferred to the Sessions Judge against the conviction and sentence passed by the Deputy Magistrate. In the petition of appeal, no point was made regarding the refusal of the Deputy Magistrate to send for the police-diary mentioned above, but it has been stated to us by Mr. Gregory, who appeared both in the Deputy Magistrate's Court as well as in the Court of the Sessions Judge, that this point was argued by him before the Sessions Judge. We do not find that it is dealt with by the Sessions Judge in the

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They have appealed to this Court, and Counsel on their behalf has urged, that the evidence does not justify their conviction, and that, even if the evidence, as given, would justify a conviction, the accused have been so prejudiced by the action of the Judge in excluding evidence which ought to have been admitted, that they are entitled to a new trial.

We consider that the Judge has wrongly excluded evidence which he ought to have admitted.

A police-officer in this case had, under the provisions of s. 161 of the Criminal Procedure Code, examined persons who were afterwards called as witnesses.

At the Sessions trial this police-officer was in Court, and had with him the statements which he had taken down.

judgment which was recorded by him. This, however, is the principal point which has been taken before us in support of the rule which was issued in this case. In fact, it forms the first and second grounds taken in the petition presented to this Court. The first ground is to the following effect: "That the Deputy Magistrate ought to have compelled the production of the statements of the witnesses for the prosecution as recorded by the Sub-Inspector and the Inspector of Police under s. 161 of the Criminal Procedure Code. Such statements are not governed by the provisions of s. 172 of the Criminal Procedure Code, and were therefore not privileged. These statements were most material, and their production would have enabled your petitioners' Counsel to show that the witnesses were not reliable. Your petitioners' Counsel had strongly complained before the Appellate Court of the non-production of the said statements." The second ground is: "That the petition, presented by your petitioners, clearly shows that the papers wanted were the statements of the witnesses, and not the diaries, though the word 'diaries' was inaccurately used, because the Inspector had used the expression. The Deputy Magistrate ought to have called for those papers." The first paragraph, it seems to us, does not accurately state what happened; the first paragraph says that an application was made for the statements of the witnesses for the prosecution, as recorded by the Inspector and Sub-Inspector of Police, under s. 161 of the Criminal Procedure Code. The fact is that what was wanted was not the statements of all the witnesses, but only the statements of the four mentioned above, *vis.*, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch. It may be conceded that the document that was asked to be produced was misdescribed in the petition, and also in the Judge's notes as "diaries." It appears that, from ss. 161 and 172 of the Criminal Procedure Code, what was wanted was not properly described as "diaries." Under s. 172, a diary is a privileged document, and neither of the parties has any right to ask for its production; but, although in the application and in the note the document in question is described as a diary, it is sufficiently clear that what was wanted was the production of the statements, which in this case seem to have been reduced to writing, of the four witnesses mentioned above, which statements were taken by the investigating police-officer under s. 161 of the Criminal Procedure Code. It may also be conceded in favour of the petitioners that these statements could have been, under certain conditions, used as evidence in the case. For instance, they might have been used for the purpose of contradicting the witnesses mentioned above, or of contradicting the Inspector of Police under s. 145 of the Evidence Act. That being so, the Counsel for the petitioner was entitled to have an order from the Deputy Magistrate for the production of these statements. It is an error on his part to have refused the application, but it does not follow that, because there is this error, his judgment should be set aside. On the other hand, both under s. 537 of the Criminal Procedure Code as well as s. 167 of the Evidence Act, we cannot reverse or alter a judgment unless we are satisfied that the error in question has caused a failure of justice. Mr. Ghose was asked to point out in what way this error has caused a failure of justice, and he contended that, if the statements had been sent for, the petitioner would have been in a position to establish that the cutcherry-baree in Sultanpore was really in the possession of Moazum Hossein, and not in the possession of Budrunnissa; and if it was established that the cutcherry was in the possession of Moazum Hossein, then the charge would have entirely fallen to the ground, because the common object of the unlawful assembly stated in that document was the forcible taking possession of the cutcherry. Now, we have referred to the judgment of the Deputy Magistrate, and we are of opinion that it is not based, as regards the question of possession, upon any part of the depositions of the four witnesses

There can be no doubt that these statements would be admissible in evidence. They are not a portion of the diary, and are not protected by any enactment.

The Judge refused to allow them to be used, on the ground that the accused had not asked the committing Magistrate to allow them to be produced.

It appears from an affidavit, which has been used before us, that, when the Sub-Inspector, who made the investigation, was being cross-examined, the Counsel for the accused asked the Judge to hand up the statements taken down by the witness to enable him to answer questions as to statements made by some of the persons who were called as witnesses for the prosecution. This the Judge refused to do.

We think that the Judge ought to have permitted Counsel to put the statements to the witness. There is no doubt that an accused person is entitled to call as his witness any person who is in Court, whether he has summoned him or not (see s. 291 of the Criminal Procedure Code), and there is, we think, equally no doubt that an accused may, so far as the law of evidence permits him to do so, make use of, as evidence, any document which is in Court at the trial. Before, however, we could order a new trial on this ground, we would have to be satisfied that injustice had been done to the accused by the exclusion of this evidence.

If it had appeared that there was a material difference between the statements made by the witnesses to the Sub-Inspector, and their statements made in Court, it would have been difficult to say that the accused had not been prejudiced by the Judge's decision on this question.

The Judge says that he has read the statements, and that there is practically no difference between what the persons examined stated and what the witnesses have deposed before both Courts. We see no reason to doubt the correctness of the Judge's statement, and if the legal advisers of the accused had seen any real ground for disputing it, they would have endeavoured to obtain the production of these statements, so that they might have been considered at the hearing of the appeal.

mentioned above, *vis.*, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch. His finding upon the question of possession is mainly based, *firstly*, on the evidence of one of the two leading ryots, *vis.*, Kedar Ali, and, *secondly*, upon the circumstance that, about the time that Moazum Hossein's servants were alleged to have been ejected from the cutcherry of Sultanpore, they erected another cutcherry-baree in Mujlispor, within three or four miles from Sultanpore. With reference to this second ground, the Deputy Magistrate says that Mujlispor was a very small village, and, if Moazum Hossein had been in possession of the cutcherry at Sultanpore, there would have been no necessity for erecting a new cutcherry at Mujlispor. In fact, the judgment of the Deputy Magistrate was not founded on the evidence of the four witnesses, whose statements before the investigating police-officer was asked to be sent for. We are therefore not satisfied that the omission to send for these documents has in any way caused a failure of justice.

There was only one other point argued before us, *vis.*, that the sentence in this case is too severe. We have considered this point, and we are of opinion that the sentence that has been passed upon the petitioners, having regard to the nature of the offence established against them, is not too severe. We therefore discharge the rule.

MACPHERSON, J.—I agree. I further think that the statements called for would have been of no practical use to the petitioners unless they were in a position to summon the witnesses for the prosecution, and cross-examine them with reference to statements which they had made to the police.

The statements were called for at a very late stage, when the petitioners were not entitled to have the prosecution-witnesses summoned for the purpose of cross-examination.

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Taking all the circumstances into consideration, we do not think that the omission of the Judge to admit this evidence would justify us in ordering a new trial. On the mere speculation that these statements would disagree, and in face of the Judge's statement that they do not materially disagree, we could not order a new trial.

[Their Lordships then proceeded to determine the case on its merits, and ended in upholding the conviction and reducing some of the sentences.]

H. T. H.

Conviction upheld.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

1889.

May 20.

IN THE MATTER OF THE PETITION OF KOILASH CHANDRA CHAKRABARTY.

16 Cal. 657.

KOILASH CHANDRA CHAKRABARTY v. THE QUEEN-EMPRESS.¹

Penal Code (Act XLV. of 1860), ss. 441 and 456—House-breaking by night—Criminal Trespass—Intent.

When a stranger, uninvited and without any right to be there, effects an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and, when an attempt is made to capture him, uses great violence in his efforts to make good his escape, a Court should presume that the entry was made with an intent such as is provided for by s. 441 of the Penal Code.

An accused person in the middle of the night effected an entry into a house occupied by two widows, members of a respectable family. On an alarm being given, and an attempt made to capture him, he made use of great violence, and effected his escape. Upon these facts, he was charged with offences under ss. 456 and 323 of the Penal Code. The defence set up was an *alibi*, which was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the house, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts convicted the accused under s. 456. It was contended that, as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal.

Held that, under the circumstances of the case, the Court ought to presume that the entry was effected with such intent as is provided for by s. 441, and that the conviction should be upheld.

THE petitioner in this case was charged with house-breaking by night in the premises of one Golak Mohun Mojumdar, and of voluntarily causing hurt to one Sarba Joya Debi, under ss. 456 and 323 of the Penal Code.

The case, as proved by the complainant and his witnesses, was that he was awoke in the middle of the night by his cousin Sarba Joya Debi calling out that there was a thief in the house shaking the padlock of the *sindhuk*; that he rose and went out at once to the house in which Sarba Joya slept, and found the accused coming out; that he thereupon seized him by his beard, and a struggle ensued; that the accused bit him on the neck, and that, on Sarba Joya coming out, and giving an alarm, the accused left him, and hit her over the head with a *khota*, and then left the premises. The defence set up by the accused, who was the village doctor, was an *alibi*; but the Deputy Magistrate accepted the story

¹ Criminal Revision, No. 163 of 1889, against the order of J. G. Campbell, Esq., Sessions Judge of Mymensingh, dated the 2nd of February 1889, affirming the order of Baboo Bhaban Mohun Raha, Deputy Magistrate of Netrokona, dated the 31st of December 1888.

of the prosecutor, and disbelieved the *alibi*. The accused, by way of assigning a motive for a false charge being brought against him, alleged that the cousin of the complainant, a widow named Bhaba Sundari, who slept in the same house as Sarba Joya, was unchaste, and that as he, the accused, had been interfering with her visitors, this charge had been got up against him.

The Deputy Magistrate came to the conclusion that the accused broke into the house and committed the assault charged, but that his object in breaking into the house was not theft, but probably something worse, suggesting thereby that his object was the prosecution of an intrigue with Bhaba Sundari. He accordingly convicted the accused on both charges, and sentenced him to six months' rigorous imprisonment, and a fine of Rs. 25 on the first charge, and a fine of Rs. 50 on the second charge.

The accused then appealed to the Sessions Judge, and it was contended on his behalf that the conviction under s. 456 could not be sustained, inasmuch as, if he merely entered the house to prosecute an intrigue with Bhaba Sundari, there could be no criminal trespass, and the assault was committed outside the house, and had nothing to do with the entry. The Sessions Judge, however, rejected that contention, and held that the conviction was right, as there was no evidence to show that the woman invited him or consented to his intrusion, and, when he was seized, he was guilty of extreme violence. The appeal was accordingly dismissed.

The accused then moved the High Court, under its revisional powers, upon the ground that the prosecution having failed to prove that he entered the house with intent to commit theft or any other offence, the conviction was bad.

A rule was issued which now came on for argument.

Baboo *Dwarkanath Chuckerbutty* for the petitioner.

Mr. Kilby for the Crown.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

In this case the petitioner, Koilash Chandra Chakrabarty, was convicted by the Deputy Magistrate of Netrokona of the offences of house-breaking by night and of voluntarily causing hurt under ss. 323 and 456 of the Penal Code respectively, and sentenced to six months' rigorous imprisonment in respect of the first offence, and to a fine of Rs. 50 in respect of the second. He appealed to the Sessions Judge of Mymensingh, but his appeal was dismissed; and he now moves this Court to set aside the conviction and sentence under s. 456 of the Code, on the ground that the prosecution failed to prove that he had entered the complainant's house with the intent to commit theft or any other offence.

In our opinion, the conviction and sentence ought to be maintained. The facts are these: The complainant, who is apparently a person in comfortable circumstances, lives in a country village in a house which is divided into several distinct apartments. One of these he used himself with his wife and three young children to sleep in, and another was used for the same purpose by two widows, cousins of the complainant, the elder of whom was of advanced age, and the younger, whose name is Bhaba Sundari, a woman of about 20 years of age. On the night of the 12th Aughran, when the events out of which this case has arisen took place, there was no other occupant of the complainant's house but the persons I have mentioned. On that night, a considerable time before daybreak, the complainant was awakened by his elder cousin, who told him that there was a thief in the house who was shaking the padlock of a

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sindhuk in his room. He got up and went out at once, and found the petitioner forcing his way out of the ladies' room by pushing aside the *bera*. He seized the petitioner, and a struggle ensued, in the course of which the complainant was bitten by the petitioner, and the elder lady received a blow from him with a piece of bamboo which drew blood. The complainant, under these circumstances, charged the petitioner with having entered his house with intent to commit theft and with assault. The defence was an *alibi*, and the petitioner asserted that he had been falsely accused, because he was supposed by the complainant to have interfered with the amours of the younger of the widows. The *alibi* has been disbelieved by both the Courts below, and there seems to be no ground for the aspersions cast on the character of Bhaba Sundari.

Neither of the Courts below has found in terms with what intent the petitioner entered the complainant's house. The Deputy Magistrate declined to believe that his object was theft, but thought that he might have been there for "something worse," by which, I presume, is meant the prosecution of an intrigue with the younger widow; but with reference to this aspect of the case the learned Judge, in disposing of the argument that the petitioner's act was not criminal, as his entry was for the purpose of having connexion with Bhaba Sundari, remarks: "There is no evidence that the woman invited him in, or consented to his intrusion, and when seized he was guilty of extreme violence," and we should do wrong, were we, in the existing state of the evidence in the case, to assume, as we were invited to do by the pleader who appeared before us on behalf of the petitioner, that the intrusion of the petitioner was less distasteful to Bhaba Sundari than to any other member of the complainant's household. The learned Judge refused to accept that view, and on that ground, as we understand his judgment, declined to disturb the conviction. What we have then to deal with is the case of a man, a stranger, who, uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances we think a Court ought to presume that the entry was effected with an intent such as is provided for by s. 441 of the Penal Code. This is the view upon which the learned Judge has acted, and we therefore think that his decision ought to be upheld.

H. T. H.

Conviction upheld.

CRIMINAL REVISION.

*Before Mr. Justice Prinsep and Mr. Justice Hill.***KEDARNATH DAS (PETITIONER) v. MOHESH CHUNDER CHUCKERBUTTY AND ANOTHER (OPPOSITE PARTIES).¹**

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May 13.

Criminal Procedure Code (Act X. of 1882), s. 195—Sanction to prosecute—Notice to accused—Revisional power, Exercise of, by High Court.

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When Subordinate Courts grant sanction to prosecute under s. 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not.

A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted."

There was no further record of the proceedings. Immediately on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications.

The attorney for the complainant, who had expressed his willingness to have the application heard and disposed of there and then, intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the following day without notice to and in the absence of the complainant or his attorney, and the Magistrate granted the sanction asked for.

On an application to the High Court to revoke the sanction, *held* that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard.

Held, further, that the mere fact of the charge laid by the complainant not having been proved was not in itself sufficient ground for granting sanction to prosecute him under ss. 182 and 211 of the Penal Code, and as, beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction, it should be revoked.

THE facts which gave rise to this application were as follows:—

The petitioners, Kedarnath Das and his brother, were, according to the allegation of the petitioners, the owners of the southern portion of No. 6, Bhoalanath Coondoo's Lane in Calcutta, which had been allotted to them under a decree for partition passed by the High Court in its ordinary original civil jurisdiction. In an affidavit filed in support of his application Kedarnath Das stated that in the Bengali year 1293 (1886-87), Mohesh Chunder Chuckerbutty and Nobo Coomar Chuckerbutty, the opposite parties, who were their purohits, requested him and his brothers to allow them to reside in the portion of the second premises so allotted to them, promising to vacate as soon as they were asked to do so, and that he and his brother allowed them to reside there.

In his affidavit he went on to state that on the first day of March he called on the said Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty, and informed them that the house was badly in need of repairs, and that he and his brothers wished to repair the same, and desired them to leave the house as soon as possible, and he placed two of his servants, Jooman and Hem Raj, in the house.

¹ Criminal Motion, No. 175 of 1889, against the order passed by *Moulvie Abdul Jubber*, Officiating Presidency Magistrate of Calcutta, Northern Division, dated the 11th of April 1889.

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That on the 5th March, having received information that the said Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty had ordered his servants to leave the house, he called there and met Nobo Coomar Chuckerbutty, who threatened to break his head if he entered the house. ~~but that he~~ entered the house and told his servants not to leave it, and, finding that the sudder-door was wholly out of repair and about to fall in pieces, he removed the same to his dwelling-house.

That on the 9th March, having received information that his servants had been turned out of the said house, he called there, and on seeing him Nobo Coomar Chuckerbutty left the house and proceeded towards the direction of the Burtollah thannah. That he went into the house and found that the cook-room had no door, and certain doors and windows, which he had stored in one of the godowns, were missing, and he found a carpenter employed in sawing certain rafters. Seeing this he went to the thannah and informed the jemadar of what had happened, and thereupon the jemadar wrote something in a book, and desired him to put his signature thereto, which he did.

That thereafter and on the same day a jemadar of police went to the house, but he did not make any enquiries into the petitioner's charge, while he made certain enquiries into a certain complaint perferred by Nobo Coomar Chuckerbutty against the petitioner, and made him produce the sudder-door which he had removed on the 5th March, but which did not in any way relate to the subject-matter of his complaint. Thereafter, the Inspector of the thannah reported to the Deputy Commissioner of Police that the petitioner's complaint was a false one, whereupon he directed the Inspector to prosecute him. Subsequently, at the instance of the said Inspector, a summons was issued against him.

That, on the day of the hearing of the said complaint, he appeared in the Calcutta Police Court with his attorney, Baboo Kali Nath Mitter, who informed the Hon'ble Syed Amir Hossein, the Magistrate of the Northern Division of Calcutta, of the circumstances under which the complaint was made, and the action taken by the police, and that there was no judicial enquiry as to the truth or otherwise of the said complaint; thereupon the said Magistrate ordered summons to issue against Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty on the complaint perferred by the petitioner, and accordingly summonses were issued against them, returnable on the 10th day of April instant.

That, on the 10th day of April, the petitioner appeared with his attorney, Baboo Kali Nath Mitter, before Syed Abdul Jubber, who was officiating as Presidency Magistrate, and his attorney explained to the Magistrate the circumstances under which the case was placed before him, and, in support of the petitioner's complaint, his attorney examined him and his brother Amrita Lal Das and also Luckhimoney, Koosum, Hurry Mati, Falgu Mistry, and Nemo Lal Chunder, as witnesses, but the Magistrate did not take any notes of their evidence, and after the case for the prosecution was closed delivered his judgment.

That he and his witnesses proved the existence of the doors and windows in the house at the time when Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty were in possession of the same, but that he could not give, and did not attempt to give, any evidence of the taking thereof by Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty or either of them.

That, after the defendants were discharged, their pleader, Mr. Cranenburgh, applied to the Magistrate for sanction to prosecute him, when the Magistrate stated that he would not hear any application then, as it was not the

proper time to hear applications. That his attorney then and there requested the Magistrate not to grant any sanction without notice to the petitioner, when the said Magistrate stated that, when the application for sanction was made to him, he would then consider whether he would issue any notice or not.

That thereafter, on the 11th of April, the Magistrate, without any notice to the petitioner or his attorney, granted sanction for the prosecution of the petitioner.

The judgment of the Magistrate, delivered on the 10th of April, was as follows :—

"Kedarnath Das v. Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty."

DECISION :

"The charge of theft of doors and windows is not proved at all against the accused. They are acquitted.

(Sd.) ABDUL JUBBER,
Offg. Presidency Magistrate."

The sanction granted by the Magistrate on the 11th April was in the following terms :—

"Sanction is hereby given to Mohesh Chunder Chuckerbutty and Nobo Coomar Chuckerbutty, under s. 195 of the Criminal Procedure Code, to prosecute Kedarnath Das, under ss. 211 and 182 of the Penal Code, for having, on the 25th March last, in the said Court, with intent to cause injury to the said complainants, instituted a criminal proceeding against them, and falsely charged them with having, on the 9th March last, in Bholanath Coondoo's Lane, committed theft of two pairs of doors, two windows, and 25 rafters, knowing that there was no just or lawful cause for such proceeding or charge.

11th April 1889.

Prosecution sanctioned.

(Sd.) A. J.

11th April 1889.

Issue summons, ss. 182 and 211.

(Sd.) A. J."

On the 26th of April, Mr. *M. P. Gasper* applied to the High Court (MACPHERSON and RAMPINI, JJ.) for a rule, calling on the Presidency Magistrate and the opposite parties to show cause why the order granting the sanction should not be set aside and the sanction revoked, and a rule in these terms was granted.

The application was based on a petition and affidavit of Kedarnath Das setting out the above facts.

The rule now came on to be heard.

Mr. *M. P. Gasper* and Baboo *Kali Nath Mitter* in support of the rule for the petitioner.

Baboo *Mohun Chand Mitter* for the opposite parties.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

This is a rule issued on an application made by the petitioner for the revocation of a sanction granted by the Presidency Magistrate of the Northern

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Division of the Town of Calcutta under s. 195, Code of Criminal Procedure, to prosecute him under ss. 182 and 211, Penal Code, in respect of certain proceedings taken by him in the Court of that Magistrate. We have nothing really amounting to any record of the proceedings in that case beyond the judgment of the Magistrate to the effect that "the charge of theft of doors and windows made by the petitioner was not proved at all against the accused." It appears that, after the dismissal of that case, an application was made for sanction to prosecute the petitioner Kedarnath Das in the presence of his attorney, and that the Magistrate declined to hear that application at once, and stated that it should be made at the hour fixed by him for the hearing of such applications. This order, we are told, was made, although the attorney for the petitioner Kedarnath Das expressed his willingness to have the application then heard in his presence, and intimated that he was prepared to oppose it. The application, it seems, was subsequently renewed in the absence of that attorney, and granted.

Now, although it has been recently held by a Full Bench of this Court that service of notice before a sanction is given under s. 195 is not absolutely necessary, still, under the circumstances stated, we think that the Magistrate did not exercise a proper discretion in neglecting to give the other side through his attorney an opportunity of being heard, especially after he had intimated that he was prepared to oppose that application; and, further, we think that the Magistrate did not exercise a proper discretion, because, so far as we can learn the facts of this case, he should not have readily granted the sanction asked for. Under s. 195, a discretion is granted to us to revoke any sanction which may have been granted by any authority, such as a Presidency Magistrate of Calcutta, subordinate to us, and therefore the law imposes upon us a responsibility in such matters to consider whether the application has been properly granted or not. It is therefore incumbent upon the Subordinate Courts so to frame the proceedings before them as to satisfy this Court as a Court of revision. In the present case we have absolutely nothing before us except the judgment of the Magistrate recording that the charge preferred by the petitioner Kedarnath was not proved. Now, the fact that that charge was not proved was in itself no sufficient ground for granting the accused in that case permission to prosecute the complainant with having intentionally and falsely charged him with such offence. Under such circumstances, we think that there were no sufficient grounds for granting the sanction to prosecute the petitioner, and that that order should accordingly be revoked.

H. T. H.

Rule made absolute.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

IN THE MATTER OF BICHITRANUND DASS AND OTHERS (PETITIONERS) *v.* BHUGBUT PERAI (OPPOSITE PARTY). 1889.
May 20.

IN THE MATTER OF BICHITRANUND DASS AND OTHERS (PETITIONERS) *v.* DUKHAI JANA (OPPOSITE PARTY).¹ 16 Cal. 667.

Jurisdiction of Criminal Court—Tributary Mehals—Kheonjur—"Local Area"—Code of Criminal Procedure (Act X. of 1882), ss. 182 and 531.

The Penal Code and Criminal Procedure Code have no application to the Tributary Mehal of Kheonjur, which is on precisely the same footing in that respect as Mohurbhunj.

Certain persons, officers of the Maharajah of Kheonjur, one of whom was a resident of the Cuttack district, and the others residents of Kheonjur, were charged before the Deputy Magistrate of Tajpore with certain offences under the Penal Code. They were convicted, and on appeal to the Sessions Judge the conviction was upheld. It was found by the Sessions Judge that the scene of the occurrence which gave rise to the charges was within the Territory of Kheonjur.

Held that the Deputy Magistrate and Sessions Judge had no jurisdiction to try the case, and that the conviction must be set aside.

Held, further, that ss. 182 and 531 of the Criminal Procedure Code had no application to the case.

The words "local area" used in s. 182 only apply to a "local area" over which the Criminal Procedure Code applies, and not to a local area in a foreign country or in other portions of the British Empire to which the Code has no application; and similarly s. 531 only refers to districts, divisions, sub-divisions, and local areas governed by the Code of Criminal Procedure.

THE only question raised at the hearing of these two rules was whether the Deputy Magistrate of Tajpore and the Sessions Judge of Cuttack had jurisdiction to try the accused for offences which were alleged and found by the Sessions Judge to have been committed in Kheonjur, a tributary mehal adjoining the district of Cuttack.

The facts of the two cases were practically identical, the principal accused person in both cases being Bichitranund Dass, one of the officers of the Maharajah of Kheonjur, and it is sufficient for the purpose of this report to state the facts which gave rise to the issue of the rule in the latter of the two motions.

The prosecution alleged that Bichitranund Dass, who was the peshkar of Anundpore, accompanied by the other accused, all servants of the Maharajah of Kheonjur, came with a large number of men on to lands situate in Sukinda, which is within the district of Cuttack and within the jurisdiction of the Sub-divisional Magistrate of Tajpore, and proceeded to break *mokha* from the *baris* of Dukhai Jana and others, to cut dhan on the lands, and also to cut a *dhandi* which served as a boundary or line of demarcation between Sukinda and Kheonjur. Thereupon certain men of Sukinda came up and protested against the trespass, and this resulted in some nine of the latter being seized by Bichitranund and the other accused, and taken off to Anundpore in Kheonjur, when they were taken before the Manager. That official sent them down

¹ Criminal Motions, Nos. 4 and 6 of 1889, against the order passed by *J. B. Worgan, Esq.*, Sessions Judge of Cuttack, dated the 27th of September 1888, modifying the order passed by *J. S. Davidson, Esq.*, Deputy Magistrate of Tajpore, dated the 6th of February 1888.

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to be tried by the Sub-divisional Magistrate of Tajpore, by whom they were discharged. It was alleged by the Sukinda people that they were cutting their *sua* crops on their own land, and that their crops were carried off by the Kheonjur party.

After the nine men had been discharged, a complaint was made before the Deputy Magistrate of Tajpore against Bichitrannund and the others charging them with offences under ss. 147 and 342 of the Penal Code. The principal question raised in the case was whether the scene of the occurrence was situate within Sukinda or Kheonjur, and on behalf of the accused it was contended that, as the occurrence took place in Kheonjur, the Court had no jurisdiction to try them. The Deputy Magistrate found that Bichitrannund, being a resident of Sukinda, and therefore a British subject, was liable to be tried by him, whether the occurrence took place in Kheonjur or not.

Upon the principal question he found that the *sua* lands claimed by the Sukinda people were actually in their possession, and formed part of Sukinda; that the accused entered upon their lands with intent to deprive the Sukinda people of them; that they also entered the *baris* of Dukhai Jana and others, and committed certain acts of violence therein, such as trampling down the hedges, breaking the *mokha* crops, and cutting the *dhandi*; and that they arrested nine Sukinda men within the limits of Mulasar Mouza in Sukinda, and therefore in British territory.

Upon these findings he convicted the accused of offences under ss. 147 and 342 of the Penal Code, and fined Bichitrannund Dass Rs. 300, Karmokar Patnaik Rs. 100, and the other accused Rs. 20 each with an alternative of one month's rigorous imprisonment each. He further directed all the accused to execute bonds in various sums to keep the peace for a period of three years.

Against that conviction Bichitrannund Dass and Karmokar Patnaik appealed to the Sessions Judge, who upheld the conviction, but reduced the amount of the fines.

The material portion of the judgment of the Sessions Judge was as follows:—

"The facts of this case are fully stated in the judgment of the lower Court. The allegation of the prosecution is that the riot was committed in the "*baris*" or homesteads of certain ryots in mouza Mulasar in Sukinda, in the jurisdiction of the Sub-divisional Magistrate of Tajpore in the district of Cuttack, by the appellants and others, of whom the appellant Bichitrannund is a man of the Cuttack district, whilst the appellant Karmokar is a man of the Kheonjar territory. The wrongful confinement or seizure of the complainant and his companions is also alleged to have occurred in or close to the said *baris*. About this the Deputy Magistrate was not satisfied, he being of opinion that the arrests were made on the *sua* lands, the cutting of the crops on which led to the same. From these lands he thought the Mulasar men were taken by the appellants to the "*gal*" or cattle-fold near the *baris*. He did not pass separate sentences for the riot and the wrongful confinement, but for the two offences jointly. * * * * The case for the appellants is that they were not present, but Bichitrannund says that the *sua* lands are not in Mulasar, but in Chanchaniapal, a mouza in Kheonjur, adjoining Mulasar, and the arrest was admitted by certain of his co-accused in the case on that ground, it being their allegation that it was effected on the *sua* lands, the distance of which from the *baris* is stated to be a quarter of a mile or something less. The exact position of these fields might, I think, have been with advantage ascertained and shown

on a sketch-map, it being a matter of importance to know their distance from the *busti* of Mulasar, as well as from the nearest *busti* in the Mouza Chanchaniapal." [The Judge then proceeded to go into the geographical position of the *sua* lands and other facts immaterial for the purpose of this report, and came to the conclusion that it had not been proved by the prosecution that the *sua* lands were in Sukinda.] He then continued :—

"We are now brought to the other part of the case, *vis.*, the seizure in the *sua* fields, and to the question of jurisdiction, the first point being whether the Penal Code is or is not applicable to the case. It was said for the appellants it is not, because Kheonjur is not in British India. It was said for the prosecution that this statement is incorrect, and that Kheonjur is not out of British India, it being under Reg. XII. of 1805 a part of Zillah Cuttack. Reference was made for the prosecution to the cases of *Hursee Mchapatro v. Dinobundo Patro*¹ and *The Empress v. Keshub Mohajan*,² the latter being a Full Bench case deciding that Mohurbunj is not in British India. The question of the other Tributary mehals being or not being in British India was not settled by that case, special features being found in respect of Mohurbunj. The view taken on the general question would, I think, not support a finding that the Tributary mehals are not within the limits of British India, and I shall proceed on the view that they are within those limits, and that Kheonjur is so situated, and thus is not to be regarded as a foreign state under the Extradition Act of 1879. At the same time, I do not consider that the Penal Code can be held to be in force in Kheonjur, inasmuch as the exemption thereof from the Regulation Criminal Law given to this mehal by Reg. XIII. of 1805 was not annulled by the Penal Code. What law is in force in Kheonjur does not appear. Criminal jurisdiction is exercised by the Superintendent as a Sessions Judge, and by the Magistrates of Cuttack, Balasore, and Puri, as Assistant Superintendents; and, in a Mohurbunj case tried by me at the May Sessions at Balasore, it was stated that the spirit of the Codes was followed in Mohurbunj, and this is no doubt true of the other Tributary mehals.

"Taking it that, if the arrest occurred at a place in which the Penal Code, and equally the Criminal Procedure Code, were not in force, the question of jurisdiction demands settlement, it will be well to see how the matter of *venue* stands. If the *sua* fields be held to be in Sukinda, both of the appellants were, and are, liable under s. 2 of the Penal Code. All that the one of them who belongs to Kheonjur could claim might be to make an objection as to the matter of his arrest by calling himself a subject of a foreign state, but, as I have already held Kheonjur not to be a foreign state, no plea of this kind can be entertained. The question is thus only whether Mr. Davidson's decision in the matter of *venue* was justified. It was said for the appellants that it was not, as he made no attempt to re-lay the boundary-line as shown by the map to which his decision may very possibly be contrary, and that, in acting as he did, he assumed a power which is by law vested in the Superintendent, and no one else, *vis.*, by Act XX. of 1850. I have already shown that the dispute would appear to have involved a very nice question as regards position, and I think myself that this question demanded a more accurate method of determination than that which was adopted by Mr. Davidson, which seems to have left the point in doubt. The fact of the Mulasar men having held the fields would not give the Deputy Magistrate jurisdiction, and was hardly relevant to the issue, the position of the lands being one to offer temptation for encroachment. I think

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that it was a matter in which the onus was on the prosecution, and that it was not met. I do not think that I can properly uphold the finding that the *sua* fields are within Sukinda and not in Kheonjur. The point is open to doubt, and of this doubt I think the appellants can claim the benefit.

"It being now held that the scene of the arrests was not proved to be in Sukinda, and that, if in Kheonjur, it was in a place not under the operation of the Penal Code, though in British India, the question is how did Mr. Davidson's jurisdiction stand? As regards the Kheonjur appellant Karmokar Patnaik, I do not think that he is, under the view taken by me, differently placed from the other appellant, who is a man of Cuttack. If Kheonjur is in British India, he is as much a native Indian subject of Her Majesty as is Bichitranund. It cannot, however, be said that s. 188 of the Criminal Procedure Code would apply, nor was it contended. S. 531 was the section on which (with s. 182) the prosecution relies as making the conviction legally sound; and it was urged that the case was one capable of inquiry and trial within either the local area of Sukinda, *i. e.*, Tajpore or of Kheonjur, the latter of which is, it was said, a Sessions division existing at the time of the passing of the present Criminal Procedure Code. Under s. 182, if it was uncertain in which of the areas the offences were committed, it was, it was argued, open to the prosecution to proceed in either the Tajpore Magistrate's or in the Superintendent's Court, and either Court could enquire into and try the case. Against this it was said that Kheonjur cannot be considered to be a 'local area' within the meaning of the Code, and that the alternative procedure was thus not open as contended.

"As to this matter, I do not find any definition of the phrase 'local area' in the law. The point came before me for consideration in the Mohurbunj trial alluded to, and the view that I then took of it was that 'local areas' meant areas within British India. It was said that they are not this, but areas within which the Criminal Codes are in force, and, as the Penal Code is not in force in Kheonjur, it cannot be held to be a local area. I was not shown any authority for this restricted view of the words 'local area,' and I should not, in the absence thereof, be disposed to alter the view adopted before. I think that the law is not contravened thereby.

"I thus think that Mr. Davidson was not without jurisdiction as regards either of the appellants as respects what they are alleged to have done at the *sua* fields, and that, as he had jurisdiction, he was justified in applying the Penal Code.

"I have not said anything as to the objection of Mr. Davidson's relaying or defining the boundary being, as alleged, *ultra vires* or not, because on the view taken by me this point of law need not be gone into. My attention was drawn by Baboo H. B. Bose to a judgment of Mr. Macpherson of the 23rd of May 1877 in R. A. No. 116 of 1875, *Bamadev Bhramachari v. Dasrahi Nakh*, showing that it was held by him that a Civil Court could not settle its own jurisdiction against a Tributary mehal, and I should doubt whether a Magistrate could do so any more. But if s. 182 applies, the Deputy Magistrate's action in this respect is of no importance as regards the conviction.

"I may say that, even if the *sua* fields were in Kheonjur, I consider it could not be held that there was no offence, if the application of the Penal Code was legal. The right of private defence would not justify what the appellants did.

"An objection was made that a request made for recall of the witnesses for further cross-examination on the 19th of December was disallowed, as also

a repetition of the request made on the 9th of January. Looking at the cross-examination which had preceded this petition, and the nature of the evidence, which indicated clearly enough the charge which was made after it was concluded, I do not think that the Deputy Magistrate was wrong in refusing the application, and I do not think that anything could be gained by a remand now. I should thus not interfere on this ground. The conviction is accordingly upheld, as also the order for security, and the appeal to this extent dismissed. In view, however, of the uncertainty of the real position of the land, I think the sentence is capable of mitigation, and I reduce it in the case of appellant Bichitranund to Rs. 200, and of Karmokar to Rs. 60 fine, in default the term of imprisonment to be as ordered by the lower Court."

Against the order of the Sessions Judge, the petitioners moved the High Court, and a rule was issued which now came on for hearing.

Baboo *Mohesh Chandra Chowdhry*, Baboo *Umbica Churn Bose*, Baboo *Abinash Chandra Banerjee*, and Baboo *Karuna Sindhu Mukerjee* for the petitioners.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown. The application was based on a petition setting out the above facts, and the principal grounds upon which it was contended that the decisions of the lower Courts were erroneous and the conviction bad were as follows:—

1. That the Courts below were wrong in holding that the territory of Kheonjur, which is a Tributary state, formed part of British India.
2. That the Sessions Judge ought to have held that the order of the Deputy Magistrate was liable to be quashed for want of jurisdiction.
3. That the Sessions Judge was wrong in holding that, under s. 182 of the Criminal Procedure Code, the Deputy Magistrate of Tajpore had jurisdiction to try the case even if the "*sua* land" were held to be within the territory of Kheonjur.
4. That the interpretation put upon the phrase "local area" in s. 182 of the Criminal Procedure Code by the lower Court was not correct, and that that section had no application to the case.
5. That the Sessions Judge ought to have held that the Deputy Magistrate had not the power to assume jurisdiction against a Tributary mehal.
6. For that, the *sua* lands having been found to be situate within the Kheonjur state, and that the complainant and the people of Sukinda were taking crops from the said land, the Court below ought to have held that the petitioners were justified in arresting the trespassers and taking them to the Sub-divisional Officer, and that there was no offence within the meaning of s. 342 or under s. 379 of the Penal Code.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

In this case we think it clear that the conviction cannot stand. The alleged offence was unquestionably and admittedly, if it was committed at all, committed within Kheonjur. Now, there seems to be no question that Kheonjur and Mohurbunj are Tributary mehals standing exactly upon the same footing with regard to their relations with the British Government and their independence. This is apparent from the treaty engagements executed by the Rajahs of these respective territories, which are set out at pages 184 to 187 of the 1st volume of Aitchison's Treaties. A comparison of these two engagements shows that they are practically identical in terms, and the learned counsel who appears for the

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Crown has not disputed that proposition. Now, this place Kheonjur being in this respect the same as Mohurbunj, we have to consider the effect of the Full Bench case *The Empress v. Keshub Mohajan*,¹ and the cases that gave rise to that reference to the Full Bench. There is no doubt of this, that the result of the Full Bench case and the other cases is this, that, whether Mohurbunj was a foreign territory or not, the Criminal Procedure Code and the Penal Code had no application to it. It therefore follows by parity of reasoning that in the case of Kheonjur these Codes have no application. This proposition also was not disputed by Mr. Kilby who appears for the Crown. Mr. Kilby very properly pointed out his position, and told us that he found it was impossible to support the judgment in the face of these considerations. That being so, and these Codes not applying, it follows that the Magistrate before whom this case first came for decision, and the Sessions Judge to whom an appeal was made from the decision of the Magistrate, had no jurisdiction to try the case. It follows also that the Sessions Judge was wrong in his judgment where he considered that s. 182 of the Criminal Procedure Code applied. That section clearly does not apply for two reasons. In the first place, the words "local area" in that section must mean a local area over which this particular Code applies, and it would not refer to a local area in a foreign country, or in a portion of the British Empire to which this Code has no application. The whole purport of the section makes that clear. Then again that section in reality intends to provide for the difficulty which would arise where there is a conflict between different areas, in order to prevent an accused person getting off entirely, because there may be some doubt as to what particular Magistrate has jurisdiction to try the case. Each portion of the section refers to this conflict. The Sessions Judge finds as a fact that this particular offence was committed in this local area of Kheonjur, and it is impossible to find from his judgment with what other local area that local area in Kheonjur conflicts. For this reason also s. 182 has no application to the present case. The other section to which the Sessions Judge refers, *viz.*, s. 531, is equally inapplicable. That section, of course, only refers to districts, divisions, sub-divisions, and local areas governed by the Code of Criminal Procedure, and for similar reasons it does not apply. In our opinion, the place where the offence is said to have been committed was not within the jurisdiction of the Magistrate or of the Sessions Judge.

For these reasons we think it is quite clear that the judgment is wrong. We set aside the convictions, and direct that the fines, if realised, be refunded.

H. T. H.

Rule made absolute, and conviction quashed.

CRIMINAL MOTION.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

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June 3.

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GOLAP PANDEY (PETITIONER) v. R. H. BODDAM (OPPOSITE PARTY).³

Summary Trial—Magistrate, power of, to try case summarily—Criminal Procedure Code (Act X. of 1882), s. 260—Criminal Trespass—Penal Code (Act XLV. of 1860), s. 447.

A complainant applied to a Magistrate for process against certain persons under ss. 447, 146, 148, and 149 of the Penal Code. The Magistrate, having perused the petition of the complainant and examined him on oath, issued summonses against the persons

¹ I. L. R., 8 Cal. 985.² Criminal Motion, No. 192 of 1889, against the order passed by *W. H. Thomson, Esq.*, Deputy Magistrate of Giridih, dated the 22nd of April 1889.

named under those sections. The complainant was not himself an eye-witness of the occurrence, and merely stated in his petition and evidence what he had been told by his servants. Subsequently, before the accused appeared, the Magistrate examined an eye-witness, and issued a fresh summons under s. 447 only, and then proceeded to try the case summarily, and convicted one of the accused. It was contended that he had no power so to try and dispose of the case.

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Held that the Magistrate had power to try the case summarily.

When a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences.

During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on to the premises belonging to the defendant for the purpose of making a survey and for getting materials for a hostile application against the defendant. They went (some of them armed) and without the permission of the defendant, and in his absence, and when the defendant's servants objected to their action, they persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting.

Held that their actions amounted to criminal trespass.

THE facts of this case were as follows:—

Mr. R. H. Boddam, the complainant, was the lessee of a tract of land from the Raja of Palganj on the Parasnath Hill, which was a hill sacred to the Si-tambari Society of the Jain community, and on and about which were situate temples belonging to that society. The complainant had originally a tea garden on his land, but finding that it would apparently be a profitable business he set up a hog's lard manufactory on his land. This action gave offence to the society, and various proceedings were taken with a view to put a stop to the manufactory, which ultimately resulted in a civil suit being filed against Mr. Boddam and his lessor, which suit was pending at the time of these proceedings. On the 23rd March 1889, Mr. Boddam laid a complaint before the Deputy Magistrate of Giridih, charging the petitioners Golap Pandey and others with offences punishable under ss. 447, 146, 148, and 149 of the Indian Penal Code, and asking that they might be bound down to keep the peace under s. 106 of the Criminal Procedure Code.

The complaint was based on a petition of Mr. Boddam, in which he set out the facts leading up to the civil suit, and the annoyance he had suffered in consequence, and stated that, on the 24th February, when he was away in Calcutta, a large party under the leadership of Golap Pandey, acting under the orders of the temple authorities, trespassed on to his garden, and made a survey of his lands; that two of the party were armed with swords, and a number of the others with *lathies*; that they threatened his servants, and, in spite of their objections, proceeded to make a survey of the land; and that their proceedings nearly resulted in a breach of the peace. Mr. Boddam's deposition was recorded by the Magistrate in support of his application, and it appeared that his knowledge of the occurrence was derived from information received from his servants, as he himself was away in Calcutta at the time.

The Magistrate, on this application, issued summonses against the persons named, under the sections named in Mr. Boddam's petition.

On the 6th April, the returnable date of the summons, none of the accused appeared owing to their inability to reach the Court on that day. The Magistrate on that day appeared to have examined one witness, named Bhuttu Maji, who was an eye-witness of the occurrence complained of by Mr. Bod-

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dam, and upon his evidence issued fresh summonses to the accused under s. 447 of the Penal Code only.

On the 13th April, the case came on before the Magistrate, who tried it summarily, and convicted the accused Golap Pandey of an offence under s. 447, and sentenced him to pay a fine of Rs. 100.

The judgment of the Deputy Magistrate was as follows :—

“ Mr. R. H. Boddam, of Parasnath, states on oath that he has the lease of a large tract of land from the Raja of Palganj on an eastern spur of the Parasnath Hill, a hill which is sacred to the Sitambari Society of the Jain community. This society has temples at Modhuban, the foot of the hill, and on the top of the hill ; they have also several shrines on the several peaks. These temples and shrines are visited at various times of the year by Jain pilgrims. The leaders of the society are Rai Budrinath Das of Calcutta and Rai Dhunput Singh of Moorshedabad. Accused Golap Pandey is their agent at Madhuban, and is manager of the various temples and shrines. Mr. Boddam does not know the other two defendants. Mr. Boddam has a tea garden on the lands leased him, and in the midst of this garden he has recently established a piggery and a lard manufactory. This action on the part of Mr. Boddam seems to have given the Sitambari Society great offence, and whereas the former and the representatives of the latter used to be very friendly before, they are now, I may say, rancorous enemies. The Sitambari Society have for some time been trying to force Mr. Boddam to close up his piggery and lard manufactory. They at first worked through the Bengal Government, and then instituted a civil suit. An injunction was issued by the Deputy Commissioner of Hazaribagh, directing Mr. Boddam to stop all business at his manufactory until the disposal of the civil suit. Mr. Boddam appealed to the High Court, and on the 12th February the injunction was set aside. Mr. Boddam at once issued orders for the resumption of operations, and he says that the Sitambari Society almost simultaneously adopted ways and means to terrorize his workmen, and induce them to desert, and thus smash up his (Mr. Boddam's) business. While Mr. Boddam was away at Calcutta, a large party, acting under the orders of the temple authorities, trespassed into Mr. Boddam's garden, and made a survey ; Mr. Boddam says this took place on the 24th February, but the evidence heard by me shows it was on Monday, the 25th February. Mr. Boddam insinuates that the survey was all sham, that the party simply came to intimidate his workmen, and they succeeded in this, some of his workmen have run away, and his munshi, Bhattu, has served a notice to quit. Mr. Boddam also states that the leaders of the society have often told him that, if he persisted in carrying on the lard manufactory, he would be jeopardizing his life. Mr. Boddam wants defendants to be punished for their trespass, and also to be bound down to keep the peace under s. 106, Criminal Procedure Code. I find that, under Mr. Boddam's lease, he is bound to give up to the Sitambari Society any portion or portions of the lands leased him, if it is needed by them for the purpose of erecting temples, shrines, or dharmshalas ; Mr. Boddam is entitled to an abatement of rent for each such relinquishment. There is a Government road from Madhuban to the top of the hill. This road runs through Mr. Boddam's garden, Mr. Boddam's bungalow is a good way off the road, and a private road leads to it from the Government road. This private road continues on to the lard manufactory, which is further interior. *Bond fide* visitors are allowed access to the garden, but Mr. Boddam says that the public have no right to make use of his private roads and paths for any and every purpose they may choose. Recently Mr. Boddam has made a cart track, which passes by his lard manufactory ; this

track acts as a short cut for his workmen, who come up from the foot of the hill ; it is also admitted by Mr. Boddam's witnesses that jungle people take their carts along the track.

Bhattu Manji, aged 35, son of Gopal, is Mr. Boddam's munshi, and is in charge of the lard manufactory ; in general matters he is second in authority to Kishen Manji, aged 25, son of Bilsa. The latter remains in charge of the garden during Mr. Boddam's absence. Hulas Singh, aged 30, son of Bhavani, is Mr. Boddam's bungalow peon. These three men have been examined as witnesses by the prosecution. Bhattu's deposition shows that, on a Monday, Golap Pandey, Lukshmi Chand, and a Bengali amin, all of a sudden turned up in doolies at the lard manufactory. Each dooly had four bearers ; defendants Gonder and Amrit accompanied the party and also a flag-bearer. The party came up by the jungle cart track referred to above, and not by the Government road. Witness insinuates that this route was adopted, because the party wished to avoid being observed by Mr. Boddam's workmen and labourers, whom they would have met, had they come up by the regular road. Gonder and Amrit had each a sword, and there was also a sword in Lukshmi Chand's dooly. The party began a survey ; witness remonstrated with them for attempting such a thing in his master's absence, and without his previous permission ; he was scolded into silence, and was told that the party were acting under the orders of the Bengal Government. He withdrew further opposition, and the party, after taking bearings to a peak on the top of the hill, and making a survey of the piggery and the lard manufactory, proceeded towards the bungalow, measuring the road as they went. Witness did not follow them. Witness gives some hearsay evidence regarding the threats to the workmen, referred to by Mr. Boddam, and says that two workmen, Birbal and Roopun, have run away, and he himself intends leaving. Witness says that, before the survey began, an offering of a pice was made to a stone near the piggery, he does not remember having seen any offering made to the stone previous to this, nor has he heard it styled "Bhoirubsthan." On reaching Mr. Boddam's bungalow, the party were confronted by Hulas Singh, and a scene similar to what occurred between them and Bhattu again took place. Witness snatched the flag, and refused to give it up. Matters stood thus, when Kishen Munshi appeared on the scene ; he bid the peon stand aside, and entered into a conversation with the party himself. This witness, Hulas, says that the stone to which offerings are made is not on Mr. Boddam's land. Kishen Manji says the party boasted of having received orders from the Bengal Government to make the survey ; witness asked for the order ; it was not produced, but he was told that Rais Dhunput Singh and Budri Dass were great friends of Government, and had ordered the survey. While this conversation was going on, the party finished their work and left. Witness at first said that, when he appeared on the scene, Hulas was having a peaceful conversation with the trespassers ; but he corrected himself immediately after, and said that angry words were passing between them.

Such is the case for the prosecution, a very much tamer affair than I had supposed it to be. Golap Pandey says that private business took him to the vicinity of the piggery ; an amin was going up to survey the piggery and the "Bhoirubsthan" in it, and he accompanied him to show him the latter place. The other two defendants simply acted as attendants. Golap Pandey seems to think his action quite legal ; he says he has always had free access to Mr. Boddam's house, lands and premises, and that he was not legally bound to take previous permission for the purpose of an entry to make a survey. The presence of the sword is ascribed to the practice of jungle travellers always having such weapons with them for the purpose of defence against wild beasts.

I. L. R., Cal. 121.

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Prosecution witness, Bhuttu, distinctly says that the object of the trespassers was to make a survey. The evidence of Ishri Pershad, aged 28, son of Tejnarain, shows that the Deputy Commissioner's injunction was set aside, because in the plaint which accompanies the application made by the Jains for the injunction, the boundaries of the tract in lease to Mr. Boddam were not given, nor were the interior details of his garden and piggery fully and properly described. The High Court transferred the civil suit to the Subordinate Judge of the 24-Pergunnahs, and the legal advisers of the Jains advised the making of another attempt for an injunction after obtaining all the necessary materials. They directed Lukshmi Chand to have the tea garden surveyed and to prepare a map, showing its boundaries and the position of the piggery, lard manufactory, and Mr. Boddam's bungalow in it. Witness cannot say whether the leaders of the community were consulted in this matter, or whether their permission was obtained to the making of a survey; so far as witness's knowledge goes, Lukshmi Chand was given full powers to exercise his discretion in this matter by the legal advisers, and he appointed an amin, whose name witness does not know, and had the survey made. Witness files the map prepared by the amin which is marked Exhibit I. On all the facts before the Court, there is hardly a doubt that the real object of the trespass was to make a map of Mr. Boddam's lands and premises for the purpose of the civil suit; but they ought to have known that doing this in the illegal way they did would cause Mr. Boddam annoyance.

Poran Chand, aged 28, is one of the managers at Madhuban. He swears to the existence of the most friendly relations between his community and Mr. Boddam, prior to these complications; when the lard business was first started, witness, under orders from his principals, visited the place without obtaining previous permission, and was shown over the works by the *chola sahib*, and afterwards by Mr. Boddam himself. Witness says that Mr. Boddam's garden paths are used as a short cut by him and pilgrims; that he has never been stopped while passing through the garden. He says there is a "Bhoirubsthan" near the piggery, which pilgrims visit while descending from the shrines on the top of the hill; witness says he has seen offerings being made to this idol which, he says, is in Mr. Boddam's compound. To a question put by the Court, witness said that pilgrims have a right to visit the "Bhoirubsthan," but Mr. Boddam may send them away, if he finds them straying about in other portions of his lands without his permission. Witness was asked whether the Jain community had a right to enter on Mr. Boddam's lands, and do any act they pleased. After a deal of hesitation, he gave a reply in the affirmative, and said they could build temples and shrines on any portion of Mr. Boddam's lands without taking his previous permission. Witness says he was away at Moorsheadabad when the amin visited the place, and he cannot say under whose orders the survey took place.

Admitting all that defendants urge, which are: (1) that the Jain community have a right to make Mr. Boddam deliver to them lands they may need for sacred purposes; (2) that they use the garden paths as a short cut; (3) that they have a right to visit a "Bhoirubsthan" near the piggery; (4) that they are admitted into Mr. Boddam's lands as sight-seers; (5) that previous to these complications the temple people were allowed to go in and out of Mr. Boddam's lands without any let or hindrance, nevertheless it is very clear that they have not the right to go on Mr. Boddam's lands, and do any or every act they please. Defence witness, Poorno Chunder, distinctly says that Mr. Boddam would be perfectly justified in sending out of his premises any member of the community he may find straying about portions of his lands other than that occupied by the "Bhoirubsthan."

Defendants' vakil urges that all the facts set forth by the prosecution do not constitute criminal trespass, for proof of motive to annoy on the part of his clients is absent. He urges that a survey for the purpose of a civil suit pending was absolutely necessary, and an entry for the purpose of such a survey does not amount to criminal trespass. A distinct provision is made in the Civil Procedure Code for such a case; if the vakil's interpretation of the law were correct, the Code would have said that the person wishing to make the survey was at liberty to enter his adversary's lands and make the survey, without being liable to be treated as a trespasser; on the contrary, the Code lays down that the survey in such a case is to be done through the Court. Defendants admit having acted all along under legal advice, and they ought to have known what the correct procedure is; they departed from the correct procedure wilfully, and it is absurd for them to argue that they had no idea that their conduct would cause Mr. Boddam annoyance. Their action did cause annoyance; they must have known very well that they would cause annoyance, and the Court holds that all the elements necessary to make a trespass—criminal trespass—existed. The Court is distinctly of opinion that defendant Golap Pandey ought to have taken Mr. Boddam's permission before he made the survey, and that his having done so without permission amounts to an entry for the purpose of causing annoyance. The Court finds Golap Pandey guilty of criminal trespass to cause annoyance, and, under s. 447 of the Penal Code, sentences him to a fine of Rs. 100. As regards the other two defendants, the evidence shows they followed Golap Pandey simply as attendants, and, on the facts before the Court, it would not be fair to hold that they were participators in the offence committed by Golap Pandey; the Court therefore acquits them under s. 245, Criminal Procedure Code.

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The Court does not consider action under s. 106, Criminal Procedure Code, needed."

Golap Pandey thereupon applied to the High Court under its revisional power for a rule, calling on the Deputy Magistrate and the opposite party to show cause why the conviction and sentence should not be set aside, upon, amongst others, the following grounds:—

(1.) That the Deputy Magistrate had no jurisdiction to try the case under s. 260, Criminal Procedure Code, and the said trial was illegal and improper, and, as such, ought to be set aside.

(2.) That the proceedings and the judgment of the Deputy Magistrate did not comply with the provisions of s. 264, Criminal Procedure Code, and therefore the conviction and sentence based thereon ought to be set aside.

(3.) That the lands in dispute being the subject-matter of the civil suit in which the complainant had been sued as a trespasser on the said lands, the petitioner, the servant of the plaintiffs therein, was not guilty of an offence under s. 447, Penal Code, for a *bond fide* entry therein for the purpose of a survey, under legal advice, for the purpose of the said suit without any intention of either committing any offence, or intimidating or insulting or annoying the complainant.

(4.) That, there being no evidence or finding that the complainant was the owner of the lands (and, as a matter of fact, a *bond fide* civil suit being pending in the Civil Court with respect to the title thereto), the conviction under s. 447 was illegal.

(5.) That, admittedly, the Jain Sitambari Society having a right to go over the hills for the purpose of worshipping or selecting a site for any new temple

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thereon, the entry, as alleged and found against your petitioner, did not constitute any offence under s. 447, Penal Code.

(6.) That, as there was no evidence that the petitioner entered the land with the intention of committing any offence, or intimidating or insulting or annoying the complainant or his men, the learned Deputy Magistrate was wrong in convicting the petitioner under s. 447, Penal Code.

(7.) That the findings of the Deputy Magistrate do not support a conviction under s. 447, Penal Code.

Upon this application, a rule was issued, which now came on to be heard.

Mr. *Woodroffe* and Baboo *Dwarka Nath Chuckerbutty* for the petitioner.

Mr. *Hill* and Baboo *Dwarka Nath Mookerjee* for the opposite party.

The arguments advanced at the hearing of the rule are sufficiently stated in the judgment of the High Court (TREVELYAN and BEVERLEY, JJ.), which was as follows :—

The first question which we must decide in this case is whether we ought to hold that the Magistrate had no power to try this case summarily, and that his proceedings are illegal.

Learned counsel for the accused cited to us cases to show that the offence was, for the purposes of s. 260 of the Criminal Procedure Code, determined by the complaint, and that, if a complaint be made of an offence not triable summarily, the Magistrate cannot, under any circumstances, investigate the complaint summarily.

Although there are expressions used in some of the cases sufficient to justify this argument, we do not think that the cases are so unanimous as to force us to the same conclusion.

We say this as it appears to us that there may frequently be cases in which the charge has been exaggerated, and is, on examination by the Magistrate before process is issued, reduced to its proper proportions. This is notoriously the case in respect of many charges, which, according to the complaint, would be triable exclusively by a Court of Session, but which, when shorn of their exaggeration, the Magistrate very properly finds to be comparatively slight offences within his own cognizance.

If the complainant does not complain of this course, it is difficult to see why the Magistrate should adopt the procedure applicable only to the exaggerated charge.

In the case of *The Empress v. Abdool Karim*,¹ Mr. Justice Ainslie, with the concurrence of Mr. Justice Broughton, says : " If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to show from the deposition of the complainant that the circumstances of aggravation are really mere exaggerations and not to be believed." In another case *The Queen v. Aboo Sheikh*,² where a man was charged with rioting, and the Magistrate tried the case summarily as one of mischief and unlawful assembly. Phear and Ainslie, JJ., declined to interfere at the instance of the accused person.

In the matter of *Mewa*,³ it was held that a Magistrate has a discretion to enquire into and try a person on any charge which he may consider covered

¹ I. L. R., 4 Cal. 18 cf. p. 20.

6 N. W. 254.

² 23 W. R. Cr. 19.

by the facts reported without reference to the particular charge which may have been pressed, and without reference to the procedure, which, when he has determined the offence with which he will charge the accused, it will be competent for him to adopt. In the two latter of these cases the Judges do not seem to have heard any argument, but the same observation can be made with regard to the cases of *The Queen v. Johrie Singh*¹ and *Ram Chunder Chatterjee v. Kanye Laha*,² cited to us by Mr. Woodroffe for the petitioner.

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In the present case the complaint was made by Mr. Boddam, who did not pretend to be an eye-witness of what had occurred. The Magistrate, before issuing process against the accused, examined an eye-witness, one of Mr. Boddam's servants, and his statement showed what the real complaint was. We think that this case comes within the class of cases contemplated by Mr. Justice Ainslie, and that, when the Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily. The mere fact that the complainant enumerates sections of the Penal Code relating to offences not triable summarily does not, we think, affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences.

We think that this case was triable summarily. It has also been urged before us that no offence has been committed, the object of the intruders only being to survey the premises.

No doubt, that was their primary object; but, when we find them going on to the premises in Mr. Boddam's absence and without his leave, and taking three swords with them, we think it clear that they intended to intimidate Mr. Boddam's servants into not opposing their entering upon the premises, which, from their relation with Mr. Boddam, they must have known he would have objected to their entering. It is true that they seem to have to some extent attempted to avoid discovery; but, when accosted by Mr. Boddam's servants, they persisted in their trespass, and endeavoured to prevent opposition by the false statement that they had been sent by the orders of the Bengal Government.

The trespass was most unwarrantable, and if it were to be tolerated that while two persons are litigating as to a property, one may go armed on to the property of which the other is in possession for the purpose of getting materials for a hostile application, breaches of the peace would be frequent.

We think, therefore, that the conviction must stand, and we do not think that the fine was under the circumstances excessive.

The rule is, therefore, discharged.

H. T. H.

Rule discharged.

¹ 22 W. R. Cr. 28.

² 25 W. R. Cr. 19.

CRIMINAL MOTION.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

1889.

June 12.

16 Cal. 725.

IN THE MATTER OF THE PETITION OF MOHUR MIR AND OTHERS *v.* THE QUEEN-EMPRESS,

and

IN THE MATTER OF THE PETITION OF KALI ROY AND OTHERS *v.* THE QUEEN-EMPRESS.¹

Sentence—Cumulative Sentences—Rioting—Distinct offences—Conviction for rioting and causing hurt and grievous hurt—Separate conviction for more than one offence when acts combined form one offence—Abetment of grievous hurt during riot—Penal Code (Act XLV. of 1860), ss. 147, 323, 325.

Six accused persons were charged with and convicted of rioting, the common object of which was causing hurt to two particular men. Four of the accused were also charged with and convicted of, respectively, causing hurt during the riot to the two men and a woman, and were sentenced to separate terms of imprisonment under ss. 147 and 323 of the Penal Code.

Held that the sentences were legal.

During the course of a riot, in which X was attacked and beaten by several of the rioters, one of them K inflicted grievous hurt on X by breaking his rib with a blow struck with a *lathi*; K and three others of the rioters were charged with offences under ss. 147 and 325 of the Penal Code, and K was convicted under those sections. The other three were convicted under s. 147 and also under s. 325 read with s. 109. Separate sentences were passed on K, and also on the other three for each of the offences.

Held that the sentences on K were legal, but that, as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt, although they had each of them assaulted X, the conviction of them under s. 325 read with s. 109 could not be supported.

THE accused in the two cases which gave rise to these two rules were peons employed by a large zemindar named Mohunt Gopal Das, and the complainants in both cases were ryots of his, residing in a village called Damra. It was alleged that for a considerable time the zemindar had been trying, though unsuccessfully, to enhance the rents of his ryots, and this had led to numerous cases between him and the ryots. It was alleged that, having failed to attain his object in the Civil Courts, he endeavoured to break down the resistance by a system of petty persecutions, and that he kept a number of peons, amongst them the accused, for the purpose of watching the jungle and waste-lands of his villages, impounding the cattle of the ryots, and charging the ryots with theft when grass or bamboos were taken from the jungle. The occurrences which formed the subject-matter of these two cases were alleged to have taken place in carrying out the object of the Mohunt, and they took place on the same day. Some of the accused were charged in both cases.

In Rule No. 202, the following persons were charged: (1) Mohur Mir, (2) Kali Rai, (3) Tenu Sheikh, (4) Umed Sheikh, (5) Murad Sheikh, and (6) Makhan Singh or Rai.

In that case, it was alleged that the accused had been deputed to bring two ryots, named Prankristo and Lal Behary, to the zemindary cutcherry. The story told by the witnesses for the prosecution was shortly to the effect that Pran-

¹ Criminal Motions, Nos. 202 and 203 of 1889, against the orders passed by *J. Whitmore, Esq.*, Sessions Judge of Birbhoom, dated the 21st April 1889, modifying the orders passed by *W. B. Brown, Esq.*, Sub-Divisional Magistrate of Rampore Haut, dated the 1st of April 1889.

kristo, Lal Behary, and a woman named Khiroda, were returning home from Futtehpore Hat to Damra in a cart along with some others, when they were stopped by the accused and other peons of the zemindar, and after a conversation they were assaulted and beaten in a savage manner. Both Prankristo and Lal Behary were stripped of their clothes and beaten with *lathies*, and Rs. 21, which were tied up in Prankristo's *dhoti*, were taken away. On Khiroda calling for help, some of the peons attacked her, and pulled off her ornaments, which they took away. After the assault the three persons named were left lying wounded on the spot of the occurrence. The defence consisted of *alibis*, and was also based on the fact that no persons were named in the first information.

The Sub-Divisional Magistrate convicted all the accused of rioting, coming to the conclusion that the common object was the causing of hurt to Prankristo and Lal Behary. He further found that there was nothing to show that robbery was contemplated by the assembly, or that there was any idea of assaulting Khiroda till she raised an alarm. He convicted and sentenced the various accused as follows :—

Mohur Mir, under s. 147, two years' rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo, six months' rigorous imprisonment.

Kali Rai, under s. 147, one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo, one year's rigorous imprisonment.

Tenu Sheikh, under s. 147, one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo, six months, and under s. 392, to an additional six months.

Umed Sheikh and Murad Sheikh, under s. 147, to one year's rigorous imprisonment and a fine of Rs. 200, or six months.

Makhan Singh or Rai, under s. 147, to one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323, for causing hurt to Khiroda, six months, and, under s. 392, to an additional six months.

All the accused were further ordered to be bound over to keep the peace for three years.

The accused all appealed to the Sessions Judge, who set aside the conviction of, and sentences passed against, Kali Rai, Tenu Sheikh, and Makhan Singh, under s. 392, but upheld all the other convictions and the sentences passed thereon, with the exception of reducing the fines inflicted on all the prisoners save Kali Rai from Rs. 200 to Rs. 30, and in the case of Kali Rai and three others he reduced the fine from Rs. 200 to Rs. 50.

In Rule No. 203, the persons charged were—

(1) Makhan Singh, (2) Tenu Sheikh, (3) Murad Sheikh, and (4) Kali Rai.

In that case the prosecution alleged that one Kuree Ram was going alone from upper to lower Damra, when some 12 or 14 peons came up to him and asked him to go to the cutcherry. On his refusal to go, on the ground that it was too late, he was immediately attacked. He was mauled and knocked down by Mohur Mir and beaten with *lathies* by Tenu Sheikh and Kali Rai, the latter of whom hit him a blow on the side which fractured one of his ribs. Then all the peons fell on him and gave him a miscellaneous beating, and stripped him of his clothes and left him. The defence in this case was practically the

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same as in the other. The Sub-Divisional Magistrate convicted all the accused under s. 147, and sentenced them each respectively to six months' rigorous imprisonment and a fine of Rs. 200, or six months. He convicted Kali Rai of causing grievous hurt under s. 325 and sentenced him to one year's rigorous imprisonment, and he convicted the other three under ss. 325 and 109 of abetting the causing of grievous hurt by Kali Rai, and sentenced them to three months' rigorous imprisonment; and he further ordered all the accused to be bound over to keep the peace for three years.

On appeal, the above convictions and sentences were upheld by the Sessions Judge, except that the fines in all cases were reduced from Rs. 200 to Rs. 30.

In both cases, an application was made to the High Court under its revisional powers to send for the records and set aside the convictions and sentences upon numerous grounds, and amongst them upon the ground that separate punishments for component parts of the same offence ought not to have been inflicted, and that the sentences were illegal.

Two rules were issued which now came on to be argued.

Mr. Woodroffe and Baboo Rajendro Nath Bose for the petitioners in both cases.

Mr. Kilby for the Crown.

The only question argued at the hearing of the rules material for the purpose of this report was that relating to the legality of the sentences.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

We have heard these two rules together.

In the first of them (Rule 202), six prisoners have been convicted and sentenced by the Magistrate. On appeal to the Sessions Judge, the sentences were in some respects modified. As they stand at present, four of the accused have been convicted of, and sentenced for, offences falling under ss. 147 and 323, Indian Penal Code, and the only question which we have to consider is whether these sentences were legal.

Mr. Woodroffe contended that separate sentences under those sections could not be imposed, relying upon a decision of a Full Bench of this Court, given in the appeal of *Nilmoni Poddar v. Queen-Empress*.¹ That decision has, we think, no application to the facts of the present case. The decision in question dealt with the liability of one rioter for offences actually committed by another rioter. It in no way affects the question of the liability of a rioter for the acts committed by himself. The Judges who referred that case to the Full Bench did not refer the appeals of the persons who actually committed acts of grievous hurt, but dismissed the appeals of those persons. In the Full Bench Case, Tottenham, J., says: "The actual perpetrator is unquestionably punishable both for rioting and for any further offence he commits;" and for this proposition of law there is ample authority—see *Queen-Empress v. Ram Sarup*.²

In the present case the accused have been separately convicted and punished for acts committed by themselves in the course of the riot. Kali Roy is convicted of having voluntarily caused hurt to Prankristo by hitting him with

¹ I. L. R., 16 Cal. 442 (*ante* p. 920).

I. L. R., 7 All. 757.

a *lathi*. Makhan Roy is convicted of having caused hurt to Khiroda by hitting her with a *lathi*. Tenu Sheikh, of having caused hurt to Prankristo, by hitting him with a stick, and Mohur Mir, of having caused hurt to Prankristo by hitting him with a shoe.

We are of opinion, therefore, that the sentences passed upon those persons are legal.

Mr. Woodroffe further drew our attention to a passage in the judgment in *Lokenath Sarkar v. Queen-Empress*¹ which runs as follows: "If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting; but the facts of the case do not warrant such a finding, for rioting was being committed before the hurts were inflicted, and the two men wounded." Without assenting to the proposition of law, as thus laid down, we would remark that in this case also the evidence shows that the offence of rioting was committed before Prankristo and his companions were actually struck. The accused, who appear to be zemindary peons, were deputed to bring Prankristo and Lal Behary to the zemindary cutcherry; and they appear to have used considerable violence to them in attempting to do so before they struck them.

In the second case (Rule 203), Kali Rai has been convicted and sentenced both for rioting under s. 147 and under s. 325 for voluntarily causing grievous hurt to Kuree Ram by breaking one of his ribs; and the other three accused have been convicted and sentenced under ss. 147 and 325 read with s. 109, that is to say, for abetting the causing of grievous hurt to Kuree Ram by Kali Rai. We do not think that the conviction under this latter section was right, inasmuch as although the evidence shows that they themselves beat Kuree Ram there is nothing to show that they abetted Kali Rai in inflicting the particular blow which broke his rib. We think, therefore, that these three accused should have been acquitted on that head of the charge, and we accordingly set aside that portion of the conviction and the sentence of three months' rigorous imprisonment imposed in respect of it.

In other respects we discharge the two rules.

Rule 202 discharged.

H. T. H.

Rule 203 made absolute in part.

CRIMINAL MOTION.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

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Criminal Procedure Code (Act X. of 1882), ss. 195, 439, 476—Sanction for prosecution—Order for prosecution—Jurisdiction of High Court in revision to quash orders under s. 476 of the Criminal Procedure Code.

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The High Court is competent in the exercise of its revisional powers to interfere with an order of a Subordinate Court, whether made under s. 195 or under s. 476 of the Criminal Procedure Code, directing the prosecution of any person for offences referred to in

¹ I. L. R., 11 Cal. 349.

² Criminal Motions, Nos. 241, 242, and 243 of 1889, against the orders passed by Baboo Mohim Chunder Ghose, Deputy Magistrate of Nattore, dated the 7th of May 1889.

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those sections. The High Court, under s. 439, has the powers conferred on a Court of appeal by s. 423 to alter or reverse any such order.

Before a Court is justified in making an order under s. 476, directing the prosecution of any person, it ought to have before it direct evidence, fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to in that section, or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted.

When a Subordinate Magistrate, after trying a case, sent the record to the District Magistrate with a suggestion that certain persons ought to be prosecuted under s. 211 of the Penal Code, the High Court held that this did not constitute a sanction to prosecute.

*Queen v. Baijoo Lal*¹ and *In the matter of the Petition of Kali Prosunno Bagchee* followed.

On the 19th of December 1888 one Khepu Nath Sikdar, a hotel-keeper at Nattore, lodged an information at the police-station that he had missed from his box in his hotel certain gold and silver articles, and that he suspected one Grish Chunder Mukerji and the other lodgers of having committed theft in respect thereof. The local police investigated the case and sent up Grish Chunder Mukerji, in whose house it was alleged one of the stolen articles was found. In the course of the trial before the Deputy Magistrate of Nattore, Grish Chunder Mukerji set up the defence that the charge was a false one, preferred at the instigation of the Mohunt of Tarkeshar in the district of Hughli, because he, Grish Chunder Mukerji, had refused to permit his wife to go to the Mohunt, who wanted her for an immoral purpose. Before the case for the prosecution against Grish Chunder was closed, the Deputy Magistrate examined witnesses tendered by the accused, and rejected the prayer of the complainant Khepu Nath Sikdar for summoning all his witnesses. Thereupon Khepu Nath Sikdar moved the District Magistrate of Rajshahi (Mr. H. A. D. Phillips) to transfer the case to the file of some other Magistrate, but the District Magistrate refused the application, and in his order of refusal, dated the 23rd April 1889, made the following remarks:—

"The issues are no doubt of grave importance, but I see no reason for transferring the case from the file of the Sub-Divisional Magistrate, and I accordingly reject the application. At the same time I feel sure the Sub-Divisional Magistrate will recognise the extreme gravity of the case, and do his best to sift the matter to the bottom and get at the truth. If the case is false, it is one which should certainly be followed by the prosecution of Khepu for false charge, and of the Mohunt also for abetment of the same, were there any chance of proving such an abetment. On the other hand, if the theft be true, and the allegation about the Mohunt be false, then Grish deserves to be punished for wanton defamation."

The case was then again taken up by the Deputy Magistrate, who, after examining some more witnesses on the 7th May 1889, acquitted the accused; his judgment being in the following terms:—

"On the 20th December last, Khepu Sikdar, a hotel-keeper of Nattore, Upper Bazar, instituted a case of theft in a building at the Nattore police-station, and stated that the stolen property consisted of a new pair of golden *balar* and four pieces of silver anklets. He charged Abinash Chunder Bayragy and Kalachand Acharji, of Tarkeshar, and the present accused, Grish Chunder Mukerji, of Bhanjipore, near Tarkeshar, in the district of Hughli, with the theft, alleging that they had been lodgers in his hotel from the day be-

¹ I. L. R., 1 Cal. 450.

² 23 W. R. Cr. 39.

fore that on which the theft occurred. Head-constable Dino Bandhu Ghose, of Nattore station, took up the investigation. He went to Tarkeshar with Khepu Sikdar. On searching the house of Grish Chunder Mukerji, he obtained a piece of *bala* under a window, which Khepu Sikdar identified as one of the pair that had been stolen. The head-constable, however, reported the case to be entirely false for reasons set forth in the "B" Form, in which the case was reported. After the receipt of the head-constable's report I communicated the matter to the District Magistrate, and, at the same time, having regard to the important issue involved in the case, suggested to him the desirability of having an enquiry made through the Magistrate of Hughli by some trustworthy police-officer under him. The Sub-Inspector of Haripal made the investigation, and reported Khepu's case to be true. It would have been a good thing, if some officer other than the Sub-Inspector of Haripal had made the investigation, for Tarkeshar is within Haripal, and the Sub-Inspector of that place did not, in my opinion, act quite independently in this matter. After receipt of his report the District Magistrate ordered the original case to be tried. No reliable witness has been produced by Khepu Sikdar; but, on the contrary, the evidence of certain witnesses examined by me and a consideration of the entire circumstances leave no room for doubt in my mind that Khepu's case is entirely a got-up one, the result of a deep-laid conspiracy to ruin Grish and others.

"Grish has a handsome-looking young wife, and the Mohunt of Tarkeshar was anxious to get hold of her. Here is something like history repeating itself in connection with the Mohunt, for who has not heard of the incidents connected with the Mohunt, Elokeshi, and Nobin? In order to keep her out of the Mohunt's way Grish had to remove his wife to her paternal residence at Sonamukhi, in the district of Bankura. I have examined the wife of Grish, Kristokamini by name. She is a tender girl of about 16, and is now *enciente*. In spite of her delicate condition, Grish produced her before me, fetching her from Sonamukhi, as it had been alleged by Baboo Mohim Chandra Moitra, mukhtear, under instruction from Khepu Sikdar, for whom he appeared, that the wife of Grish was a girl of only 7 or 8 years of age. Baboo Mohim Chundra Moitra, when he came to know that Khepu had given him false information as regards the age of Kristokamini, declined to act on his behalf. The deposition of Kristokamini shows how the vile woman 'Chotaginni' acted as a pimp to win her over to the Mohunt. There is some writing of Grish in a *khata* produced by Kepu Sikdar (*vide* Exhibit A). Grish has explained how he was made to write in the *khata* by Khepu Sikdar. It was done after Grish was released on bail from the *hajut*. It should be mentioned that I put Grish into *hajut* when the police first produced him before me. Grish stated from the very beginning that he had never been to Nattore before the institution of this case. I find no possible reason why Grish should come to Nattore. Can it be supposed that he came merely to commit the theft and then fly off? If so, what made him give his true address, as he was a stranger to this place? Is it possible that, after giving his address, he would be so careless as to take the ornament home, and not dispose of it somewhere on the way? The ornament was found under a window under very suspicious circumstances, and where anybody might have thrown it. Khepu has no wife; he lives here with a mistress, and is altogether a notorious character. It is said that he made the ornaments for his brother's wife; what could he say, having none of his own? I consider the allegation to be entirely false, for he does not seem to be such a rich man as to invest money for ornaments for his brother's wife. Again, is it possible that he kept the ornaments in a broken box in the midst and in the presence of strangers? The evidence leaves no doubt in my mind that Khepu

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acted as a mere tool in the hands of Mohendra Mukerji, employed under the Chotataraf Rajbati. It is in evidence that he had deposited a considerable sum of money with the Rajbari treasurer, and that it was under his order that Rati Kanta Karmakar prepared the ornaments. Mohendra, it should be mentioned, is a relative of the present Sub-Inspector of Nattore, and has a relative in the person of Panchcowrie Mukerji, of Dhaniakhali, employed under the Mohunt. It is in evidence that Panchcowrie happened to be in Nattore about the time when Khepu's case was instituted. He is a resident of Dhaniakhali, in the district of Hughli, and the report of the Sub-Inspector of Haripal was sent from that place. Witness Prasannanath Bhaduri, who has given evidence as to how the plot was hatched by Mohendra, has produced a letter marked A with its envelope, with the post-mark of Haripal on it. The letter purports to have been written by Panchcowrie to Mohendra in connection with the case. If Khepu's case was true, what business had Mohendra and Panchcowrie to mingle in it, and what business had they to get up a false case unless it was to further the interests of the Mohunt, who had cause to be annoyed with Grish, not only for his failure to get hold of his wife, but also for his giving evidence against him in a certain case. I need not enter into further details. The plot, to say the least, is the most mischievous and nefarious that I have ever come across; its sole object was to wreak vengeance on a supposed enemy, if not also to put Grish out of the way, and so facilitate the Mohunt's intrigue with his wife. I consider Grish to be an innocent man, as far as Khepu's case is concerned. As some evidence for the defence has been taken, the prisoner ought to be acquitted. He has therefore been formally charged to-day, and he has pleaded not guilty. I acquit Grish Chunder Mukerji under s. 258, Criminal Procedure Code, and direct that he be set at liberty. The records of the case will be submitted to the District Magistrate for prosecution of Khepu Sikdar under s. 211, Indian Penal Code, and of Mohendra Mukerji and Panchcowrie Mukerji for abetting the same. All these persons may be tried under any other section of the Penal Code that may be found applicable. A list of witnesses for the prosecution will be attached to the record."

After the above order was passed, the case was taken up by Mr. Ainslie, Deputy Magistrate of Rampore Baulia, who described himself in his order as "Deputy Magistrate in charge," and he issued warrants for the arrest of the three persons referred to in the above order. Those three persons accordingly moved the High Court to quash the sanction or direction given by the Deputy Magistrate of Nattore for their prosecution under s. 211 of the Penal Code. On those applications three rules were issued, calling upon the Deputy Magistrate to show cause why his order should not be set aside; and similar rules were issued upon Grish Chunder Mukerji, because it appeared from the affidavit of one of the petitioners that the Deputy Magistrate had asked the pleaders of Grish Chunder Mukerji whether he would like to prosecute the complainant in the event of a prosecution under s. 211 being sanctioned, and that thereupon the pleader had replied in the affirmative. These three rules now came on for disposal.

In Rule No. 241—Mr. *Woodroffe*, Baboo *Umbica Churn Bose*, and Baboo *Gopi Nath Mookerjee* for the petitioner, Khepu Sikdar.

In Rule No. 242—Mr. *M. Ghose*, Baboo *Jogendro Nath Bose*, and Baboo *Ramini Kumar Gohu* for the petitioner, Panchcowrie Mukerji.

In Rule No. 243—The *Advocate-General* (Sir *G. C. Paul*) and Baboo *Gopi Nath Mookerjee* for the petitioner, Mohendra Mukerji.

Baboo *Ram Charan Mitter* for the Deputy Magistrate in all three rules.

Mr. Hill and Baboo Iswar Chunder Chuckerbutty for Grish Chunder Mukerji, the opposite party, in all three rules.

Baboo Ram Charan Mitter, in showing cause, contended that the Deputy Magistrate of Nattore had given no sanction to any individual under s. 195 of the Criminal Procedure Code, and that therefore the High Court had no power to quash the order under the provisions of that section. If an order under that section had been passed, the petitioners ought to have gone to the Sessions Judge in the first instance. Moreover, the High Court had no power to quash an order for prosecution, which did not amount to a sanction. *Queen-Empress v. Rachappa*.¹

On the merits he contended that, though the Deputy Magistrate was not justified in referring in his judgment to the previous history of the Mohunt of Tarkeshar, which was not in evidence before him, the evidence recorded by the Deputy Magistrate was sufficient to justify him in directing a prosecution under s. 476 of the Criminal Procedure Code.

Mr. Hill claimed the right to address the Court on behalf of Grish Chunder Mukerji, who had been called upon to show cause.

TREVELYAN, J., enquired if Mr. Hill intended to argue that no sanction had been given by the Deputy Magistrate under s. 195, Criminal Procedure Code.

Mr. Hill informed the Court that it would be his contention that no sanction had been accorded by the Deputy Magistrate to any private individual.

TREVELYAN, J.—In that case, Mr. Hill, you have no *locus standi* on your own showing, and we rule that you are not entitled to be heard.

Mr. Woodroffe, on behalf of Khepu Sikdar in Rule No. 241.—Whether the order of the Deputy Magistrate is to be regarded as a sanction under s. 195, Criminal Procedure Code, or as a direction by the Court under s. 476, the High Court is equally competent to deal with it. If the order is to be regarded as a sanction, it can be revoked by the High Court under the provisions of s. 195, Criminal Procedure Code; and if the order be one made under s. 476, the revisional powers of the High Court are large enough to enable it to set it aside. Any order in a judicial proceeding is liable to be altered or reversed by the High Court in its revisional jurisdiction—s. 439. Similar orders have been quashed in the case of *Queen v. Baijoo Lal*,² following the earlier case of *In the matter of the Petition of Kali Prosunno Bagchee*.³ On the merits, the case has been so irregularly and improperly tried by the Deputy Magistrate that no weight ought to be attached to his conclusions. There is nothing to show that a theft had not really occurred, and that the charge of Khepu Nath Sikdar was false.

Mr. M. Ghose, who appeared on behalf of Panchcowrie Mukerji in Rule No. 242, was stopped by the Court on the ground that there was no evidence against his client.

The Advocate-General, who appeared on behalf of Mohendra Mukerji in in Rule No. 243, contended that, his client never having been examined in the case by either side, the Deputy Magistrate had no right to direct his prosecution; and that the evidence against him was wholly inadmissible and incredible on the face of it.

The following judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was delivered by

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¹ I. L. R., 13 Bom. 109.² 23 W. R. Cr. 39.³ I. L. R., 1 Cal. 450.

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TREVELYAN, J.—This is an application to set aside an order of the Deputy Magistrate of Nattore, dated 7th May 1889, by which he directs that the records of a case, brought by Khepu Nath Sikdar against Grish Chunder Mukerji, be submitted to the District Magistrate for the prosecution of Khepu Sikdar under s. 211 of the Indian Penal Code, and of Mohendra Mukerji and Panchcowrie Mukerji for abetting this offence. He then goes on to say: "All these persons may be tried under any other section of the Penal Code that may be found applicable. A list of witnesses for the prosecution will be attached to the record." That order being made, and the record being sent, whether to the Magistrate or where does not appear, an order was made by Mr. E. F. Ainslie, who describes himself as "Deputy Magistrate in charge," directing issue of warrants against these three persons for their arrest, and fixing a day for the hearing; and directing, furthermore, that the case should remain on his file.

This case has been argued at some length. The *first* question is as to what this order of the 7th May means; the *second* is whether we have jurisdiction under the revision powers conferred upon us to set aside this order; and the *third* question is whether, under the circumstances of this case, we ought to exercise such powers in favour of the persons who have applied to us.

One view of this order of the 7th May is that it amounts to a sanction to prosecute. Another view of this order is that it is an order made by the Deputy Magistrate under the provisions of s. 476 of the Criminal Procedure Code, sending the case for inquiry or trial to the Magistrate of the District. There is a third view of this order: it is one that is sought to be supported by an order of the Magistrate of the District, dated 23rd April, on an application made to transfer the case from Nattore. In that order, after some observations having no reference to the matter of the application made before him, the Magistrate said this: "At the same time I feel sure the Sub-Divisional Magistrate will recognize the extreme gravity of the case, and do his best to sift the matter to the bottom, and get to the truth. If the case is false, it is one which should certainly be followed by the prosecution of Khepu for a false charge, and of the Mohunt also for abetment of the same, were there any chance of proving any such abetment. On the other hand, if the theft be true, and the allegation about the Mohunt be false, then Grish deserves to be punished for wanton defamation." It has been urged that the order made by the Deputy Magistrate has been suggested by the order of the Magistrate, and is intended to be in compliance with it. With regard to the first view, we think it clear that this order does not mean to give Grish Chunder sanction to prosecute. It does not purport to do so; and unless it did, it is difficult to see how it amounts to a sanction to prosecute. It only really submits the case to the District Magistrate to be dealt with under s. 211 if he thinks proper to do so, and the remark—"All these persons may be tried under any other section of the Penal Code that may be found applicable"—really means that, if a prosecution is instituted under s. 211, and it turns out that there are other sections under which these persons can be tried, they may be so tried. That does not assist us in construing the order. It does not show that sanction was given to Grish Chunder to prosecute. Whether this order may be construed in either of the two other ways that I have pointed out is, we think, immaterial. In either case, we think it is an order that we can deal with, and we think that we can also deal with the order that has resulted from it, *viz.*, the issue of warrants. The practical effect of either of these two constructions is the same. If we have power to interfere with an order under s. 476, we have equally power to interfere with a matter of this kind in which the Deputy Magistrate, having tried the case,

makes an order sending the record with an invitation to the District Magistrate to prosecute. If this amounts to simply sending the case to the District Magistrate to deal with it under s. 211 of the Penal Code, then it is not a sanction to prosecute. If it is an order under s. 476 of the Criminal Procedure Code, then the considerations arise to which we will presently refer, *viz.*, whether there was any necessity for a preliminary inquiry, and whether the absence of such preliminary inquiry has vitiated the inquiry purporting to be made under that section. We have ample jurisdiction to interfere on a question of this kind. In the first place, we have the terms of the Criminal Procedure Code, which clearly show that we have such jurisdiction. Under s. 439, the High Court, in exercising its powers of revision, has the powers conferred on a Court of Appeal by s. 423 to alter or reverse an order of the lower Court. So that we have the same power to alter or reverse an order of this description as an Appellate Court would have in a case of appeal. This construction, we think, is confirmed by the cases cited, in which different Benches of this Court have interfered with orders made under this section, or under the corresponding section in the earlier Act. The cases to which we have been referred are first the case of *Queen v. Baijoo Lall*,¹ decided by Macpherson and Morris, JJ., and there is an earlier case, namely, *In the matter of the Petition of Kali Prosunno Bagchee*.²

There being jurisdiction, and the order being in the way described, the question arises whether this is a case in which we ought to interfere. We think that the Magistrate ought not to have made this order, and that there is no ground for his order. There is no doubt that before proceedings under s. 476 can be instituted, either there must be a preliminary inquiry held by the Magistrate, and in such inquiry there must be direct evidence fixing the offence upon the persons whom it is sought to charge, or in the earlier proceedings out of which this enquiry arises, there must be direct evidence charging these persons with an offence. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that these persons had been guilty of an offence. The law as laid down in the cases clearly shows that, before a Magistrate can proceed at all under that section, he must, either in the case before him, or in the inquiry which he must make, have distinct evidence on the commission of an offence. If the order is to be construed in accordance with the third view we have mentioned, we equally think that it could only be made upon the footing that there was before the Magistrate direct and substantial evidence of the commission of an offence.

The learned Judges then proceeded to consider the evidence in all the rules, and concluded as follows :—

It is clear to us that, on the evidence in this case, the Magistrate was not justified in taking steps beyond the acquittal of Grish Chunder.

That being so, we must set aside the order made by him of the 7th May 1889, beginning with the words—"The records of the case will be submitted * * * *"—down to the end.

And further we direct that the order made by Mr. Ainslie and the warrants issued by him be quashed.

H. T. H.

Rules made absolute.

¹ I. L. R., 1 Cal. 450.

² 23 W. R. Cr. 39.

1889.
IN THE
MATTER OF
THE PETI-
TION OF
KHEPU NATH
SIKDAR
v.
GRISH
CHUNDER
MUKERJI,
16 Cal. 730.

FULL BENCH.

1889.

July 15.

16 Cal. 766.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Tottenham, Mr. Justice Trevelyan, Mr. Justice Ghose, and Mr. Justice Beverley.

QUEEN-EMPRESS *v.* SARAT CHANDRA RAKHIT.¹

Sessions Judge, Jurisdiction of—Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X. of 1882), ss. 195, 487—Penal Code, s. 196.

A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure.

*Madhub Chunder Mosumdar v. Novodeep Chunder Pundit*² overruled; *Empress v. D'Silva*³ referred to.

THIS was a reference to a Full Bench by Mr. Justice Trevelyan and Mr. Justice Beverley; the referring order was as follows:—

“The appellant before us has been convicted under s. 196 of the Penal Code of using as genuine evidence which he knew to be false. He has also been convicted under s. 471, read with s. 467, of the Penal Code; but, in our opinion, the alleged offence falls under s. 196, and the conviction under s. 471 should be set aside. The conviction under the latter section has made no difference in the punishment.

“The sanction to prosecute was given by Mr. F. H. Harding acting as District Judge of Chittagong.

“The appellant has been tried and convicted of this offence by Mr. Harding acting as Sessions Judge of Chittagong.

“One of the grounds of appeal is as follows: ‘While the Judge accorded a sanction to bring a case against me in the Criminal Court, it has been illegal on his part to convict and punish me against himself.’

“This question has been argued before us by the Deputy Legal Remembrancer, who cited the case *In the matter of Madhub Chunder Mosumdar v. Novodeep Chunder Pundit*,³ and we have had to consider the terms of ss. 477 and 487 of the Criminal Procedure Code. We have grave doubts as to the correctness of the above-mentioned decision, and, as the matter is one of importance, we refer to a Full Bench the following question:—

“‘Can a Sessions Judge try a person for an offence punishable under s. 196 of the Indian Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure?’

“If this question is decided in the affirmative, the appeal should, in our opinion, be dismissed. If it be decided in the negative, the appellant will have to be re-tried by another Sessions Judge.”

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown.—There being only one Court in each district, which can try Sessions cases, or hear most appeals, great inconvenience must be occasioned when such cases are transferred. In the present instance the nearest Sessions Court is at Tipperah; the most

¹ Full Bench on Criminal Appeal, No. 327 of 1889, against the decision of *F. H. Harding, Esq.*, Officiating Sessions Judge of Chittagong, dated the 11th March 1889.

² 1. L. R., 16 Cal. 121.

³ 1. L. R., 6 Bom. 479.

convenient perhaps at Alipore. In the one case witnesses would have to march 200 miles during the rains to Tipperah and back, or else recross the Bay of Bengal. A Bench of this Court has decided that, if the Judge had jurisdiction to try, the conviction and sentence are right; upon a re-trial then either the same sentence will be repeated, or there will be a miscarriage of justice. The law could not have intended to prescribe a course entailing such consequences unless there exists an imperative reason for so doing. That reason can only be the fear that the Judge may have prejudged the case, and condemned the prisoner before trial; but the District Judge in this case merely amended a sanction previously granted by an inferior Civil Court.

If an appeal admitted after hearing the judgment and argument, if a rule to show cause why an order could not be set aside, are not prejudged, how can it be said that a Judge granting a sanction to prosecute (where he merely has to consider whether he ought to remove an artificial obstruction put in the way of a man's ordinary right to complain of an offence) has condemned the accused before the hearing.

It would be more plausible to say that the Sessions Judge had prejudged the case, when, after reading the proceedings of the commitment, he alters or adds to the charge. The prisoner has been acquitted of all the charges framed by the Magistrate, but sentenced upon the one which the Judge has framed in this case. And as to this there is no objection, for the law prescribes it. S. 477 clearly shows that, where the offence is committed in the presence of the Judge, and where he has himself committed the offender for trial, the Legislature does not consider that a sufficient reason to justify the removal of the case from his jurisdiction.

So under s. 487 the Sessions Judge may try offences which have been committed in his presence as District Judge, and where the preliminary enquiry and commitment have been made by himself. Clearly it was not contemplated that he should be debarred from trying a case like the present.

I submit that s. 487 does not debar him. The words "no Judge of a Criminal Court" in s. 487 apply to an Assistant Sessions Judge (s. 31), but not to a Sessions Judge. The Sessions Judge (ss. 477, 478) may try any case committed to his Court, whether by himself or by any Civil or Revenue Court that thinks he ought to try it; *a fortiori* he may try any case committed to his Court in the ordinary way by a Magistrate. If it be argued that s. 477 is restricted to cases in which the Sessions Judge himself makes the commitment, such a narrow construction is inconsistent with s. 478. I also submit that the words "judicial proceedings" in s. 487 do not include a sanction under s. 195 granted or revoked by a Superior Court. In dealing with such sanction, such Court has no authority to take evidence; and it cannot therefore be a judicial proceeding [see s. 4 (d)]. Whenever in any proceeding evidence may be legally taken the Code provides for it, as in appeals (Ch. XXXI., s. 428); but no such provision is to be found in Ch. XV., or as applicable to the Superior Courts mentioned in s. 195. The case of *Krishnanund Das v. Hari Bera*¹ decides that notice need not be given to the accused when sanction is granted for his prosecution. How then could evidence be taken in such a case? Again, an offence which is brought under the notice of the District Judge in a proceeding, as in this case, is not brought under the notice of the Sessions Judge "as such Judge." The Court of Session which tries the offence, whether with assessors or jury, is a different Court from that of the Civil Judge—*Empress v. D' Silva*.²

1889.

QUEEN-
EMPRESS

v.

SARAT
CHANDRA
RAKHIT,
16 Cal. 766.¹ I. L. R., 12 Cal. 58.² I. L. R., 6 Bom. 479.

I. L. R., Cal. 123.

1889.

QUEEN-
EMPRESS

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CHANDRARAKHIT,
16 Cal. 766.

I contend that s. 487 only applies to cases which can be tried by more than one Judge or Magistrate in the district: and that it does not apply to Sessions Judges or to appeals involving for trial a transfer to another district. The words in s. 487 "shall try" do not apply to appeals; trials and appeals are quite distinct under the Code. The word "try" is confined to trials; appeals are heard under s. 407, rejected under s. 409, and dealt with under s. 428.—See *Weir*, 1081.

No one appeared for the prisoner.

The order of the Court (PETHERAM, C.J., TOTTENHAM, TREVELYAN, GHOSE, and BEVERLEY, JJ.) was as follows:—

The facts of this case are sufficiently set out in the order of reference. The question referred to us for our decision is the following:—

"Can a Sessions Judge try a person for an offence punishable under s. 196 of the Penal Code, when he has, as a District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure?" The reference has been rendered necessary in consequence of the decision in *Madhub Chunder Mozumdar v. Novodeep Chunder Pundit*.¹

S. 487 of the Code of Criminal Procedure now in force runs as follows:—

"Except as provided in ss. 477, 480, and 485, *no Judge of a Criminal Court or Magistrate*, other than a Judge of a High Court, the Recorder of Rangoon, and the Presidency Magistrates, shall try any person for any offence referred to in s. 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice *as such Judge or Magistrate* in the course of a judicial proceeding."

We are of opinion that in this section effect must be given to the words "*as such Judge or Magistrate*," and the meaning of the section, we think, must be taken to be that, when an offence referred to in s. 195 has been committed before a Judge of a Criminal Court or Magistrate, or in contempt of his authority, or brought under his notice in the course of a judicial proceeding, he cannot himself try such offence. That this is so, we think, is clear from the exception made in regard to the provisions of s. 477, under which a Court of Session is empowered to charge and commit, or admit to bail and try, any person who has committed before it any offence of the kind referred to in s. 195. It appears to us that it would be inconsistent to hold that a Sessions Judge may try an offence committed before him as Sessions Judge, and that he may not try such an offence if committed before him as District Judge.

This view appears to have been taken by the Bombay High Court in the case of *Empress v. D'Silva*.² That was a decision under s. 473 of the Code of 1872, which section ran as follows: "Except as provided in ss. 435, 436, and 472, no Court shall try any person for an offence committed in contempt of its own authority." Under that section it was held that a Sessions Judge was not debarred from trying a case of forgery in which he had sanctioned the prosecution as a District Judge. The *ratio decidendi* in that case was much the same as that which has been indicated above. The learned Judges who decided that case said:—

"The Legislature seems to have been impressed by the sense of this inconvenience, and, consequently, in enacting s. 472 of the Code, it gave jurisdiction to the Court of Session to try all cases of contempt committed before it in which the offence is triable exclusively by the Court of Session. It would be difficult to suppose that

¹ I. L. R., 16 Cal. 121.

² I. L. R., 6 Bom. 479.

the Legislature had any other intention in regard to offences of the same kind committed before the Judge of the Court of Session in his civil capacity, and certainly s. 473 is not so worded as to oblige us to hold that there was any other intention."

It will be seen that s. 487 of the present Code, which corresponds to s. 473 of the Code of 1872, is couched in more definite language. The prohibition is restricted to a "Judge of a Criminal Court," and, that being so, we think we must place a strict construction on the words "as such Judge," and hold that they do not include a Judge of a Civil Court or District Judge.

For these reasons we are of opinion that the Sessions Judge was not debarred by this section from trying the case which was the subject of this reference.

T. A. P.

Appeal dismissed.

CRIMINAL MOTION.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

IN THE MATTER OF THE PETITION OF ASLU AND OTHERS. ASLU *v.* THE QUEEN-EMPRESS.¹

1889.

QUEEN-
EMPRESS

v.

SARAT
CHANDRA
RAKHIT,

16 Cal. 766.

1889.

July 23.

Security for keeping the peace—Magistrate of the District—Appellate Court—Criminal Procedure Code (Act X. of 1882), ss. 106, 423.

16 Cal. 779.

The Magistrate of a District when acting as an Appellate Court is not competent to make an order under s. 106 of the Criminal Procedure Code (Act X. of 1882), requiring the appellant to furnish security for keeping the peace.

In this case the petitioners and one Abdul Wahed Khan were charged before the Assistant Magistrate of Midnapore with rioting under s. 147 of the Penal Code. They were all convicted and sentenced to fines of various amounts, or, in default, to various terms of rigorous imprisonment.

Against the convictions and sentences an appeal was preferred to the District Magistrate, who set aside the conviction of Abdul Wahed Khan, but dismissed the appeal of the petitioners. The District Magistrate further considered that, as there was a probability of further breaches of the peace, the petitioners should be bound over to keep the peace, and he accordingly directed that they should each give one surety in the sum of Rs. 100 to keep the peace for one year.

The petitioners then applied to the High Court to exercise its revisional powers and set aside the convictions, sentences, and order upon various grounds, and amongst them, that the order of the District Magistrate directing them to give a surety to keep the peace was illegal.

A rule was issued which now came on to be heard.

Mr. *Dass* and Baboo *Joygopal Ghose* for the petitioners in support of the rule.

No one appeared for the Crown.

The judgment of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows :—

¹ Criminal Motion, No. 291 of 1889, against the order passed by *C. Vowell, Esq.*, District Magistrate of Midnapore, dated the 25th of April 1889, affirming the order passed by *Stevenson Moore, Esq.*, Assistant Magistrate of Midnapore, dated the 18th of March 1889.

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MATTER
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This rule must be made absolute. The question raised in this case is whether an Appellate Court affirming a conviction and sentence has power, under s. 106 of the Criminal Procedure Code, to order the appellant to execute a bond for keeping the peace. In the Court below the learned Magistrate seems to have thought that he had power to pass such an order under that section, upon the authority of a Full Bench ruling in the case of *Empress v. Kanta Prasad*.¹ But that was a case under the Criminal Procedure Code (Act X. of 1872), s. 489, and that section provided that, if "the Court or Magistrate by which, or by whom, a person is convicted, or the Court or Magistrate by which, or by whom, the final sentence or order in the case is passed, is of opinion that it is just and necessary to require such person to give a personal recognizance for keeping the peace, such Court or Magistrate may direct the taking of a bond to keep the peace." Now, the words "or the Court or Magistrate by which, or by whom, the final sentence or order in the case is passed" have been left out in s. 106 of the present Criminal Procedure Code; and it is further provided by the last-mentioned section that such Court may, at the time of passing the sentence, order the person convicted to execute a bond. S. 423 of the present Criminal Procedure Code expressly lays down what the powers of an Appellate Court are, and the power to take security for keeping the peace is not mentioned there: and there is no other provision of the law which enacts that the Appellate Court shall have the same powers as the Court of original jurisdiction has; and, that being so, we do not think that, under the provisions of the Criminal Procedure Code (Act X. of 1882), the Appellate Court has the power to order a security-bond to be taken; and we accordingly direct that the order of the District Magistrate, so far as it directs that each of the appellants, except Abdul, do give one surety of one hundred rupees to keep the peace for one year, be set aside.

H. T. H.

Rule made absolute.

CRIMINAL MOTION.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

1889.

July 9.

16 Cal. 781.

NUR MAHOMED (PETITIONER) v. BISMULLA JAN (OPPOSITE PARTY).²

Criminal Procedure Code (Act X. of 1882), s. 488—Evidence Act (Act I. of 1872), s. 120—Bastardy proceedings—Order of affiliation—Evidence.

Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings within the meaning of s. 120 of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf.

Upon a summons, charging that the defendant, having sufficient means, had refused to maintain his child by his *nika* wife whom he had subsequently divorced, the Magistrate found that the marriage had not been proved, but that, upon the other evidence adduced, including the similarity of the features and the name of the child with those of the defendant, who did not appear before him during the proceedings, but with whom he stated that he was well acquainted, the child was the illegitimate child of the defendant. He accordingly made an order for maintenance under the section.

Held, that, under the circumstances, he was wrong in taking into account the similarity of the names and the features of the child and the defendant; but, as there was ample evidence of the paternity, he was justified in making the order he did, as it was immaterial for the purpose of determining the liability of the defendant to maintain the child, whether the mother had been married to the defendant or not.

¹ I. L. R., 4 All. 212.² Criminal Motion, No. 270 of 1889, against the order passed by Syed Abdul Jabbar, Presidency Magistrate of Calcutta, Northern Division, dated the 3rd of June 1889.

THIS rule was obtained for the purpose of getting an order set aside which had been passed under s. 488 of the Criminal Procedure Code, directing the petitioner to pay the sum of Rs. 15 a month for the maintenance of a child, named Nur Ahmed, aged about 3½ years.

The charge, as laid in the summons, was as follows : " That you, having sufficient means, refused to maintain your child Nur Ahmed, about 3½ years old ; the said child is by your *nika* wife, Bismulla Jan, whom you have subsequently divorced." The summons was issued at the instance of Bismulla Jan, the mother of the child, and both parties were represented by Counsel before the Magistrate, Nur Mahomed being exempted from appearing personally by an order made by the Magistrate, and not being present in Court on any of the various occasions on which the case was heard.

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The judgment of the Magistrate was as follows :—

This is an application under s. 488, Criminal Procedure Code, for an order against the defendant Haji Nur Mahomed for the maintenance of a child aged about 3 years and 9 months, and named Nur Ahmed. The complainant's version of the case is that five years ago the defendant married her in the *nika* form ; that the child was born in wedlock ; and that seven or eight months after the birth of the child he discontinued his visits to her. The marriage is denied by the defendant, and the evidence adduced in support of it by the prosecution is wholly unworthy of credit. The only individuals who are said to have been present at the ceremony are the complainant's brother, her sister, and a man who gives lessons in the family. Although it is not necessary for the validity of a marriage under the Mahomedan law that there should be a good number of persons present, yet, according to custom, not only a man is nominated to perform the functions of a Kazi, but friends on both sides are invited to witness a marriage. In this case not a single friend, not even Ahmed Sahib, who, according to complainant's own evidence, used to be with the defendant on other occasions, was present at his marriage with the complainant. There was none to act the part of a Kazi. The dower is said to have been Rs. 10 only. This sum is, no doubt, more than the minimum fixed by law, but it is not possible that the complainant, who was a dancing-girl, should have surrendered her liberty for a consideration which is less than what she expected as her wages for a night's performance. When a left-handed marriage takes place between a dancing-girl and a respectable man of position, the proposal for an alliance generally emanates from the latter, and the former is not, therefore, satisfied with a moderate dower. The witness Haji Abdullah Dugmar has married a dancing-girl on payment of a dower of Rs. 2,500, and the complainant has herself got a dower of Rs. 1,000 at her subsequent marriage with a Hindu. It is not easy, therefore, to believe that, if the defendant had married her, she would have been satisfied with a trifling sum of Rs. 10, or would not have made him execute a deed of dower. It is also incredible that a man of the defendant's position in society would have allowed his wife to stay at the house of a professional songstress, such as her mother is, if he had led her to the altar ; he would have naturally taken her to his own house, or, if that was not possible, would have removed her to some place where she would not be subject to the gaze of her mother's visitors. Under the above circumstances, I consider the story of her marriage with the defendant as a fiction. The story, I think, has been invented to create a right of inheritance for the boy.

The next question for determination is, whether the child is an illegitimate issue of the defendant ? The mother of the child asserts that the defendant is its father, and there is sufficient proof that he was in the habit of visiting her about the time she became pregnant. No evidence is adduced by the defence to rebut her statement that she was in his keeping. It is contended that she had tried to father the child on one Jogendro Mullick, who was also, at one time, the complainant's paramour. I do not think the evidence which has been given on this point is deserving of any weight. There is no doubt that Jogendro kept the complainant for a certain period, but I am not satisfied that he kept her at the time of her conception. The

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evidence of Jogendro Nath's *mushahib* or companion, Aga Mahomed Ali, is anything but trustworthy. If Jogen was threatened with exposure, and he had to pay a large sum of money to prevent her from carrying out her threat, there would certainly be taken some precautionary measure by Jogen, or his friend, Aga Mahomed Ali, against the repetition of the threat. The death of Jogen, as Mr. Henderson argued, has led the defence to hint that he was the father of the child. There is no evidence that Jogen was the child's natural father. While, on the other hand, the evidence of the mother that the defendant is the father of the child, is corroborated by the ocular proof which the child itself furnishes. Although the witness for the defence, Aga Mahomed Ali, says that the child resembles the defendant in thinness only, no one who has seen Haji Nur Mahomed and sees the child can fail to observe a strong resemblance between the two. The child is, in fact, a miniature representation of the defendant. There is another matter which, in my opinion, confirms the statement of the complainant that the defendant is the father of the child. It is not disputed that the child was christened Nur Ahmed, and the name shows that within six days of its birth, when the ceremony of giving a name generally takes place, it was believed and known who the child's progenitor was. Not only the word "Nur" exists in both the names, but there is a correspondence of sounds in the terminal words Mahomed and Ahmed. Taking, therefore, all the circumstances of the case into a careful consideration, I am of opinion that the child is an illegitimate offspring of the defendant Haji Nur Mahomed. Mr. Garth contended that, as the complainant based the claim of the child to maintenance on the legitimacy of its birth, the Court can grant no allowance to it when its legitimacy was not established. I do not think this contention is right. Under the Statute quoted above, both legitimate and illegitimate children are entitled to maintenance, and, although in this case the child is not proved to be legitimate, but is proved to be an illegitimate issue of the defendant, the law makes it obligatory upon the father to maintain it.

Suppose a child X sues its father Z for maintenance. Is it to have no maintenance because the Court, which tried the suit, declared that the marriage of X's mother with Z was void, owing to a certain legal defect in the marriage contract? The section quoted imposes on a husband or a father the duty of maintaining his wife or helpless children, both legitimate or illegitimate, and he cannot claim exemption from it except on the ground of poverty.

I direct that Haji Nur Mahomed pay Rs. 15 per month for the maintenance of his illegitimate child Nur Ahmed.

Against that order, the petitioner moved the High Court, and a rule was issued which now came on to be heard.

Mr. *Phillips* and Mr. *Roberts* for the petitioner.

Mr. *M. P. Gasper* and Mr. *Henderson* for the opposite party.

Mr. *Gasper* (showing cause).—The fact that Nur Mahomed was not called as a witness to deny the paternity of the child raises an almost irresistible presumption against him, and there can be no doubt that in such proceedings the person sought to be charged is a competent witness. Although there is no express decision to that effect in this country, the case of *In the matter of Toke Bibee v. Abdool Khan*,¹ decided by Wilson, J., shows that such proceedings are in their nature civil proceedings, and not criminal.

[TREVELYAN, J.—There can be no doubt that in England the defendant is a competent witness.—See Paley, 5th Edition, p. 113.]

Mr. *Gasper*.—I submit that here also he is a competent witness, and that Nur Mahomed might have given evidence himself to deny the paternity, and, not having done so, the Court is entitled to presume that he could not do so. In England, the Act requires corroboration of the evidence of the mother, but the amount of corroboration required by the Courts is very slight—see *Cole v.*

¹ I. L. R., 5 Cal. 536.

*Manning*¹ and *Lawrence v. Ingmire*,² and the Courts will not interfere if there be any corroboration whatever of the mother's testimony. Here then is ample evidence against the defendant, and the Court ought not to interfere. The Magistrate would have been perfectly justified, had the defendant been present before him at the hearing, in comparing the similarity of his features with those of the child, and taking such similarity into account, and the mere fact that the defendant was exempted from personal attendance does not, I submit, preclude such comparison, when, as stated by the Magistrate, Nur Mahomed's features were well known to him.—See *Bamundoss Mookerjee v. Mussamut Tarinee*.³

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Mr. *Phillips* (in support of the rule) did not contend that the defendant was not a competent witness, and might have been called, but argued that the evidence did not justify the order, and that the Magistrate should not have acted on the similarity of the features and the name of the child with those of the defendant, and referred to *Bamundoss Mookerjee v. Mussamut Tarinee*³ as not supporting the proposition contended for by the other side. He further contended that the case the defendant was called to meet, being the charge that the child was his child by a *nika* wife, the whole case stood or fell on the question as to whether or not the marriage was proved, and it was not open to the Magistrate to pass an order on the assumption that the child was the illegitimate offspring of the defendant.

Mr. *Roberts* followed on the same side.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

In this case the Officiating Magistrate of the Northern Division made an order against Nur Mahomed, the applicant before us, directing payment of Rs. 15 a month for the maintenance of a child, which the Magistrate found to be his child by one Bismulla Jan. We were asked, in the exercise of the revisional jurisdiction of this Court, to set aside that order. We gave a rule, and we were to a very great extent, if not entirely, induced to grant that rule by the circumstance that the Magistrate had compared the child produced in Court with what herecollected of the lineaments of Nur Mahomed, who had not appeared in Court, and thus acted upon the information, which he had obtained otherwise than in his magisterial capacity, and also by the circumstance that he relied on the resemblance of name between the infant and the putative father. In granting the rule, we stated that the fact that Nur Mahomed had not been called as a witness was a circumstance weighing so strongly against the applicant that, although we sent for the record, we could not hold out to the applicant much hopes of success. Now we have heard Counsel on both sides ; and the main contention placed before us by Mr. *Phillips* is that, the suggestion of marriage having failed, the whole case failed. We, however, think that the basis of an application for the maintenance of a child under the provisions of s. 488 of the Code of Criminal Procedure is the paternity of the child irrespective of its legitimacy or illegitimacy. The fact of the marriage of the parents may be not only strong evidence to show paternity, but also raises a presumption which has a very strong bearing upon the question of paternity. The summons, which is in the record called a charge, runs thus : "That you, having sufficient means, refused to maintain your child Nur Ahmed, about 3½ years old." This would have been quite sufficient for the present purposes, but the summons then states further : "The said child is by your *nika* wife Bismulla Jan, whom you have subsequently divorc-

¹ L. R., 2 Q. B. Div. 611.

² 20 Law Times Rep., N. S., 391.

³ 7 Moore's I. A. 169, see page 203.

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ed." The statement, as to the child being by his *nika* wife, is not at all a necessary statement, and the failure to prove marriage does not, in our opinion, destroy the case altogether. The case for the plaintiff was that originally, when a child, she was in the keeping of Nur Mahomed; this relationship between them ceased to exist a short time after, when she went to a man called Ashgar; and after that, to Jogendro Churn Mullick. Subsequently she left Jogendro Mullick, and married Nur Mahomed; and this child was the fruit of that marriage. The Magistrate, after hearing the evidence, came to the conclusion that the marriage was not proved; and we think that the Magistrate was right in coming to that conclusion. It appears, however, from the evidence that, since the day on which the marriage is said to have taken place, this woman lived with Nur Mahomed and Nur Mahomed alone, until the child was born. She speaks to it, and there are witnesses who corroborate her statement. That would show, if uncontradicted, that this man was the father of the child. In fact, they both lived together, and during this period the child was conceived. Evidence was given suggesting that Jogendro Mullick was the father of the child; but the evidence on this point has been disbelieved by the Magistrate, and we cannot say that the Magistrate was wrong. The evidence on the record shows, in the opinion of the Magistrate, that Nur Mahomed only could have been the father of the child, and there is evidence from which the Magistrate could arrive at such finding. Nur Mahomed was not called in the Police Court to contradict the case for the prosecution; and, except his Counsel in Court, no one on his behalf seems to have denied the paternity, and he never denied it. In England, it has been held more than once that, under the provisions of 14 and 15 Vic., c. 99, s. 2, bastardy proceedings are regarded as civil proceedings, and the parties to them are capable of giving evidence; and according to the case cited to us of Mr. Justice Wilson's taken together with the English cases, there can be no question that bastardy proceedings are civil proceedings within the meaning of s. 120 of the Indian Evidence Act, and that the defendant thereto may give evidence on his own behalf. Mr. Phillips did not deny that this was the law; we are told that, after the witnesses for the defence had been examined, and Mr. Henderson had been heard in reply, Mr. Garth invited the attention of the Magistrate to the point, whether Nur Mahomed was a competent witness or not. According to law, he was unquestionably a competent witness, and, as he has not been called, we must make the usual presumption arising from the fact of such omission. The fact that Counsel by an error of judgment, or for some other reason, omitted to call him, does not, in the smallest degree, interfere with this presumption.

We think, however, that the Magistrate was wrong in making use of his information, which he seems to have obtained otherwise than as a Magistrate. He was also wrong in using the circumstance of the similarity of names. That was not a circumstance which in the least could assist the Magistrate in coming to the conclusion of this kind. If it were so, any woman, by naming her child after a particular individual, might be able to make evidence in favour of herself, and thus give rise to a failure of justice. The Magistrate was therefore wrong in mixing up all these matters. But, apart from these circumstances, there is ample evidence upon which the Magistrate could have made the order, and we have no reason to doubt the correctness of such order. The rule is discharged.

H. T. H.

Rule discharged.

APPELLATE CRIMINAL.

*Before Mr. Justice Trevelyan and Mr. Justice Beverley.*SCHEIN (APPELLANT) v. THE QUEEN-EMPRESS (RESPONDENT).¹

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16 Cal. 799.

Appeal in Criminal Case—Criminal Procedure Code (Act X. of 1882), s. 411—Bengal Excise Act (Beng. Act VII. of 1878), ss. 60, 74—Appeal from sentence of Presidency Magistrate—"Like offence"—Punishment on second or subsequent conviction of offence under Bengal Excise Act.

No appeal lies from a sentence of six months' rigorous imprisonment and a fine of Rs. 200, or a further period of three months' simple imprisonment, passed by a Presidency Magistrate.

The offence of selling wine retail by a person who has only a wholesale license is an offence of a like nature to that of selling wine without a license at all, within the meaning of the term "like offence" as used in s. 74 of the Bengal Excise Act.

*Ram Chunder Shaw v. The Empress*² followed.

THIS was an appeal against a conviction by the Chief Presidency Magistrate of an offence under the Bengal Excise Act (Beng. Act VII. of 1878). The accused, who was a licensed wholesale vendor of spirituous and fermented liquor, was charged, under s. 60 of the Act, with having, on the 7th day of June 1889, sold on two different occasions imported liquor by retail, and also, on the 8th of May and subsequent dates, sold imported liquor by retail without an excise retail license. It appeared in evidence that an Excise Officer, named Siddons, sent one Ashruff with a marked rupee and two marked four-anna bits to the accused with instructions to purchase three pints of claret. Ashruff went and returned almost at once with the wine, on which the Excise Officer and others rushed into the house and forcibly took from the accused the marked money which they found on his person. In the accused's room was found a book containing entries of sales of wine, all or most of which the prosecution contended were of a retail nature. It was found that the accused had been convicted on the 8th May 1886 of an offence under the Act, the offence being selling two dozens of claret without a license.

The Magistrate, believing the evidence for the prosecution, convicted the accused of the offence charged, and, under the provisions of s. 74 of the Act, sentenced him to pay a fine of Rs. 200, or in default to undergo three months' simple imprisonment, and also to undergo six months' rigorous imprisonment. Against that conviction and sentence the accused appealed to the High Court, upon the grounds that the evidence did not justify the conviction, and that, as there was no evidence that he had been convicted of a like offence to the one charged, the sentence of six months' rigorous imprisonment was bad in law.

Baboo *Umbica Churn Bose* for the appellant.

Mr. *Acworth* for the Crown.

On the appeal being called on, Mr. *Acworth* objected that no appeal lay. He relied on the language of s. 411 of the Criminal Procedure Code, and referred to the case of *In the matter of Fotharam Davay*,³ which he pointed out had been decided under the similar provisions contained in s. 167 of the Presidency Magistrates' Act (Act IV. of 1877), which was then in force.

¹ Criminal Appeal, No. 463 of 1889, against the order passed by *F. J. Marsden, Esq.*, Chief Presidency Magistrate of Calcutta, dated the 11th of June 1889.

² I. L. R., 6 Cal. 575.

³ I. L. R., 2 Mad. 30.

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The Court here stopped Mr. *Acworth*, and called on Baboo *Umbica Churn Bose*, who contended that s. 411 did not apply, but, upon being referred by the Court to ss. 413 and 415 of the Code, contended that whether an appeal lay or not it was a case in which the Court should exercise its revisional powers under s. 439. He then went into the facts of the case, and contended that the conviction was not justified, and that, even if it was, the sentence of rigorous imprisonment was illegal, as the conviction for selling without a license was not a like offence to selling retail with only a wholesale license, although he admitted that the decision in *Ram Chunder Shaw v. The Empress*¹ was against him.

Mr. *Acworth* was not called on.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

The first question which was raised before us was one raised by the learned Counsel for the prosecution. He contended that no appeal lies in this case. This is an appeal from the decision of the Presidency Magistrate inflicting a sentence of six months' rigorous imprisonment and a fine of Rs. 200, and, in default of payment of the fine, three months' simple imprisonment.

The question depends on the construction of s. 411 of the Criminal Procedure Code, which says: "Any person, convicted on a trial held by a Presidency Magistrate, may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees."

In this case the Magistrate has neither sentenced the appellant to imprisonment exceeding six months, nor has he sentenced him to a fine exceeding two hundred rupees. But it is contended by the pleader for the appellant that the combination of the sentences of imprisonment and fine gives an appeal. That is not justified by the words of s. 411, and we think a reference to s. 415 makes the construction of the earlier section clear. S. 415 says: "An appeal may be brought against any sentence referred to in s. 413 or s. 414, by which any two or more of the punishments therein mentioned are combined."

There is no mention of s. 411 in that section; and, according to the ordinary construction, it follows that the Legislature did not intend to apply to s. 411 the provision in s. 415, that is to say, that a combination of punishments does not give a right of appeal under s. 411, though it does so under ss. 413 and 414. S. 404 provides as follows: "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

S. 411 is the only section under which an appeal lies, and therefore it seems to us that no appeal lies in this case. In this view we are supported by the decision in *In the matter of Jotharam Davay*,² in which s. 167 of the Presidency Magistrates' Act (IV. of 1877) was considered. The terms of that section are exactly similar to those of s. 411 of the Code of Criminal Procedure now in force. It is not necessary for us to go over the facts of that case. It is sufficient to say that there is no distinction whatever to be drawn between the circumstances of that case and the circumstances of this case. The terms of the Act they were then applying are the same as the terms of the Act we are now applying, and the reasons given by the Judges in that case seem to us conclusive on this question.

¹ I. L. R., 6 Cal. 575.

² I. L. R., 2 Mad. 30.

It appears that a Division Bench in another case, *viz.*, *Ram Chunder Shaw v. The Empress*,¹ entertained an appeal in a case of this kind from the order of the Presidency Magistrate, but it is to be remarked that, in that case, the question as to whether there was an appeal or not was not raised by Counsel, and was not apparently considered by the Court, and so it is no assistance to us as an authority. We consider that no appeal lies in this case, but as a Court of Revision we have the right to look into the facts, and we accordingly heard the learned pleader for the appellant with regard to the facts of the case, in order that we might see whether there are circumstances which would justify us in interfering under our powers of revision. Having heard the whole evidence, we think there is nothing in this case which would justify our interference.

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There has been no irregularity in procedure, and we think that the Magistrate has arrived at a right conclusion on the facts of the case.

Much has been made of the fact that the witnesses for the prosecution were persons interested in getting a conviction. In cases of this kind it is impossible to put forward witnesses who are not in some degree interested. That circumstance would render it necessary for the Magistrate to examine the evidence for the prosecution carefully, but it is not a circumstance which would prevent a conviction.

It appears from the evidence in the case that there was found in the room of the accused a book containing memoranda of sales of liquors. This book was given in evidence, and in the affidavit used before us on behalf of the accused and made by a person who was in Court during the time, the deponent speaks of Mr. Siddons having said in his evidence that he found this book in the room of the accused. The book which was produced contains a number of entries purporting to be entries of the sale of liquor by retail. It was suggested by the learned pleader for the appellant that possibly that was a book recording a series of purchases. We think that the only possible inference is that it is an account of sales by retail. People do not purchase by retail in order to sell wholesale. The circumstance that an account of this kind containing a number of sales of liquor by retail is found in the room of a person who has only got a license to sell wholesale, to some extent supports the evidence for the prosecution. It shows that he was in the habit of doing an act which the prosecution in this case are charging him with doing. Moreover, on the question of punishment, it is evidence which the Magistrate is not only entitled to look at, but to consider to the fullest extent. On the facts, therefore, we see no reason to interfere.

There is one more question to consider. It has been argued that the Magistrate has no power to give imprisonment in this case. The Excise Act (Beng. Aft VII. of 1878), s. 74, under which this prosecution was instituted, provides: "Whenever any person is convicted of an offence against the provisions of this Aft, punishable with a fine of two hundred rupees or upwards, after having been previously convicted of a like offence, he shall be liable, in addition to the penalty attached to such offence, to imprisonment for a period not exceeding six months." It is in evidence that the appellant was, on the 18th May 1886, convicted of the offence of selling two dozens of claret without a license under the provisions of this same Aft.

¹ I. L. R., 6 Cal. 575.

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The question before us is, whether the selling of wine without a license is an offence like to that of selling wine by retail, when the vendor has got a wholesale license only. That question is concluded by the decision to which we have referred in the case of *Ram Chunder Shaw v. The Empress*.¹ Morris and Prinsep, JJ., there said this: "It appears to us, however, that the section contemplates merely that the offender having been already convicted of an offence punishable with fines of Rs. 200 or upwards should be again convicted of another offence punishable with the same punishment, and that this is the correct interpretation to be put on the term, 'like offence.'"

That decision is an authority for saying that the Magistrate was right in the view that he took of the law. We agree with the decision, and we think that the offence of selling wine by retail, with a wholesale license, is an offence like to the offence of selling wine without a license at all; it is equally the offence of selling wine without having a license so to sell it.

It remains only to consider the question of punishment. We do not think that under the circumstances there is anything excessive in the punishment.

In the result we dismiss the appeal and decline to interfere.

H. T. H.

Appeal dismissed.

I. L. R., 6 Cal. 575.

DIGEST OF CRIMINAL CASES.

A.

Abatement of a Nuisance—

See PUBLIC NUISANCE.

Abetment of Abetment—

ABETMENT OF ABETMENT—*Property removed with criminal intent, but with consent of owner—Penal Code (Act XLV. of 1860), s. 108, expls. 2, 4; s. 378, expl.]* A sought the aid of B with the intention of committing a theft of the property of B's master. B, with the knowledge and consent of his master, and for the purpose of procuring A's punishment, aided A in carrying out his object. On the prosecution of A for theft, *held* that, as the property removed was so taken with the knowledge of the owner, the offence of theft had not been committed. *Held*, further, it is not necessary to an indictment for the abetment of an abetment of an offence to show that such offence was actually committed.—*Empress v. Troylukho Nath Chowdhry*, I. L. R., 4 Cal. 366 [see p. 173 of this book].

Abetment of Bigamy—

See BIGAMY.

Abetment of Criminal Trespass—

See CRIMINAL TRESPASS, 3.

Abetment of Extortion—

See EXTORTION.

Abetment of Grievous Hurt during Riot—

See SENTENCE, 7.

Abetment of Kidnapping—

See KIDNAPPING, 1.

Abetment of Offence under Indian Ports Act—

See MASTER AND SERVANT.

Absonding Accused—

Deposition in the Case of an. See EVIDENCE, 6.

Absence—

Of Accused; Examination of Witnesses in. See EVIDENCE, 3.

Of Complainant in Warrant-case. See DISCHARGE, 6.

Of Entry in Book irrelevant. See RIGHT OF REPLY, 2.

Accomplice—

See JURY, 6.

„ PARDON, 1.

Acknowledgment in Khata-book:

See STAMP, 4.

Acquittal—

1. **ACQUITTAL—***High Courts' Procedure Act (X. of 1875), s. 147—Presidency Magistrates' Act (IV. of 1877), s. 181—Calcutta Municipal Act (Beng. Act IV. of 1876), ss.*

Acquittal (contd.)—

75-79.] The powers of interference given to the High Court by s. 147 of the High Courts' Criminal Procedure Act were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured.—*Corporation of Calcutta v. Bheecunram Napit, alias Bicchum Napit*, I. L. R., 2 Cal. 290 [see p. 42 of this book].

2. **ACQUITTAL—***Criminal Procedure Code (Act X. of 1882), ss. 248, 259, 345, 437—Further inquiry, Power of District Magistrate to direct—“Subordinate Magistrate”—Compoundable offence.]* A criminal charge under s. 448 of the Penal Code having been instituted, the accused was sent up by the police before a Deputy Magistrate of the first class. Previous to any evidence being taken, the complainant intimated to the Magistrate that the case had been amicably settled, and that he did not wish to proceed further in the matter, upon which the Magistrate recorded an order: “Compromised; defendant acquitted.” Subsequently, the Magistrate of the district, relying upon ss. 248 and 259, and professing to act under s. 437 of the Criminal Procedure Code, directed the Deputy Magistrate to send up the parties, and proceed regularly with the case. *Held* that ss. 248 and 259 had no bearing on the case, and that the mere fact of the accused having been sent up by the police did not prevent the offence, which was legally compoundable, from being compromised, and that consequently the order of the Deputy Magistrate was perfectly correct and legal. *Held* further that, in addition to the Magistrate's order not being warranted by the fact, it was *ultra vires*, inasmuch as the Deputy Magistrate was a Magistrate of the first class, and not “inferior” to the District Magistrate; and to give the District Magistrate jurisdiction to call for a record under s. 435 from another Magistrate, and to act under s. 437, the latter must be inferior. *Nobin Kristo Mookerjee v. Rusick Lall Laha* (I. L. R., 10 Cal. 268) followed.—*Queen-Empress v. Nowab Jan*, I. L. R., 10 Cal. 551 [see p. 543 of this book].

Acquittal—

Accused may be compensated in a Case of. See COMPENSATION.

Appeal by Government from an Order of, in a Case tried by jury. See APPEAL BY LOCAL GOVERNMENT, 2.

Appeal from Judgment of. See APPEAL, 1.

By Assistant Magistrate afterwards invested with First-class Powers. See JURISDICTION, 3.

Acquittal (contd.)—

High Court as a Court of Revision will not interfere with an Order of. See REVISION, 2.

When Order of, does not operate as an. See DISMISSAL OF COMPLAINT, 1.

Judge disagreeing with Verdict of. See FALSE EVIDENCE, 8.

Time for Appeal by Government from Order of. See APPEAL BY LOCAL GOVERNMENT, 1.

Verdict of, by Jury. See JURY, 1, 2.

Actual Possession—

See POSSESSION, 13, 16.

Act VI. of 1835 (Khasi Hills and Cachar)—

See JURISDICTION OF HIGH COURT, 1.

Act XXXVII. of 1855 (Santhal Districts)—

S. 4, cl. d. See REVISION, 4.

Act XXI. of 1856—

See SUMMARY TRIAL, 1.

Act I. of 1859 (Merchant Seamen)—

S. 83. See MERCHANT SEAMEN'S ACT.

Act XLV. of 1860 (Penal Code)—

S. 11. See SANCTION TO PROSECUTE, 1.

S. 21. See ILLEGAL GRATIFICATION, 1.

 " PUBLIC SERVANT, 2.

 " SANCTION TO PROSECUTE, 1.

S. 24. See FORGED DOCUMENT, 2.

S. 25. See FORGED DOCUMENT, 2.

S. 34. See REFRESHING WITNESS'S MEMORY, 2.

S. 52. See DEFAMATION.

 " RASH AND NEGLIGENT ACT.

S. 71. See SENTENCE, 3, 6.

S. 75. See PREVIOUS CONVICTION, 2.

 " SENTENCE, 5.

S. 88. See RASH AND NEGLIGENT ACT, 2.

S. 97. See RIOTING, 2.

S. 103. See RIOTING, 2.

S. 104. See RIOTING, 2.

S. 105. See RIOTING, 2.

S. 108. See ABETMENT OF ABETMENT.

S. 109. See APPEAL, 5.

 " BIGAMY.

 " FALSE CHARGE, 2.

 " KIDNAPPING, 1.

 " PUBLIC SERVANT, 2.

S. 114. See CONFESSION, 7.

 " DISCHARGE, 5.

S. 141. See MANDAMUS.

 " POSSESSION, 2.

 " RIOTING, 2.

S. 143. See SENTENCE, 4.

 " SUMMARY TRIAL, 2.

 " UNLAWFUL ASSEMBLY.

S. 144. See SENTENCE, 6.

 " SUMMARY TRIAL, 2.

S. 146. See SUMMARY TRIAL, 7.

Act XLV. of 1860 (Penal Code) (contd.)—

S. 147. See POSSESSION, 2.

 " RIOTING, 2.

 " SENTENCE, 2, 4, 6, 7.

S. 148. See CONFESSION, 8.

 " SENTENCE, 2, 3, 6.

S. 149. See CONFESSION, 7, 8.

 " JURY, 4.

 " REFRESHING WITNESS'S MEMORY, 2.

 " SENTENCE, 3.

S. 156. See RIOTING, 1.

S. 161. See ILLEGAL GRATIFICATION.

S. 165. See ILLEGAL GRATIFICATION, 2.

S. 167. See SEPARATE TRIAL, 1.

S. 173. See SUMMONS.

S. 176. See CAUSING DISAPPEARANCE OF EVIDENCE.

S. 177. See FALSE INFORMATION, 4.

S. 179. See SENTENCE, 5.

S. 182. See FALSE CHARGE, 1.

 " FALSE INFORMATION, 2, 3.

 " SANCTION TO PROSECUTE, 3.

S. 183. See PUBLIC SERVANT, 3.

S. 188. See DISOBEDIENCE OF ORDER, 1, 2.

 " POSSESSION, 18.

 " PUBLIC NUISANCE, 18.

S. 191. See FALSE EVIDENCE, 4, 8.

S. 192. See FALSE EVIDENCE, 2.

S. 193. See FALSE EVIDENCE, 5-8.

S. 196. See SANCTION TO PROSECUTE, 15.

S. 199. See FALSE EVIDENCE, 7.

S. 201. See CAUSING DISAPPEARANCE OF EVIDENCE.

 " FALSE INFORMATION, 1.

S. 210. See FRAUDULENT EXECUTION OF DECREE.

 " SANCTION TO PROSECUTE, 12.

S. 211. See FALSE CHARGE, 1-11.

 " SANCTION TO PROSECUTE, 3, 5, 7, 14.

S. 217. See PUBLIC SERVANT, 1.

S. 218. See PUBLIC SERVANT, 1.

S. 221. See SANCTION TO PROSECUTE, 5.

S. 223. See ESCAPE, 2.

S. 224. See ESCAPE, 1.

S. 225. See ESCAPE, 1.

S. 268. See PUBLIC NUISANCE, 1.

S. 277. See PUBLIC SPRING.

S. 282. See PUBLIC NUISANCE, 1.

S. 283. See PUBLIC NUISANCE, 1.

S. 290. See PUBLIC NUISANCE, 1.

S. 292. See TRANSFER OF CASE, 3.

S. 294. See TRANSFER OF CASE, 3.

S. 300. See CHARGE, 3.

 " CULPABLE HOMICIDE, 2, 4.

 " PLEA OF GUILTY.

S. 302. See CONFESSION, 7, 8.

 " JURY, 9.

 " PLEA OF GUILTY.

S. 304. See CULPABLE HOMICIDE, 1, 3.

Act XLV. of 1860 (Penal Code)
(*contd.*)—

- S. 304. See JURY, 9.
- S. 304A. See CULPABLE HOMICIDE, 1, 3.
" FALSE CHARGE, 7.
" RASH AND NEGLIGENT ACT.
- S. 323. See SENTENCE, 7.
- S. 324. See CONFESSION, 8.
" SENTENCE, 2, 3, 4, 6.
- S. 325. See JURY, 4, 9.
" SENTENCE, 7.
- S. 326. See CONFESSION, 8.
- S. 330. See ENHANCEMENT OF SENTENCE.
- S. 331. See JURISDICTION, 4.
- S. 336. See CULPABLE HOMICIDE, 1.
- S. 337. See CULPABLE HOMICIDE, 1.
- S. 338. See CULPABLE HOMICIDE, 1.
- S. 341. See MISCHIEF, 1.
- S. 342. See FALSE CHARGE, 9.
- S. 346. See WRONGFUL CONFINEMENT.
- S. 347. See FALSE CHARGE, 9.
- S. 353. See SENTENCE, 4.
- S. 361. See KIDNAPPING, 2.
- S. 363. See KIDNAPPING, 1.
- S. 366. See KIDNAPPING, 2.
- S. 372. See DISCHARGE, 5.
- S. 378. See ABETMENT OF ABETMENT.
- S. 379. See FISHERY.
" SUMMARY TRIAL, 4.
- S. 380. See DISCHARGE, 3.
- S. 384. See EXTORTION.
- S. 411. See COMMITMENT, 2.
" SEVERAL OFFENCES.
" STOLEN PROPERTY.
- S. 413. See SEVERAL OFFENCES.
- S. 417. See ATTEMPT TO CHEAT.
" JURISDICTION, 6.
" SUMMARY TRIAL, 4.
- S. 420. See JURISDICTION, 6.
- S. 425. See MISCHIEF, 1, 2.
" POSSESSION, 2.
- S. 427. See SUMMARY TRIAL, 2.
- S. 441. See CRIMINAL TRESPASS, 4.
- S. 447. See CRIMINAL TRESPASS, 1, 2.
" FISHERY.
" SUMMARY TRIAL, 4, 7.
- S. 448. See ACQUITTAL, 2.
- S. 456. See CRIMINAL TRESPASS, 4.
- S. 457. See APPEAL, 5.
- S. 464. See FORGED DOCUMENT, 2.
" FORGERY, 2.
- S. 464, cl. 2. See FALSE EVIDENCE, 2.
- S. 465. See FORGERY, 1.
- S. 466. See FORGERY, 3.
" SEPARATE TRIAL, 1.
- S. 467. See FORGED DOCUMENT, 2.
- S. 471. See FORGED DOCUMENT, 1, 2.
" SEPARATE TRIAL, 1.
- S. 479. See DISCHARGE, 5.
- S. 494. See BIGAMY.
- S. 497. See ADULTERY.
- S. 498. See ADULTERY.
" DISCHARGE, 5.

Act XLV. of 1860 (Penal Code)
(*contd.*)—

- S. 499. See DEFAMATION.
- S. 503. See CRIMINAL INTIMIDATION.
- S. 511. See FORGERY, 1.
" SENTENCE, 5.

Act V. of 1861 (Police)—
See FALSE EVIDENCE, 1.
" POLICE ACT.

Act XVII. of 1862 (Repealing Law)—
See GENERAL CLAUSES ACT.

Act XVIII. of 1862 (Crim. Pro., Supreme Courts)—
Ss. 26, 27. See DEFAMATION.

Act VI. of 1863 (B.C.) (Calcutta Municipality)—
Ss. 109, 110. See MUNICIPAL OFFENCES.

Act III. of 1864 (B.C.) (Mofussil Municipality)—
Ss. 2, 10, 11, 13, 15, 16, 57, 58. See MUNICIPAL OFFENCES, 1.

Act II. of 1867 (B.C.) (Gambling)—
See GAMBLING.

Act XIV. of 1868 (Contagious Diseases)—
Ss. 11, 21. See CONTAGIOUS DISEASES ACT.

Act VIII. of 1869 (B.C.) (Landlord and Tenant)—
S. 53. See EJECTMENT.

Act XVIII. of 1869 (Stamp)—
See STAMP, 1, 2.

Act XXII. of 1869 (Garo Hills)—
S. 9. See JURISDICTION OF HIGH COURT, 1, 2.

Act I. of 1871 (Cattle-trespass)—
See CATTLE-TRESPASS ACT.
" JURY, 3.

Act IX. of 1871 (Limitation)—
S. 5, cl. b, Sch. II., art. 153. See APPEAL BY LOCAL GOVERNMENT, 1.

Act I. of 1872 (Evidence)—
S. 5. See ILLEGAL GRATIFICATION, 2.
S. 6. See EVIDENCE, 5.
S. 8, ill. g. See EVIDENCE, 5.
S. 13. See ILLEGAL GRATIFICATION, 2.
S. 14. See ILLEGAL GRATIFICATION, 2.
S. 21. See CONFESSION, 15.
S. 24. See CONFESSION, 10.
S. 25. See ADMISSION.
" CONFESSION, 1.
S. 26. See ADMISSION.
" CONFESSION, 1, 15.
S. 27. See CONFESSION, 12.
S. 30. See CONFESSION, 3, 7, 8.
S. 32, cl. 1. See EVIDENCE, 4.

Act I. of 1872 (Evidence) (ctd.)—

- S. 33. See CONFESSION, 6.
- " EVIDENCE, 2, 3, 4.
- S. 34. See RIGHT OF REPLY, 2.
- S. 47. See SECURITY TO KEEP THE PEACE, 1.
- S. 50. See ADULTERY, 1.
- S. 54. See PREVIOUS CONVICTION, 1, 2.
- S. 80. See CONFESSION, 15.
- " EVIDENCE, 7.
- S. 91. See DISCHARGE, 9.
- " FALSE EVIDENCE, 3.
- S. 105. See DEFAMATION.
- S. 124. See INQUIRY INTO CAUSE OF DEATH.
- S. 138. See CONFESSION, 7.
- S. 165. See CROSS-EXAMINATION.
- S. 167. See CONFESSION, 1.

Act IX. of 1872 (Contract)—

- Ss. 74, 76, 108. See GOVERNMENT CURRENCY NOTE.

Act X. of 1872 (Crim. Pro. Code)—

- S. 4. See CHARGE, 1.
- " SUMMARY TRIAL, 1.
- S. 8. See SUMMARY TRIAL, 1.
- S. 36. See APPEAL, 5.
- " SENTENCE, 1.
- S. 48. See TRANSFER OF CASE, 5.
- S. 50. See POSSESSION, 3.
- S. 56. See TRANSFER OF MAGISTRATE.
- S. 64. See JURISDICTION, 2.
- " TRANSFER OF CASE, 1, 4.
- S. 66. See STOLEN PROPERTY, 1.
- S. 70. See JURISDICTION, 4.
- S. 82. See EUROPEAN BRITISH SUBJECT.
- S. 84. See EUROPEAN BRITISH SUBJECT.
- S. 90. See INFORMATION TO POLICE.
- S. 118. See FALSE EVIDENCE, 4.
- S. 119. See FALSE EVIDENCE, 4.
- " REFRESHING WITNESS'S MEMORY, 1.
- " STATEMENTS TO POLICE DURING INVESTIGATION, 1.
- S. 120. See MAINTENANCE, 6.
- S. 122. See CHARGE, 2.
- " CONFESSION, 4, 5, 6.
- S. 126. See REFRESHING WITNESS'S MEMORY, 1.
- S. 127. See INQUIRY INTO CAUSE OF DEATH.
- S. 133. See INQUIRY INTO CAUSE OF DEATH.
- S. 135. See INQUIRY INTO CAUSE OF DEATH.
- S. 142. See SANCTION TO PROSECUTE, 2.
- S. 144. See FALSE CHARGE, 8.
- S. 147. See FALSE CHARGE, 8.
- S. 148. See SUMMARY TRIAL, 1, 7.
- S. 149. See SUMMARY TRIAL, 1, 7.
- S. 154. See HOSTILE WITNESS.
- S. 193. See APPEAL, 3.
- " CONFESSION, 5.
- S. 195. See DISCHARGE, 3.

Act X. of 1872 (Crim. Pro. Code) (contd.)—

- S. 211. See COMPENSATION.
- S. 215. See DISCHARGE, 2.
- " WITNESSES FOR PROSECUTION, 1.
- S. 217. See WITNESSES FOR PROSECUTION, 2.
- S. 218. See WITNESSES FOR PROSECUTION, 2.
- S. 219. See POSSESSION, 2.
- S. 220. See CHARGE, 1.
- S. 221. See CHARGE, 1.
- S. 222. See SUMMARY TRIAL, 1.
- " TRANSFER OF MAGISTRATE.
- S. 227, cl. h. See REASONS FOR CONVICTION.
- S. 231. See JURISDICTION, 1.
- S. 237. See CHARGE, 2.
- " FALSE CHARGE, 7.
- S. 240. See REFRESHING WITNESS'S MEMORY, 2.
- S. 243. See SEPARATE CHARGES, 2.
- S. 250. See SEPARATE CHARGES, 2.
- S. 263. See APPEAL, 1.
- " JURY, 1, 2, 4, 5.
- S. 264. See SEPARATE CHARGES, 2.
- S. 265. See SEPARATE CHARGES, 2.
- S. 272. See APPEAL, 1.
- " APPEAL BY LOCAL GOVERNMENT, 1.
- " ARREST PENDING APPEAL.
- S. 283. See DISCHARGE, 5.
- " SEVERAL OFFENCES.
- S. 294. See DISCHARGE, 1.
- " REVISION, 1.
- S. 295. See DISCHARGE, 1, 3, 4.
- " RECORD OF INFERIOR COURT, 1.
- " REFERENCE TO HIGH COURT.
- S. 296. See DISCHARGE, 1, 3, 5.
- " INQUIRY INTO CAUSE OF DEATH.
- " REFERENCE TO HIGH COURT.
- " REVISION, 2.
- S. 297. See DISCHARGE, 1, 4.
- " PUBLIC NUISANCE, 17.
- " REFERENCE TO HIGH COURT.
- " REVISION, 1.
- S. 314. See SENTENCE, 3.
- S. 323. See REFRESHING WITNESS'S MEMORY, 2.
- " STATEMENTS TO POLICE DURING INVESTIGATION, 1.
- S. 324. See CONFESSION, 2.
- S. 337. See PARDON, 2.
- S. 338. See PARDON, 2.
- S. 346. See CHARGE, 2.
- " CONFESSION, 2, 4, 5, 6, 9.
- S. 349. See PARDON, 1.
- S. 359. See POSSESSION, 2.
- " WITNESSES FOR DEFENCE, 1.
- S. 362. See POSSESSION, 2.

Act X. of 1872 (Crim. Pro. Code)
(*contd.*)—

- S. 418. See GOVERNMENT CURRENCY NOTE.
- S. 419. See GOVERNMENT CURRENCY NOTE.
- S. 426. See LUNATIC.
- S. 432. See LUNATIC.
- S. 445. See SEPARATE TRIAL, 1.
- S. 446. See SEPARATE TRIAL, 1.
- S. 450. See SANCTION TO PROSECUTE, 2.
- S. 452. See JOINDER OF CHARGES, 1.
- S. 453. See JOINDER OF CHARGES, 1.
 " SEPARATE TRIAL, 1.
 " SEVERAL OFFENCES.
- S. 454. See SENTENCE, 3.
 " SEPARATE TRIAL, 2.
- S. 454. *ill. f.* See SENTENCE, 2.
- S. 455. See JOINDER OF CHARGES, 1.
- S. 457. See JURY, 4.
- S. 467. See APPEAL, 3.
- S. 468. See FALSE CHARGE, 8.
 " SANCTION TO PROSECUTE, 2,
 4, 7.
- S. 470. See FALSE CHARGE, 8.
 " SANCTION TO PROSECUTE, 2.
- S. 471. See APPEAL, 3.
 " FALSE CHARGE, 1, 8.
 " FALSE EVIDENCE, 1.
 " JURISDICTION, 1.
- S. 472. See JURISDICTION, 1.
- S. 491. See POSSESSION, 9.
 " SECURITY TO KEEP THE
 PEACE, 1.
- S. 492. See RECOGNIZANCE, 3.
- S. 502. See RECOGNIZANCE, 2.
- S. 504. See SECURITY FOR GOOD BEHAVIOUR, 3.
- S. 505. See SECURITY FOR GOOD BEHAVIOUR, 1, 2, 3.
- S. 506. See SECURITY FOR GOOD BEHAVIOUR, 2.
- S. 518. See PUBLIC NUISANCE, 1-17.
- S. 521. See PUBLIC NUISANCE, 3, 4.
- S. 523. See PUBLIC NUISANCE, 3.
- S. 526. See BAIL.
- S. 526A. See BAIL.
- S. 530. See POSSESSION.
- S. 532. See POSSESSION.
 " PUBLIC NUISANCE, 3.
 " SEPARATE CHARGES, 1.
- S. 536. See MAINTENANCE, 4.
- S. 553. See SEPARATE CHARGES, 1.
- S. 554. *ill. b.* See SEPARATE CHARGES, 1.
- S. 555. See SEPARATE CHARGES, 1.
- S. 579. See ARMS ACT.
- Ch. 18. See APPEAL, 4.
- Ch. 41. See MAINTENANCE.
- Sch. IV. See ARMS ACT.

Act XI. of 1874 (Amending Crim. Pro. Code)—

- S. 23. See APPEAL BY LOCAL GOVERNMENT, 1.

Act XIV. of 1874 (Scheduled Districts)—

- See REVISION, 4.

Act X. of 1875 (Crim. Pro., High Court)—

- S. 14. See COMMITMENT, 1.
- S. 76. See COMMISSION, 2.
 " EVIDENCE, 2.
- S. 147. See ACQUITTAL, 1.
 " COMMITMENT, 1.
 " DISMISSAL OF COMPLAINT, 1.
 " MANDAMUS.
 " MUNICIPAL OFFENCES, 2.
 " TRANSFER OF CASE, 2, 3.

Act XII. of 1875 (Ports and Port-dues)—

- S. 22. See MASTER AND SERVANT.

Act XVII. of 1875 (Burma Courts)—

- See JURISDICTION, 2.
- " JURY, 8.
- " MASTER AND SERVANT.
- " TRANSFER OF CASE, 6.

Act IV. of 1876 (B. C.) (Calcutta Municipality)—

- Ss. 75, 77, 78, 79, 346, 351. See MUNICIPAL OFFENCES, 2.
- Ss. 75, 79. See ACQUITTAL, 1.
- S. 77. See MUNICIPAL OFFENCES, 3.
- S. 248. See MUNICIPAL OFFENCES, 4.

Act V. of 1876 (B. C.) (Mofussil Municipalities)—

- Ss. 180, 215, 216. See MUNICIPAL OFFENCES, 5.
- S. 256. See DISOBEDIENCE OF ORDER, 2.

Act I. of 1877 (Specific Relief)—

- Ss. 7, 45. See COPIES OF DEPOSITIONS.

Act III. of 1877 (Registration)—

- See REGISTRATION ACT.
- " REVISION, 3.
- " SANCTION TO PROSECUTE, 9.

Act IV. of 1877 (Presidency Magistrates)—

- S. 39. See SANCTION TO PROSECUTE, 1.
- S. 41. See APPEAL, 2.
 " SANCTION TO PROSECUTE, 6.
- S. 42. See SANCTION TO PROSECUTE, 6.
- S. 43. See SANCTION TO PROSECUTE, 6.
- S. 82. See REVIVAL OF PROSECUTION.
- S. 86. See REVIVAL OF PROSECUTION.
- S. 87. See REVIVAL OF PROSECUTION.
- S. 124. See DISMISSAL OF COMPLAINT, 1.
- S. 158. See EVIDENCE, 2.
- S. 167. See COPIES OF DEPOSITIONS.
- S. 168. See SANCTION TO PROSECUTE, 6.
- S. 170. See COPIES OF DEPOSITIONS.
- S. 181. See ACQUITTAL, 1.
- S. 234. See MAINTENANCE, 2, 3.
- S. 235. See MAINTENANCE, 3.
- S. 240. See SANCTION TO PROSECUTE, 1.

Act X. of 1877 (Civil Pro. Code)—
Ss. 178, 182, 183, 647. See FALSE EVIDENCE, 3.

Act VII. of 1878 (B. C.) (Excise)—
See CANTONMENTS ACT.
» EXCISE.
» REASONS FOR CONVICTION.

Act XI. of 1878 (Arms)—
See ARMS ACT.

Act I. of 1879 (Stamp)—
See STAMP, 3, 4.

Act IV. of 1879 (Railway)—
See RAILWAY ACT.

Act XVIII. of 1879 (Legal Practitioners)—
See LEGAL PRACTITIONERS ACT.

Act XXI. of 1879 (Foreign Jurisdiction and Extradition)—
See JURISDICTION, 4.

Act III. of 1880 (Cantonments)—
See CANTONMENTS ACT.

Act VII. of 1880 (Merchant Shipping)—
See MERCHANT SEAMEN'S ACT.

Act IV. of 1881 (B.C.) (Amending Bengal Excise Act)—
See REASONS FOR CONVICTION.

Act VIII. of 1882 (Amending Penal Code)—
See SENTENCE, 4, 6.

Act X. of 1882 (Crim. Pro. Code)—

- S. 1. See CONFESSION, 1.
- S. 5. See CONTEMPT OF COURT.
- S. 30. See JURISDICTION, 5.
- S. 34. See JURISDICTION, 5.
- S. 35. See SENTENCE, 6.
- S. 45. See CAUSING DISAPPEARANCE OF EVIDENCE.
- S. 94. See INSPECTION OF DOCUMENTS.
- S. 106. See RECOGNIZANCE.
» SECURITY TO KEEP THE PEACE, 2.
- S. 107. See RECOGNIZANCE.
- S. 109. See SECURITY FOR GOOD BEHAVIOUR, 4.
- S. 110. See SECURITY FOR GOOD BEHAVIOUR, 4, 5, 6.
- S. 112. See SECURITY FOR GOOD BEHAVIOUR, 4, 6.
- S. 118. See SECURITY FOR GOOD BEHAVIOUR, 5.
- S. 123. See SECURITY FOR GOOD BEHAVIOUR, 5.
- S. 133. See PUBLIC NUISANCE, 6-14.
- S. 134. See PUBLIC NUISANCE, 7, 18.
- S. 135. See PUBLIC NUISANCE, 7, 10.
- S. 136. See PUBLIC NUISANCE, 7.
- S. 137. See PUBLIC NUISANCE, 14.

Act X. of 1882 (Crim. Pro. Code)
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- S. 138. See PUBLIC NUISANCE, 8.
- S. 139. See PUBLIC NUISANCE, 8.
- S. 144. See PUBLIC NUISANCE, 15-19.
- S. 145. See POSSESSION, 12-25.
- S. 147. See POSSESSION, 26.
- S. 161. See FALSE EVIDENCE, 5, 8.
» STATEMENTS TO POLICE DURING INVESTIGATION, 2.
- S. 163. See CONFESSION, 10.
- S. 164. See CONFESSION, 13, 15.
- S. 172. See STATEMENTS TO POLICE DURING INVESTIGATION, 2.
- S. 178. See TRANSFER OF CASE, 6.
- S. 182. See JURISDICTION, 7.
- S. 191. See COMPLAINT.
» FALSE CHARGE, 11.
- S. 195. See FALSE INFORMATION, 2.
» SANCTION TO PROSECUTE.
- S. 197. See SANCTION TO PROSECUTE, 1.
- S. 200. See DISMISSAL OF COMPLAINT, 2.
- S. 202. See COMPLAINT.
- S. 203. See COMPLAINT.
» DISMISSAL OF COMPLAINT, 2.
- S. 209. See JURISDICTION, 5.
- S. 211. See STATEMENTS TO POLICE DURING INVESTIGATION, 2.
- S. 221. See CHARGE, 4.
- S. 233. See FALSE EVIDENCE, 6.
» SEPARATE TRIAL, 3.
- S. 234. See IRREGULARITY, 4.
» SEPARATE TRIAL, 3.
- S. 235. See SENTENCE, 4.
- S. 239. See JURISDICTION, 6.
- S. 247. See JOINDER OF CHARGES, 2.
- S. 248. See ACQUITTAL, 2.
- S. 253. See JOINDER OF CHARGES, 2.
» DISCHARGE, 6, 8.
- S. 257. See WITNESSES FOR DEFENCE, 2.
- S. 259. See ACQUITTAL, 2.
» DISCHARGE, 6.
- S. 260. See SUMMARY TRIAL, 3, 7.
- S. 271. See PLEA OF GUILTY.
- S. 289. See RIGHT OF REPLY, 1-3.
- S. 290. See RIGHT OF REPLY, 1.
- S. 292. See RIGHT OF REPLY, 2.
- S. 298. See JURY, 10.
- S. 299. See PLEA OF GUILTY.
- S. 303. See RIGHT OF REPLY, 1.
- S. 307. See JURY, 9, 11.
» RIGHT OF REPLY, 1.
- S. 309. See ASSESSORS.
- S. 310. See PREVIOUS CONVICTION, 2.
- S. 342. See RIGHT OF REPLY, 1.
- S. 344. See BAIL.
- S. 345. See ACQUITTAL, 2.
» FALSE CHARGE, 9.
- S. 349. See COMMITMENT, 2.
- S. 360. See DISCHARGE, 9.
- S. 364. See CONFESSION, 13, 15.
- S. 367. See JUDGMENT.
- S. 369. See REVIEW OF JUDGMENT.

Act X. of 1882 (Crim. Pro. Code)
(*contd.*)—

- S. 370. See SUMMARY TRIAL, 5, 6.
- S. 408. See APPEAL, 5.
- S. 411. See EXCISE, 8.
- S. 417. See APPEAL BY LOCAL GOVERNMENT, 2.
- " PROPERTY.
- S. 418. See APPEAL BY LOCAL GOVERNMENT, 2.
- S. 423. See APPEAL BY LOCAL GOVERNMENT, 2.
- " ENHANCEMENT OF SENTENCE.
- " SECURITY TO KEEP THE PEACE, 2.
- S. 424. See JUDGMENT.
- S. 426. See JUDGMENT.
- S. 435. See DISCHARGE, 7.
- " RECORD OF INFERIOR COURT, 2.
- " REVISION, 3-5.
- S. 437. See ACQUITTAL, 2.
- " DISCHARGE, 7, 8.
- " DISMISSAL OF COMPLAINT, 2.
- " FURTHER INQUIRY, 1-3.
- " SUMMARY TRIAL, 4, 5.
- S. 439. See ENHANCEMENT OF SENTENCE.
- " SANCTION TO PROSECUTE, 14.
- S. 476. See SANCTION TO PROSECUTE, 14.
- S. 487. See SANCTION TO PROSECUTE, 12, 15.
- S. 488. See MAINTENANCE, 5, 6.
- S. 489. See MAINTENANCE, 5.
- S. 503. See COMMISSION, 3.
- S. 510. See REPORT OF ADDITIONAL CHEMICAL EXAMINER.
- S. 512. See EVIDENCE, 6.
- S. 514. See SECURITY TO PRODUCE PERSON BEFORE POLICE.
- S. 531. See JURISDICTION, 7.
- S. 533. See CONFESSION, 13, 15.
- S. 537. See IRREGULARITY, 4, 5.
- " SEPARATE TRIAL, 3.
- S. 540. See RIGHT OF REPLY, 3.
- S. 551. See UNLAWFUL DETENTION.
- S. 555. See FALSE EVIDENCE, 6.
- " IRREGULARITY, 2.
- Ch. XIV. See STATEMENTS TO POLICE DURING INVESTIGATION.
- Ch. XXXII. See REVISION, 4.
- Sch. V., No. XXVIII., II. (4). See FALSE EVIDENCE, 6.

Act XIV. of 1882 (Civil Pro. Code)—

- S. 37. See LEGAL PRACTITIONERS ACT, 2.
- S. 258. See FRAUDULENT EXECUTION OF DECREE.

Addition—

- Of Charge at Session. See EVIDENCE, 4.
- To Existing Embankment. See EMBANKMENT.

Additional Charges—

See REASONS FOR CONVICTION, 2.

Additional Chemical Examiner—

See REPORT OF ADDITIONAL CHEMICAL EXAMINER.

Admiralty Courts—

See MERCHANT SHIPPING ACT.

Admissibility of Secondary Evidence of Confession—

See CONFESSION, 4.

Admission—

ADMISSION—*Admission made to police-officer before arrest—Evidence Act (I. of 1872), ss. 25, 26.* An admission made by an accused person to a police-officer before arrest is admissible in evidence.—*Empress v. Dabee Pershad*, I. L. R., 6 Cal. 530 [see p. 291 of this book].

See CONFESSION, 14.

Adultery—

1. ADULTERY—*Evidence of Marriage—Evidence Act (I. of 1872), s. 50.* The provisions of s. 50 of the Evidence Act show that, where marriage is an ingredient in an offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved. *Queen v. Wazira* (8 B. L. R. App. 63) overruled.—*Empress v. Pitambur Singh*, I. L. R., 5 Cal. 566 [see p. 235 of this book].

2. ADULTERY—*Penal Code (Act XLV. of 1860), ss. 497, 498—Marriage insufficiently proved—Discharge of accused—Re-trial ordered—Wife ordered to be examined on re-trial.* In an inquiry into a case of alleged adultery, and enticing away a married woman for illicit purposes, the complainant refused to examine his wife as to the marriage. The Deputy Magistrate declined to frame a charge, and discharged the accused. The Sessions Judge directed a re-trial to be held by another Deputy Magistrate, and ordered that the evidence of the wife should be taken as to the marriage. *Held* that the Sessions Judge, in ordering a re-trial, had not exercised a proper discretion, he having admitted that the prosecution had failed to prove the marriage, and it had not been alleged that any evidence was tendered by the prosecution, and not taken by the Deputy Magistrate.—*Chunder Nath Ghose v. Nundololl Chatterji*, I. L. R., 11 Cal. 81 [see p. 597 of this book].

See PLEA OF GUILTY.

Advocate-General—

Case certified by. See MERCHANT SHIPPING ACT.

Right of, to conduct Prosecution. See CONDUCT OF PROSECUTION.

Affidavit affirmed before Deputy Magistrate—

See FALSE EVIDENCE, 7.

Affray—

See JURY, 8.

Agent of Landowner to give Information of Sudden Death—

See INFORMATION TO POLICE.

Amendment of Charge—

See SANCTION TO PROSECUTE, 2.

» SEPARATE TRIAL, 1.

Amin, Effect of Possession given by—

See POSSESSION, 4.

Animals kept without License—

See MUNICIPAL OFFENCES, 4.

Appeal—

1. **APPEAL—Criminal Procedure Code (Act X. of 1872), s. 272—Officer appointed to prefer appeal—Judgment of acquittal—Conviction on charge of murder or culpable homicide not amounting to murder—Acquittal.** On the trial by a jury of a person on a charge of murder, the jury found the accused not guilty of the offence of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he disagreed with the verdict, declined to submit the case to the High Court under s. 263 of the Criminal Procedure Code. The Local Government thereupon directed the Legal Remembrancer to appeal under s. 272 of the Code, and in pursuance of this direction an appeal was preferred by the Junior Government Pleader. *Held* that the appeal was duly made. *Held* further that a judgment passed by the Court of Session, following the verdict of a jury acquitting the prisoner, is a judgment of acquittal within the meaning of s. 272. *Held* also that, there being an acquittal on the charge of murder, the appeal lay.—*Empress of India v. Judoonath Gangooly*, I. L. R., 2 Cal. 273 [see p. 36 of this book].

2. **APPEAL—Presidency Magistrates' Act (IV. of 1877), s. 41—Prosecution—Sanction of Judge—Jurisdiction of High Court.** No appeal lies from the order of a Judge directing a prosecution under s. 41 of the Presidency Magistrates' Act.—In the Matter of the Petition of Janokey Nath Roy, I. L. R., 2 Cal. 466 [see p. 64 of this book].

3. **APPEAL—Criminal Procedure Code (Act X. of 1872), ss. 471, 467, 193—Institution of criminal prosecution pending appeal in Civil Court.** If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear grounds for believing that either the parties to the proceeding or their witnesses have committed perjury

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or any other offence against public justice, he is justified in directing criminal proceedings against such person under s. 471 of the Criminal Procedure Code without any further inquiry than that which he has already held in his own Court. As a matter of discretion and propriety, it is right for a Court, before committing a person on a charge of perjury upon his own uncontradicted statement, to await the hearing of the appeal, where an appeal is pending, in the case in which he is charged with such perjury.—In the Matter of Muttu Lall Ghose and others, I. L. R., 6 Cal. 308 [see p. 274 of this book].

4. **APPEAL—Appeal from decision of Bench of Magistrates—Summary procedure—Criminal Procedure Code (Act X. of 1872), ch. 18.** No appeal lies to a District Magistrate from the decision of a Bench of Magistrates composed of an Assistant Magistrate with second-class powers and two or more Honorary Magistrates in a case tried under ch. 18 of the Criminal Procedure Code.—In the Matter of the Petition of Havaladar Roy and another, I. L. R., 9 Cal. 96 [see p. 403 of this book].

5. **APPEAL—Practice—Repeal of Act—Appeal to High Court—Criminal Procedure Code—Act X. of 1872, s. 36—Act X. of 1882, s. 408—High Court, Revisional Jurisdiction.** On the 9th of December 1882, a person was convicted under ss. 457 and 109 of the Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate of Assam, exercising special powers under s. 36 of the old Code of Criminal Procedure (Act X. of 1872). The new Code of Criminal Procedure came into force on the 1st of January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence above mentioned on the 23rd of January 1883. *Held* by Field, J. (Mitter, J., expressing no decided opinion), that the case was governed by s. 408 of the new Code of Criminal Procedure, and that no appeal lay to the High Court. *Held* by the Court that the case was a fit one for the exercise of the High Court's revisional jurisdiction, and should be dealt with under the powers conferred on the High Court by virtue of that jurisdiction.—*Rongai v. Empress*, I. L. R., 9 Cal. 513 [see p. 485 of this book].

6. **APPEAL—Limitation Act (XV. of 1877), s. 12—Exclusion of time in obtaining copy of judgment.** Certain accused persons were convicted on the 29th February 1884, and made their first application for a copy of the judgment on the 25th March, tendering stamped paper for such copy on the 26th and 29th March. The copy was prepared on the

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30th, and the prisoners, who had been admitted to bail on the 5th March, presented their appeal on the 7th April 1884, which was rejected as being out of time. *Held* that the appeal ought to have been admitted.—In the Matter of Jhabbu Singh, I. L. R., 10 Cal. 642 [see p. 550 of this book].

Appeal—

Against Appellate Order of Acquittal by District Magistrate. See JURISDICTION OF HIGH COURT, 4.

Against Order to give Security. See SECURITY FOR GOOD BEHAVIOUR, 5.

Against Order passed by Superintendent of Tributary Mehals. See JURISDICTION OF HIGH COURT, 4.

Against Sentence of Chief Commissioner of Assam. See JURISDICTION OF HIGH COURT, 1.

Enhancement of Sentence on. See ENHANCEMENT OF SENTENCE.

Form and Contents of Judgment in a Case of. See JUDGMENT.

From Sentence of Six Months' Rigorous Imprisonment and Fine of Rs. 200. See EXCISE, 8.

Hearing of, by Judge who has granted Sanction. See SANCTION TO PROSECUTE, 12.

In Civil Court, Institution of Criminal Proceedings pending. See APPEAL, 3.

On Facts. See JURY, 3.

To Special Court at Rangoon from Sentence of Death passed by Judicial Commissioner. See JURISDICTION, 2.

Appeal by Local Government—

1. APPEAL BY LOCAL GOVERNMENT—*Criminal Procedure Code (Act X. of 1872), s. 272—Acquittal—Limitation—Act IX. of 1871, s. 5, cl. b, and Sch. II., art. 153—Act XI. of 1874, s. 23.* An appeal by the Local Government under s. 272, Criminal Procedure Code, is within time if presented within six months from the date of acquittal. The sixty days' rule does not apply.—*Empress v. Jyadulla*, I. L. R., 2 Cal. 436 [see p. 63 of this book].

2. APPEAL BY LOCAL GOVERNMENT—*Appeal upon facts from verdict of jury—Criminal Procedure Code (Act X. of 1882), ss. 417, 418, 423.* Under the provisions of Act X. of 1882, no appeal at the instance of the Local Government lies from an order of acquittal in a case which has been tried by a jury, when the questions involved are purely questions of fact; for such an appeal to lie it must be supported upon a ground which is covered by s. 418.—*Government of Bengal v. Parmeshur Mullick*, I. L. R., 10 Cal. 1029 [see p. 572 of this book].

Application—

For Copies. See COPIES OF DEPOSITIONS.

For Payment of Lost Halves of Currency Notes. See ATTEMPT TO CHEAT.

For Quashing Commitment. See COMMITMENT, 1.

For Separate Charges and Separate Trials. See JOINDER OF CHARGES, 1.

For Transfer of Case. See TRANSFER OF CASE.

Appointment—

Time from which an Order of, dates. See JURISDICTION, 3.

Approver—

See PARDON.

Arbitration—

See STAMP, 3.

Arms Act—

ARMS ACT (XI. OF 1878), s. 19, cl. f, and ss. 25, 30—*Arms in a temple—Confiscation of arms used for purposes of worship—Inspector specially empowered—License to possess arms—Criminal Procedure Code (Act X. of 1872), s. 579, and Sch. IV.—“Offences against other laws.”* A collection of fire-arms, consisting of four small cannons, four pistols, and thirty-one muskets, had been kept as objects of worship in a Sikh temple in Patna for upwards of two centuries. The mohunt of the temple neglected to take out a license in respect of these arms under Act XI. of 1878. A police-inspector, who was appointed to see that the provisions of the latter Act were obeyed, searched the temple on information received, and, having found the arms, prosecuted the person who had charge of the temple. The latter was convicted by the Deputy Magistrate of Patna under s. 19, cl. f, of Act XI. of 1878, and sentenced to pay a fine of Rs. 50, or to be rigorously imprisoned for two months. The Deputy Magistrate also ordered the arms to be confiscated, and directed that their value and the fine should be divided between the informer and the police-inspector. On a reference from the Sessions Judge of Patna, *held*, with reference to Act X. of 1872, s. 579, and the last heading to sch. iv. of the same Act, and to s. 19, cl. f, of Act XI. of 1878, that the proceedings of the police-inspector and the conviction of the accused were not illegal. There is nothing in the Arms Act to exempt the custodians of a temple from complying with the requirements of the Arms Act, either by taking out a license, or obtaining exemption under s. 27. S. 25 of the Arms Act appears to refer to cases in which the Magistrate considers that arms, whether under a license or not, are possessed for an illegal purpose, or under circumstances such as to endanger the public peace. S. 30 of the Arms Act appears to contemplate the presence of some special-

Arms Act (contd.)—

ly empowered officer besides the officer conducting the search.—*Empress v. Tegha Singh*, I. L. R., 8 Cal. 473 [see p. 399 of this book].

Arrest—

Admission made to Police before. See **ADMISSION**.

Of Judgment-debtor, Resistance to. See **SENTENCE**, 4.

Under Civil Process, Escape from. See **ESCAPE**, 2.

Arrest pending Appeal—

ARREST PENDING APPEAL—Criminal Procedure Code (Act X. of 1872), s. 272. In an appeal under s. 272 of Act X. of 1872, the High Court has power to order the accused to be arrested pending the appeal.—*Queen v. Gobin Tewari*, I. L. R., 1 Cal. 281 [see p. 12 of this book].

Assam—

Appeal from Sentence of Chief Commissioner of. See **JURISDICTION OF HIGH COURT**, 1.

Assault—

Counter-charges of. See **IRREGULARITY**, 5.

On Civil Court Peon. See **SENTENCE**, 4.

Assessment—

Notice of. See **MUNICIPAL OFFENCES**, 2.

Assessors—

ASSESSORS—Criminal Procedure Code (Act X. of 1882), s. 309—Trial by assessors—Evidence—Summing up of evidence—Delivery of opinions of assessors—Sessions Judge, Duties of. The power of summing up the evidence given by s. 309 of the new Code of Criminal Procedure (Act X. of 1882) is intended to be exercised in long or intricate cases, and the Sessions Judge should confine himself to summing up the evidence, and should not obtrude on the assessors his opinion of the worthlessness or otherwise of certain portions of the evidence.—*Shadulla Howladar v. Empress*, I. L. R., 9 Cal. 875 [see p. 494 of this book].

Assessors—

Trial by Jury of Case triable with. See **JURY**, 3.

Attachment of Property—

Resistance to. See **PUBLIC SERVANT**, 3.

Attempt to Cheat—

ATTEMPT TO CHEAT—Currency Office—Application for payment of lost halves of currency notes. A man may be guilty of an attempt to cheat, although the person he attempts to cheat is forewarned, and is therefore not cheated. *R. v. Hensler* (11 Cox C. C. 570) referred to. M wrote a letter to the Currency Office at Calcutta, enclosing the

Attempt to Cheat (contd.)—

halves of two Government currency notes, stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office, having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves, and that the notes had been withdrawn from circulation and cancelled, sent M the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying M in respect of the notes. The form was filled up and signed by M, and returned by him to the Currency Office. *Held* that, although there was no intention on the part of the Currency Office to pay the amount of the notes, M was guilty of an attempt to cheat.—*Government of Bengal v. Umesh Chunder Mitter and others*, I. L. R., 16 Cal. 310 [see p. 908 of this book].

Attempt to commit Forgery—

See **FORGERY**, 1.

Attempt to commit an Offence—

See **SENTENCE**, 5.

Attempt to commit Theft—

See **SENTENCE**, 5.

Attestation of Confession—

See **CONFESSION**, 2.

Award—

See **STAMP**, 3.

B.**Bail—**

BAIL—Illegal practice—Police-officer—Court, Duty of—Criminal Procedure Code (Act X. of 1882), ss. 344, 526, 526A. The practice of leaving to the police the decision as to the sufficiency of bail, when bail has been ordered by the Court, is contrary to law. The duty of deciding as to its sufficiency or otherwise is with the Court itself, and not with the police. M, the complainant, on the 19th November 1887, made an application to the Deputy Magistrate, under s. 526A of the Criminal Procedure Code, for the postponement of his case against G, to enable him to apply to the High Court under s. 526 for a transfer of the case from the file of the Deputy Magistrate to that of another officer. On the same date the Deputy Magistrate refused the application, and proceeded with the case, acquitting G. *Held*, having regard to the words "the Court shall exercise," &c., in s. 526A, the order of the Deputy Magistrate of the 19th November, refusing to grant the application, was illegal.—*Queen-Empress on the Prosecution of Palakdhari Mahton and others v. Gayitri Prosunno Ghosal*, I. L. R., 15 Cal. 455 [see p. 833 of this book].

Ballast thrown into the River—

See MASTER AND SERVANT.

Bamboos, Pulling down of—

See POSSESSION, 2.

Bamboo-stockade placed on Tidal Navigable River—

See PUBLIC NUISANCE, 1.

Bastardy Proceedings—

See MAINTENANCE, 6.

Batwara Proceedings—

See POSSESSION, 4.

Bench of Magistrates—

Deciding on Evidence recorded by another Bench. See IRREGULARITY, 3.

Including a Salaried Officer of Municipality. See IRREGULARITY, 2.

Power of. See MUNICIPAL OFFENCES, 5.
Trial before Interested Members of. See IRREGULARITY, 1.

Trial of Possession Cases by. See POSSESSION, 3.

When no Appeal lies to District Magistrate from Decision of. See APPEAL.

Bengal Act VI. of 1863—

Ss. 109, 110. See MUNICIPAL OFFENCES.

Bengal Act III. of 1864—

Ss. 2, 10, 11, 13, 15, 16, 57, 58. See MUNICIPAL OFFENCES, 1.

Bengal Act II. of 1867—

See GAMBLING.

Bengal Act VIII. of 1869—

Distrain under. See CRIMINAL TRESPASS, 3.

Bengal Act IV. of 1876—

Ss. 75, 77, 78, 79, 346, 351. See MUNICIPAL OFFENCES, 2.

Ss. 75, 79. See ACQUITTAL, 1.

S. 77. See MUNICIPAL OFFENCES, 3.

S. 248. See MUNICIPAL OFFENCES, 4.

Bengal Act V. of 1876—

Ss. 180, 215, 216. See MUNICIPAL OFFENCES, 5.

S. 256. See DISOBEDIENCE OF ORDER, 2.

Bengal Act VII. of 1878—

See CANTONMENTS ACT.

" EXCISE.

" REASONS FOR CONVICTION.

Bengal Act IV. of 1881—

See REASONS FOR CONVICTION.

Bengal Act II. of 1882—

See EMBANKMENT.

Bigamy—BIGAMY — Abetment — Penal Code (*Act XLV. of 1860*), ss. 109, 494.] A Mahomedan guardian of a married female infant, who, while her husband is living, causes a marriage-ceremony to be gone through in her**Bigamy (contd.)—**name with another man, but without her taking any part in the transaction, does not commit the offence of abetment under ss. 109 and 494 of the Penal Code. The practice of instituting criminal proceedings with a view to determining disputes arising in cases of this class condemned.—*Empress v. Abdool Kurreem*, I. L. R., 4 Cal. 10 [see p. 153 of this book].

See ADULTERY, 1.

Boarding-house-keeper carrying on Business without License—

See MUNICIPAL OFFENCES, 3.

Boat, Theft of—

See CONFESSION, 12.

Boats, Obstruction on Passage of—

See PUBLIC NUISANCE, 1.

Body not forthcoming in a Case of Murder—

See CONFESSION, 12.

Bona-fide Claim of Right—

See POSSESSION.

" SUMMARY TRIAL, 3.

Bona Fides—

See DEFAMATION.

Bond—

Criminal Prosecution against Owners of a. See EVIDENCE, 1.

Book—

Absence of Entry in. See RIGHT OF REPLY, 2.

Books—

Reference to. See RIGHT OF REPLY, 1.

Branches strewn on River for Fishing Purposes—

See PUBLIC SPRING.

Brass Drinking Cup—

See STOLEN PROPERTY, 2.

Breach of the Peace—

See POSSESSION, 9-12.

" PUBLIC NUISANCE, 2, 18.

" RECOGNIZANCE.

" REVISION, 1.

British Seamen—

Trial of, for Offences committed on British Ship on High Seas. See MERCHANT SHIPPING ACT.

British Territory—

Property stolen in Nepal dishonestly received in. See STOLEN PROPERTY, 1.

Buildings—

Erection of. See PUBLIC NUISANCE, 6.

Bund—

Repairing a. See RIOTING, 2.

Burden of Proof where Easement claimed—

See POSSESSION, 26.

C.**Calling for Records of First-class Magistrate's Court—**

District Magistrate's Power of. See ACQUITTAL, 2.

Calling for Records of Inferior Court—

See RECORD OF INFERIOR COURT.

Cantonments Act—

CANTONMENTS ACT (III. OF 1880), s. 14—*Bengal Excise Act (VII. of 1878)*, ss. 4, 11, 29, 32—*Spiritous liquor—Tari—Cantonment Magistrate, Powers of, to cancel license—Revenue-authorities.* "Tari" or "toddy" is "spirituous liquor" within the meaning of s. 14 of Act III. of 1880. The words "spirituous liquor," "wine," and "intoxicating drugs" in that section, must be taken in their popular and ordinary meaning. A Cantonment Magistrate in his judicial capacity has no authority to cancel a license. The power to cancel licenses belongs to the revenue-authorities. — *Queen-Empress v. Ramdhani Passi*, I. L. R., 15 Cal. 452 [see p. 381 of this book].

Cart, Turning Goods off a—

See MISCHIEF, 1.

Case certified by Advocate-General—

See MERCHANT SHIPPING ACT.

Cash, Deposit of, in Lieu of Security—

See SECURITY FOR GOOD BEHAVIOUR, 2.

Cattle-trespass Act—

1. CATTLE-TRESPASS ACT (I. OF 1871), ss. 20, 22—*False complaint—Compensation.* A complaint was made against certain persons under s. 20 of the Cattle-trespass Act of 1871, charging them with having illegally seized and detained the complainant's cattle. The Assistant Magistrate who heard the complaint found it to be false, and he ordered the complainant to pay Rs. 20 compensation to the accused, and in default to suffer simple imprisonment for 21 days. On application to the High Court, *held* that the order was illegal, and must be set aside.—In the Matter of Kala Chand and others v. Gudadhur Biswas and others, I. L. R., 13 Cal. 304 [see p. 707 of this book].

2. CATTLE-TRESPASS ACT (I. OF 1871), s. 22—*Joint fine—Fine and compensation.* Proceedings under s. 22 of the Cattle-trespass Act are quasi-civil in their nature; a Magistrate being at liberty under that section to assess and enforce, in a summary

Cattle-trespass Act (contd.)—

manner, compensation for an injury for which a civil action might be brought. An order, therefore, for the payment of a sum as fine and compensation, passed against two persons under that section, which does not specify the proportionate amount payable by each, is good.—In the Matter of Neaz v. Monsor and another, I. L. R., 14 Cal. 175 [see p. 734 of this book].

3. CATTLE-TRESPASS ACT (I. OF 1871), s. 22—*Illegal seizure of cattle—Appeal in criminal case.* No appeal lies from an order under s. 22 of Act I. of 1871, awarding compensation for illegal seizure of cattle. *Queen-Empress v. Raja Lakshma* (I. L. R., 10 Bom. 230) followed. See also *In re Gunesh Pershad* (3 N. W. 200).—*Dhiku v. Denonath Deb alias Dinu*, I. L. R., 15 Cal. 712 [see p. 874 of this book].

Cause of Death—

Report of Magistrate on. See INQUIRY INTO CAUSE OF DEATH.

Opinion of Experts as to. See CONFESION, 14.

Causing Death by Rash and Negligent Act—

See CULPABLE HOMICIDE, 3.

17 RASH AND NEGLIGENT ACT.

Causing Disappearance of Evidence—

CAUSING DISAPPEARANCE OF EVIDENCE—*Omitting to report a sudden, unnatural, or suspicious death—Penal Code (Act XLV. of 1860)*, ss. 176, 201—*Criminal Procedure Code (Act X. of 1882)*, s. 45.] Before an accused can be convicted of an offence under s. 201 of the Penal Code, it must be proved that an offence, the evidence of which he is charged with causing to disappear, has actually been committed, and also that the accused knew, or had information sufficient to lead him to believe, that the offence had been committed. *Empress of India v. Abdul Kadir* (I. L. R., 3 All. 279) followed. *Held (per Prinsep and Macpherson, JJ.)*—It is not necessary, in order to support a conviction, under s. 176 of the Penal Code, against a person falling within the provisions of s. 45 of the Criminal Procedure Code for not giving information of an occurrence falling under cl. d of that section, to show that the death actually occurred on his land, when the circumstances disclosed show that a body has been found under circumstances denoting that the death was sudden, unnatural, or suspicious; the finding of the body being a fact from which a Court might reasonably infer, in the absence of evidence to the contrary, that the death took place there. *Held (per Mitter, J.)*—It is necessary, to secure a conviction in the

Causing Disappearance of Evidence (contd.)—

latter case, to prove that the death took place, or occurred, in the village or on the land of the accused, and the finding of a body there does not of itself afford that proof.—*Matuki Misser v. Queen-Empress*, I. L. R., 11 Cal. 619 [see p. 641 of this book].

Certificate of Confession—

See CONFESSION, 15.

Charge—

1. CHARGE—*Practice—Committal for trial after charge has been drawn up—Criminal Procedure Code (Act X. of 1872), ss. 4, 220, 221.* S. 221 of the Criminal Procedure Code authorizes a Magistrate, after a charge has been drawn up, to stop further proceedings, and commit for trial. Although the explanation to s. 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew the charge.—*Empress v. Kudrutoollah*, I. L. R., 3 Cal. 495 [see p. 124 of this book].

2. CHARGE—*Criminal proceedings—Necessity for explaining charge to accused—Statement to Magistrate in foreign language—Criminal Procedure Code (Act X. of 1872), ss. 122, 237, 346.* When arraigning an accused, and before receiving his plea, the Court should be careful to insure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead. It is not necessary that a statement made to a Court by an accused in a foreign language should be taken down in the words of that language. The language in which the statement is conveyed to the Court by the interpreter is the language in which it should be recorded.—*Empress v. Vaimbilee*; *Vaimbilee v. Empress*, I. L. R., 5 Cal. 826 [see p. 240 of this book].

3. CHARGE—*Evidence—Dying statement—Presence of accused—Penal Code (Act XLV. of 1860), s. 300—Frame of charge.* The dying statement of a deceased person must be taken in the presence of the accused; if not so taken, the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory. A prisoner was charged with "causing the death of A by inflicting a wound on him with a 'chheni,' with the intention of causing bodily injury, such as was sufficient, in the course of nature, to cause death, or which he knew to

Charge (contd.)—

be likely to cause death." Held that the charge was defective and inexact as regarded the second and third clauses of the definition of murder in s. 300 of the Penal Code. With reference to the second clause, it should have run, "likely to cause the death of A, the person to whom the harm was caused." With reference to the third clause, it should have said "ordinary course of nature."—*Empress v. Samiruddin*, I. L. R., 8 Cal. 211 [or p. 385 of this book].

4. CHARGE—*Accused entitled to know exact nature of charge made against him—Criminal Procedure Code (Act X. of 1882), s. 221.* An accused is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and, unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to implicate him for acts not committed by himself, but by others with whom he was in company.—*Behari Mahton v. Empress*, I. L. R., 11 Cal. 106 [see p. 605 of this book].

Charge—

Amendment of. See SANCTION TO PROSECUTE, 2.

" SEPARATE TRIAL, 1.

Of Three Offences of Same Kind. See IRREGULARITY, 4.

Vagueness of. See FALSE EVIDENCE, 1.

Charge to Jury—

See EVIDENCE, 4.

" JURY, 7.

Charges—

Added at Session. See EVIDENCE, 4.

Arising out of Same Transaction. See JOINDER OF CHARGES, 2.

Distinct and Separate, tried simultaneously by Jury. See SEPARATE CHARGES, 2.

Joinder of. See JOINDER OF CHARGES.

Limit on Number of. See SEPARATE CHARGES, 1.

Charter of High Court—

S. 15. See POSSESSION, 2.

S. 26. See JURY, 7.

Cheat—

See ATTEMPT TO CHEAT.

Chief Commissioner of Assam—

Appeal from Sentence of. See JURISDICTION OF HIGH COURT, 1.

Child—

Blow intended for another Falling on. See JURY, 2.

Civil (as opposed to Military) Court—

Jurisdiction of. See MUTINY ACT.

I. L. R., Cal. 126.

Civil Court—

Decision on Title by. See POSSESSION, 9.
Institution of Criminal Case pending Appeal in. See APPEAL, 3.

Ouster without Authority of. See POSSESSION, 4.

Resistance to Execution of Legal Process of. See SENTENCE, 4.

When a Case of Obstruction is fit for. See PUBLIC NUISANCE, 10.

Civil Process—

Escape from Arrest under. See ESCAPE, 2.

Civil Rights of a Subject—

Duty of Magistrate in dealing with. See PUBLIC NUISANCE, 2.

Civil Suit—

Injunction in. See DISOBEDIENCE OF ORDER, 1.

Out of which Criminal Prosecution arises, Judgment in. See EVIDENCE, 1.

Trespass during Pendency of. See SUMMARY TRIAL, 5.

Using Forged Document in. See FORGED DOCUMENT, 1.

Claimants—

Joint Hearing of Case of Several. See POSSESSION, 22.

Clerk of Magistrate not disqualified to sit on Jury—

See EVIDENCE, 4.

Cognisance of Offence on Suspension—

See FALSE CHARGE, 11.

Collection of Rent—

Order prohibiting. See PUBLIC NUISANCE, 19.

Commission—

1. COMMISSION—*Parda-nashin female—Right to be examined on commission—Procedure on examination—Mode in which a Magistrate should show cause against a rule.* A parda-nashin woman summoned as a witness in a criminal case has a right to be exempted from personal attendance at Court and to be examined on commission. When a Magistrate wishes to show cause against a rule issued by the High Court, the proper course for him to adopt is to apply to the Legal Remembrancer to cause an appearance to be made for him in Court, and not to address the Registrar by letter.—In the Matter of the Petition of Hurro Soondery Chowdhrair, I. L. R., 4 Cal. 20 [see p. 159 of this book].

2. COMMISSION—*Witness, Examination of—Commission in criminal case—High Courts' Criminal Procedure Act (X. of 1875), s. 76.* The High Court refused to issue a commission in a criminal case, on the ground that

Commission (contd.)—

such a course would be unsatisfactory and dangerous to the interests of the prisoner.—*Empress v. R. P. Counsell*, I. L. R., 8 Cal. 896 [see p. 437 of this book].

3. COMMISSION—*Criminal Procedure Code (Act X. of 1882), s. 503—"Parda-nashin" woman—Examination by commission—Personal appearance in Court.* A Hindu lady having been summoned as a witness on behalf of an accused applied under s. 503 of the Code of Criminal Procedure to be examined by commission on the ground (*inter alia*) that she was a "parda-nashin," and that her enforced appearance in a Criminal Court would entail a forfeiture or her dignity and position in Hindu society. Held that such application was properly made under the section, and that, under the circumstances of the case, the order prayed for could be made.—In the Matter of the Petition of Din Tarini Debi, I. L. R., 15 Cal. 775 [see p. 875 of this book].

See EVIDENCE, 2.

» MERCHANT SHIPPING ACT.

Commitment—

1. COMMITMENT—*High Courts' Criminal Procedure Act (X. of 1875), ss. 14, 147—Commitment, Application to quash—24 and 25 Vic., c. 104, ss. 13, 15.* The words "or other proceeding" in s. 147 of Act X. of 1875 do not include a commitment; and an application to have a commitment quashed can be entertained under the provisions of that section. Application under s. 14 of that Act should be disposed of by the High Court in the exercise of its ordinary original criminal jurisdiction.—*Charoo Chunder Mullick v. Empress*, I. L. R., 9 Cal. 397 [see p. 475 of this book].

2. COMMITMENT—*Jurisdiction of Magistrate—Criminal Procedure Code (Act X. of 1882), s. 349—Penal Code (Act XLV. of 1860), s. 411—Receiving stolen property.* Under s. 349 of the Criminal Procedure Code a Second-class Magistrate transmitted a case to the District Magistrate, being of opinion that a more severe punishment was deserved than he was empowered to inflict. The District Magistrate returned the record to the Second-class Magistrate, directing him to commit the case to the Sessions Court. The committal directed was duly made. The High Court refused to interfere in the matter, holding that the proceedings of the Second-class Magistrate were not illegal, and that there was nothing done which took away the jurisdiction of the Second-class Magistrate to commit.—*Queen-Empress v. Chandu Gowala* and another, I. L. R., 14 Cal. 355 [see p. 738 of this book].

Commitment—

After Charge drawn up. See CHARGE, 1.
Directed by Sessions Judge. See DISCHARGE, 9.
By Sessions Judge of Case dismissed by Deputy Magistrate. See DISCHARGE, 3.
By Sessions Judge without Notice to Accused to show Cause. See DISCHARGE, 5.
By Sessions Judge of Case to Himself. See JURISDICTION, 1.
Power of High Court to quash Illegal. See SANCTION TO PROSECUTE, 5.
Powers of Second-class Magistrate as to. See JURISDICTION, 6.

Committal for Contempt—

See DISOBEDIENCE OF ORDER, 1.

Common Object—

See SENTENCE, 4, 7.

Compensation—

COMPENSATION—*Criminal Procedure Code (Act X. of 1872), s. 211—Order of acquittal—Compensation to accused.* An order for compensation against a complainant may be made on an order of acquittal under s. 211 of the Criminal Procedure Code.—*Mona Sheikh v. Ishan Bardhan, I. L. R., 6 Cal. 581* [see p. 297 of this book].

See CATTLE-TRESPASS ACT.

Competent Witness—

Magistrate when not a. See DISCHARGE, 2.

Complainant—

Absence of, in Warrant-case. See DISCHARGE, 6.

Complaint—

COMPLAINT—*Criminal Procedure Code (Act X. of 1882), ss. 191, 202, 203—Magistrate, Power of—"May take cognizance of," Meaning of.* The use of the term "may take cognizance of any offence" in s. 191 of the Criminal Procedure Code does not make it optional with a Magistrate to hear a complainant, but refers rather to the action of the Magistrate in taking cognizance of an offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant, and then can either issue summons to the accused, or order an enquiry under s. 202, or dismiss the complaint under s. 203.—*Umer Ali v. Safer Ali and another, I. L. R., 13 Cal. 334* [see p. 709 of this book].

Complaint—

When Dismissal of, does not amount to Acquittal. See DISMISSAL OF COMPLAINT, 1.

May be dismissed on what grounds. See DISMISSAL OF COMPLAINT, 2.

Compoundable Offence—

Criminal Trespass is a. See ACQUITTAL, 2.

Compounding of Offences—

See FALSE CHARGE, 9.

Concurrent Jurisdiction—

See REVISION, 5.

Conditional Legislation—

See JURISDICTION OF HIGH COURT, 2.

Conduct of Prosecution—

CONDUCT OF PROSECUTION—*By Advocate or Attorney—Permission by Magistrate—Presidency Magistrates' Act (IV. of 1877), s. 129.* With the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person, whether counsel or attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.—*Empress v. Butokristo Dass, I. L. R., 6 Cal. 59* [see p. 252 of this book].

Confession—

1. CONFESSION—*Evidence Act (I. of 1872), ss. 25, 26, 167—Admissibility in evidence of confession—Police-officer also a Magistrate—Deputy Commissioner of Police in Calcutta—Letters Patent, 1865, s. 26—Case certified by Advocate-General.* The prisoner, on his arrest, made a statement in the nature of a confession, which was reduced into writing by one of the inspectors in whose custody the prisoner was, and subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of Police at the Police Office, the Deputy Commissioner receiving and attesting the statement in his capacity as Magistrate and Justice of the Peace. At the trial of the prisoner at the Criminal Sessions of the High Court, this statement was tendered in evidence against him, and admitted by the Judge, who overruled an objection on behalf of the prisoner that, under s. 25 of the Evidence Act, it was inadmissible. On a case certified by the Advocate-General under cl. 26 of the Letters Patent, held that the confession was, under s. 25 of the Evidence Act, not admissible in evidence. *Per Garth, C.J.*—S. 26 of the Evidence Act is not to be read as qualifying the plain meaning of s. 25. In construing s. 25 the term "police-officer" is not to be read in a technical sense, but in its more comprehensive and popular meaning. *Per Curiam.*—S. 167 of the Evidence Act applies as well to criminal as to civil cases. *Per Garth, C.J. (Pontifex, J., doubting).*—The Court which under that section is to decide upon the sufficiency of the evidence to support the conviction is, in a case coming before the Court under s. 26 of the Letters

Confession (contd.)—

Patent, the Court of review, and not the Court below. Such decision is to be come to on being informed by the Judge's notes, and if necessary by the Judge himself, of the evidence adduced at the trial. *Per Curiam*.—Apart from s. 167, the Court has power, in a case under cl. 26 of the Letters Patent, to review the whole case on the merits, and affirm or quash the conviction.—*Queen v. Hurribole Chunder Ghose*, I. L. R., 1 Cal. 207 [see p. 1 of this book].

2. **CONFESSION—Attestation when unnecessary—***Criminal Procedure Code (Act X. of 1872)*, ss. 324, 346.] The attestation required by s. 346 of the Criminal Procedure Code is unnecessary when a confession is made in Court to the officer trying the case at the time of trial.—*Chumman Shaw, In re*, I. L. R., 3 Cal. 756 [see p. 146 of this book].

3. **CONFESSION—Evidence Act (I. of 1872)**, s. 30—*Confession of one prisoner implicating himself and another, Effect of.*] Under s. 30 of the Evidence Act, the confession of a prisoner affecting himself and another person charged with the same offence is, when duly proved, admissible as evidence against both, but such second person cannot, when it is uncorroborated as against him, be legally convicted on it. *Per Garth, C.J.*—Such evidence must be dealt with by the Court in the same manner as any other evidence. The weight, however, to be attached to such evidence, and the question, whether taken by itself it is sufficient in point of law to justify a conviction, is a question for the Judge. Unsupported by other evidence, it, however, should be taken as evidence of the very weakest kind, being simply a statement of a third person not made upon oath or affirmation. If such confession is corroborated by other evidence, it is immaterial whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession. *Per Jackson, J. (McDonel, J., concurring).*—Such evidence is not sufficient to support a conviction, even if corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction. *Per Curiam*.—The word 'Court,' in s. 30 of the Evidence Act, means, not only the Judge in a trial by a Judge with a jury, but includes both Judge and jury.—*Empress v. Ashootosh Chuckerbutty*, I. L. R., 4 Cal. 483 [see p. 179 of this book].

4. **CONFESSION—Evidence—Admissibility of secondary evidence of confession—***Confession not taken in accordance with s. 346 of Criminal Procedure Code (Act X. of 1872).*] When the confession of a prisoner, under s. 122 of the Criminal Procedure Code, was

Confession (contd.)—

not taken in the manner provided by s. 346, and was, therefore, defective, held that the evidence of the recording officer, that such confession was actually made, was inadmissible to remedy the defect. *Reg. v. Bai Ratan* (10 Bom. H. C. Rep. 166) followed.—*Empress v. Mannoo Tamoollee*, I. L. R., 4 Cal. 696 [see p. 198 of this book].

5. **CONFESSION—Criminal Procedure Code (Act X. of 1872)**, ss. 122, 193, 346.] A confession recorded by a Magistrate, who afterwards conducts the inquiry preliminary to committal, and has jurisdiction to do so, is to be treated as an examination under s. 193 of the Criminal Procedure Code, and not as a confession recorded under s. 122, notwithstanding that the prisoner may have been brought before the Magistrate before the conclusion of the police-investigation. To such a confession, consequently, the provisions of the last para. of s. 346 apply. S. 122 of the Criminal Procedure Code contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is inquired into or tried. *Empress v. Mannoo Tamoollee* (I. L. R., 4 Cal. 696) distinguished.—*Empress v. Anuntram Singh*, I. L. R., 5 Cal. 954 [see p. 246 of this book].

6. **CONFESSION—Criminal Procedure Code (Act X. of 1872)**, ss. 122, 346—*Evidence Act (I. of 1872)*, s. 33.] When a confession is made to a Magistrate by an accused person during an inquiry held previously to the case being taken up by the committing officer, and by an officer acting merely as a recording officer, it must be recorded in strict accordance with the provisions of ss. 122 and 346 of the Code of Criminal Procedure. If the provisions of these sections have not been fully complied with by the recording officer, the Court of Session may take evidence that the accused person duly made the statement recorded; but a Court of Session is not at liberty to treat a deposition sent up with the record and made by the recording officer before the committing officer to the effect that the accused person did in fact duly make before him the statement recorded as evidence of that fact. In such a case the recording officer must himself be called and examined by the Court of Session, except in cases in which the presence of the recording officer cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court of Session considers unreasonable.—*Noshai Mistri and Ram Chunder Haldar v. Empress*, I. L. R. 5 Cal. 958 [see p. 248 of this book].

7. **CONFESSION—Evidence Act (I. of 1872)**, ss. 30, 138—*Admission—Examination of*

Confession (contd.)—

witnesses—Judge—Penal Code (Act XLV. of 1860), ss. 114, 149, 302.] A prisoner, charged together with others with being a member of an unlawful assembly, made a statement before the committing Magistrate implicating his fellow-prisoners and another person. He subsequently withdrew this statement, and made another, in which he endeavoured to exculpate himself. *Held* that this statement was not evidence against the other prisoners under s. 30 of the Evidence Act. It was not a confession, nor did it amount to any admission by the prisoner that he was guilty in any degree of the offence charged; but it was simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself, and any mention made by him in such a statement of other persons having been engaged in the riot was altogether irrelevant, and not evidence against them. At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed. *Held* that such a course of procedure was irregular, and opposed to the provisions of s. 138 of the Evidence Act. It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act.—*Noor Bux Kazi v. Empress, I. L. R., 6 Cal. 279* [see p. 270 of this book].

8. **CONFESSION—Persons jointly charged—Statement by prisoner in absence of co-prisoners—Evidence Act (I. of 1872), s. 30.]** Several persons were charged together with offences under ss. 148, 302, 324, 326, read with s. 149 of the Penal Code. The Sessions Judge, when about to examine the prisoners, required all but the prisoner under examination to withdraw from the Court, until his turn for examination came round, and convicted each prisoner chiefly upon what was said by his co-prisoner during his absence from the Court. *Held* that the evidence so given was inadmissible.—*Empress v. Chandra Nath Sirkar, I. L. R., 7 Cal. 65* [see p. 332 of this book].

9. **CONFESSION—Confession of an accused person—Examination of accused—Question and answer—Recording examination—Statement of accused—Criminal Procedure Code (Act X. of 1872), s. 346.]** The confession of an accused person was recorded in a simple narrative form, instead of in

Confession (contd.)—

the shape of question and answer, as required by the Code of Criminal Procedure, s. 346. There was nothing in the character of the confession, or in the circumstances of the case, to lead to the inference that the accused had been prejudiced by the error. *Held* that the error did not affect the admissibility of the statement in evidence.—*Empress v. Munshi Sheikh, I. L. R., 8 Cal. 616* [see p. 410 of this book]; *Titu Maya v. Empress, I. L. R., 8 Cal. 618n.* [see p. 410 of this book].

10. **CONFESSION—Inducement to confess—Criminal Procedure Code (Act X. of 1882), s. 163—Evidence Act (I. of 1872), s. 24.]** A Deputy Magistrate, before taking down a statement from a person brought before him by the police, noted on the paper on which he was about to take down the statement the following words, which, after excluding the police-officers from his presence, he had verbally addressed to the accused: "After excluding from my presence the police-officers who brought him, I warned the accused that what he would say would go as evidence against him, so he had better tell the truth." *Held* that the use of such language was calculated to hold out an inducement to the prisoner to confess, and that such a confession was, therefore, inadmissible in evidence against him.—*Empress v. Uzeer, I. L. R., 10 Cal. 775* [see p. 555 of this book].

11. **CONFESSION—Incriminating statement by prisoner to police-officer—Evidence of police-constable.]** A policeman, on being cross-examined, stated that, when he arrested the prisoner, the prisoner said to him, "Some Chinamen, at the time of the occurrence, came out with hatchets;" in re-examination, the policeman so far altered the words stated to have been used by the prisoner as to substitute for the words *at the time of the occurrence* the words *at the time*; and on being asked if the prisoner had explained "what time," answered, "He said, 'At the time I struck the deceased.'" Counsel for the prisoner interposed and objected to the evidence. The Standing Counsel contended that he was entitled to clear up a matter which had been left in doubt by the cross-examination. *Held* that the evidence could not be given.—*Empress v. Mathews, I. L. R., 10 Cal. 1022* [see p. 567 of this book].

12. **CONFESSION—Confession made to police-officer—Evidence Act (I. of 1872), s. 27—Murder, Charge of, when body is not forthcoming—Theft—Intention to convert.]** No judicial officer, dealing with the provisions of s. 27 of Act I. of 1872, should allow one word

Confession (contd.)—

more to be deposed to by a police-officer de-tailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in itself to be a relevant fact against him. *S. 27* was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the facts of which he gives evidence. *Empress of India v. Panchan* (I. L. R., 4 All. 198), *Queen-Empress v. Babu Lal* (I. L. R., 6 All. 509), discussed and commented on. Thus, when a police-officer deposed that an accused had told him that he had robbed K of Rs. 48, whereof he had spent Rs. 8, and had got Rs. 40, and that he had made over the Rs. 40 to him, *held* that the statement that he robbed K of Rs. 48 was not necessarily preliminary to the surrender of the Rs. 40, and was inadmissible in evidence against him. When also a police-officer deposed to the fact that the accused, who was charged with murder, had stated to him that he and K had stolen some hides from C, and upon such statement he had sent for C, and recorded his information, and when it appeared that C had already informed the police of the fact of the theft, though the witness was not aware of it, *held* that the statement was inadmissible upon the ground that it would be most dangerous to extend the provisions of s. 27, and allow a police-officer, who is investigating a case, to prove an information received from a person accused of an offence in the custody of a police-officer, on the ground that a material fact was thereby discovered by him, when that fact was already known to another police-officer. Although, under some circumstances, a charge of murder may be sustained, when the body of the person said to have been murdered is not forthcoming, still, when that is the case, the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted. When an accused charged with murder was alleged to have taken a boat from a place where it had been secured by its owner, and after proceeding some distance in it had abandoned it, and when he was charged with the theft of the boat, *held* that the charge was unsustainable, inasmuch as it was evidently not his intention to convert it to his own use, and make it permanently his own property, but merely to make use of it for the purpose of aiding him in escaping.—*Adu Shikdar v. Empress*, I. L. R., 11 Cal. 635 [see p. 645 of this book].

13. **CONFESSION — Confession of an accused person — Evidence, Admissibility of confession in—Question and answer — Memorandum in English — Magistrate — Cri-**

Confession (contd.)—

riminal Procedure Code (Act X. of 1882), s. 164, 364, 533.] It is necessary that the English memorandum referred to in para. 3 of s. 364 of the Criminal Procedure Code should be made in respect of confessions recorded under s. 164, as the manner in which such a confession is to be recorded under the provisions of that section is fully set out in the first two paras. of s. 364. A confession of an accused person was recorded before a Deputy Magistrate by one of his clerks, under the provisions of s. 164 of the Criminal Procedure Code, while the case was under investigation by the police. No English memorandum of the nature referred to in s. 364 was made by the Deputy Magistrate. A further confession was recorded by the Magistrate under the provisions of s. 364 while the case was being heard before him. Both confessions were recorded in narrative form, and the questions and answers were not taken down. At the trial before the Sessions Judge both confessions were put in evidence, and no evidence was given under the provisions of s. 533 of the Criminal Procedure Code that the accused duly made the statements recorded. The accused was convicted mainly on the strength of the confessions. *Held*, upon the authority of the decision in *Titu Maya v. The Queen* (I. L. R., 8 Cal. 618 note), that, as the accused was not prejudiced by the questions and answers not being recorded, it was unnecessary for the Judge to take evidence under s. 533, and that the conviction based on the confessions must be upheld.—*Fekoo Mahto v. The Empress*, I. L. R., 14 Cal. 539 [see p. 748 of this book].

14. **CONFESSION — Evidence — Statement of accused to police-officer during investigation — Admissions — Confessions — Experts, Evidence of—Medical witnesses, Evidence of—Opinion of experts how elicited—Evidence Act (I. of 1872), ss. 25, 26, 27, 45.**] Instances of statements made by an accused person to a police-officer held to be admissible and inadmissible in evidence against such accused person. A medical man who has not seen a corpse which has been subjected to a *post-mortem* examination, and who is called to corroborate the opinion of the medical man who made such *post-mortem* examination, and who has stated what he considered was the cause of death, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such opinion is to put the signs observed at the *post-mortem* to the witness, and to ask what, in his opinion, was the cause of death on the hypothesis that those signs were really present and observed.—*Queen-*

Confession (contd.)—

Empress v. Meher Ali Mullick and two others, I. L. R., 15 Cal. 589 [see p. 849 of this book].

15. **CONFESSION—Criminal Procedure Code (Act X. of 1882), ss. 1, 164, 304, 533—Defect in confession—Evidence Act (I. of 1872), ss. 21, 26, 80—Presidency-towns, Investigations in.]** An accused, in custody at the time, made to a Magistrate in Calcutta, in the course of a police-investigation held in Calcutta, a statement confessing that he had murdered his father. The accused spoke and understood English, and the Magistrate questioned him in English, and was answered sometimes in English and sometimes in Bengali; whenever the answers were given in English, they were so taken down; when in Bengali, they were written down in English, and read over to the accused in that language, who accepted the English as being the meaning of that which he had stated, and signed the document in the presence of the Magistrate, who affixed the usual certificate thereto. In taking this confession, the Magistrate purported to have acted under ss. 164 and 364 of the Criminal Procedure Code. At the trial, subsequently to the admission of the confession in evidence under s. 80 of the Evidence Act, the Magistrate was called as witness, and deposed to the above facts, with reference to the language in which the confession was taken, and the mode in which it was recorded; *held*, on a reference to a Full Bench as to whether the confession was inadmissible in evidence by reason of some of the answers having been given in Bengali, but recorded in English, that the provisions of s. 164 of the Code had no application to statements taken in the course of a police-investigation made in the town of Calcutta, and that consequently ss. 364 and 533 had no application: *held, nevertheless*, that the document was properly admitted upon the evidence of the Magistrate under the provisions of s. 26 of the Evidence Act. *Seemle.*—That the provisions of s. 164, as read with s. 364, would not be complied with where answers made by an accused to a Magistrate in one language are taken down in another, unless it could be shown that it was impracticable to have taken down the answers in the language in which they were given; and, further, that there would be grave doubt if such a defect could be cured by s. 533.—*Queen-Empress v. Nilmadhub Mitter*, I. L. R., 15 Cal. 595 [see p. 853 of this book].

Confession—

Of One of Several Prisoners. See **JURY**, 6. Taken at Police-investigation not the Property of Police. See **LEGAL PRACTITIONERS ACT**, 1.

Confirmation of Possession—

Suit for. See **PUBLIC NUISANCE**, 13.

Confirmation of Sentence of Sessions Judge—

See **SENTENCE**, 1.

Confiscation and Fine—

Offence punishable by. See **SUMMARY TRIAL**, 1.

Confiscation of Arms—

See **ARMS ACT**.

Consent—

Of Accused does not cure Defect in Criminal Proceedings. See **IRREGULARITY**, 1.

Of Pleaders on behalf of Accused to Irregular Procedure. See **SEPARATE CHARGES**, 2.

Of Owner; Property removed with Criminal Intent, but with. See **ABETMENT OF ABETMENT**.

When Jurisdiction cannot be conferred on Magistrate by Waiver or. See **EUROPEAN BRITISH SUBJECT**.

Constructive Possession—

See **POSSESSION**, 1.

Contagious Diseases Act—

CONTAGIOUS DISEASES ACT (XIV. of 1868), ss. 11, 21—Rules 13, 27, passed under the Act—Magistrate, Competency of—Jurisdiction.] Any woman desirous of ceasing to carry on the business of a common prostitute is, under the provisions of the Indian Contagious Diseases Act, 1868, absolutely entitled to have her name removed from the register; and any rule, or portion of a rule, purporting to have been framed under the provisions of that Act, which places any obstacle in the way of her doing so, is *ultra vires*, and therefore void. Where a woman is prosecuted before a Magistrate under s. 11 of Act XIV. of 1868, she is not precluded from pleading that she has ceased to be a common prostitute, and that she has taken steps, under s. 21 and the rules framed thereunder, for the removal of her name from the register; and the Magistrate is competent to entertain such a defence. In the *Matter of Lakhimani Raur* (3 B. L. R., A. Cr., 70) approved.—*Empress v. Nistar Raur*, I. L. R., 6 Cal. 163 [see p. 266 of this book].

Contempt of Court—

CONTEMPT OF COURT—Publication of libel reflecting upon a Judge in his judicial capacity—Offence not included in Penal Code—Defamation—Criminal Procedure Code (Act X. of 1882), s. 5—Power of Courts of Record under common law—Jurisdiction of High Court to punish summarily.] The High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court, and the powers of the High

Contempt of Court (contd.)—

Courts to punish it, are the same in such Courts as in the superior Courts in England. Those powers, which formed part of the common law, were conferred upon the Supreme Courts, when they were established in the Presidency-towns. The Penal Code does not provide against a contempt of Court committed by the publication of a libel out of Court, when the Court is not sitting, and neither in ch. 21, "Of Defamation," nor elsewhere, provides for the punishment of a contempt of Court committed by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties. Because the publisher can be punished for "defamation" under the Code, it does not follow that he cannot be punished summarily by the High Court for a contempt of Court. He can be so punished with fine, or imprisonment, or both. The provisions of s. 5 of the Code of Criminal Procedure, 1882, relating to the procedure under which "all offences under the Penal Code," and "all offences under any other law," are punished, do not include a contempt of the High Court committed by the publication of a libel out of Court, when the Court is not sitting, although such contempt may include defamation. Such a contempt is more than mere defamation, and is of a different character. The jurisdiction of the High Court to commit for contempt has not been affected by the Code of Criminal Procedure, 1882. By the common law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court.—*Surendra Nath Banerjee v. Chief Justice, I. L. R., 10 Cal. 109* [see p. 501 of this book].

Contempt, Committal for—

See DISOBEDIENCE OF ORDER, 1.

Contents of Judgment—

See JUDGMENT.

Continuing Offence between Date of Summons and Date of Conviction—

See MUNICIPAL OFFENCES, 4.

Contradictory Statements—

See FALSE EVIDENCE, 5, 6, 8.

Conversion of Property—

See CONFESSION, 12.

Conviction—

See REASONS FOR CONVICTION.

Copies of Depositions—

COPIES OF DEPOSITIONS—*Presidency Magistrates' Act (IV. of 1877), ss. 167, 170*—"Person affected by an order"—*Application for copy of order and depositions—Refusal—Specific Relief Act (I. of 1877), ss. 7,*

Copies of Depositions (contd.)—

45.] All prosecutors whose charges are dismissed by the Presidency Magistrate are affected by the order of discharge, and are, therefore, entitled under s. 170 of the Presidency Magistrates' Act to obtain copies of the order made by, and of the depositions taken before, the Magistrate.—*Bank of Bengal v. Dinonath Roy, I. L. R., 8 Cal. 166* [see p. 378 of this book].

Co-prisoner—

Implicating another. See CONFESSION, 7.

Implicating Himself and Another. See CONFESSION, 3.

Statement of, in Absence of Another. See CONFESSION, 8.

Copy of Judgment—

Exclusion of Time in obtaining Copy of. See APPEAL, 6.

Coroner's Inquest—

See INQUIRY INTO CAUSE OF DEATH.

Corroboration—

Of Approver. See JURY, 6.

Of Confession of one Prisoner implicating Another. See CONFESSION, 3.

Cossiah and Jynteeah Hills—

Extension of Act XXII. of 1869 to. See JURISDICTION OF HIGH COURT, 1.

Counsel—

Right of, to inspect Writing. See REFRESHING WITNESS'S MEMORY, 2.

Counter-cases of Riot—

Irregular Procedure in. See SEPARATE CHARGES, 2.

Irregularity in. See IRREGULARITY, 5.

Court—

Duty of, as to Bail. See BAIL.

Meaning of, in s. 30, Evidence Act. See CONFESSION, 3.

Cow-shed, Demolition of—

See PUBLIC NUISANCE, 13.

Criminal Breach of Trust as a Public Servant—

See IRREGULARITY, 4.

Criminal Force—

See MANDAMUS.

Criminal Intent—

Property removed with. See ABETMENT OF ABETMENT.

Criminal Intimidation—

CRIMINAL INTIMIDATION—*Penal Code (Act XLV. of 1860), s. 503.* The threat referred to in s. 503 of the Penal Code must be a threat communicated, or uttered with the intention of its being communicated, to the person threatened for the purpose of influencing his mind.—*Gunga Chunder Sen*

Criminal Intimidation (contd.)—
and others *v.* Gour Chunder Banikya, I. L. R., 15 Cal. 671 [see p. 872 of this book].

Criminal Misappropriation—

See FISHERY, 1.

See PROPERTY.

Criminal Proceedings—

Irregularity in. See IRREGULARITY.

Institution of, during Pendency of Civil Appeal. See APPEAL, 3.

Criminal Trespass—

1. CRIMINAL TRESPASS—*Infringement of exclusive right of fishery in public river—Penal Code (Act XLV. of 1860), s. 447.* The unlawful infringement of a right of exclusive fishery in a part of a public river is not an offence which can be brought within the definition of criminal trespass in the Penal Code—*Empress v. Charu Nayiah*, I. L. R., 2 Cal. 354 [see p. 45 of this book].

2. CRIMINAL TRESPASS—*Penal Code (Act XLV. of 1860), s. 447.* A, who had been warned off the lands of B, subsequently, having shot a deer near the boundary of B's land, and the deer having run on to B's land, followed it on to such land for the purpose of killing it. *Held* that his doing so was not a criminal trespass.—*Chunder Narain v. J. G. Farquharson*, I. L. R., 4 Cal. 837 [see p. 205 of this book].

3. CRIMINAL TRESPASS—*Distrain—Rent Act (Beng. Act VIII. of 1869), ss. 72, 74, 76.* A, the servant of B, was convicted of criminal trespass in going upon the land of C, one of B's tenants, and preventing him from cutting his crops. B was convicted of abetment of criminal trespass. A and B pleaded that they were acting in the exercise of the legal right of distraint. It appeared that no written demand under s. 72 of the Rent Act (Beng. Act VIII. of 1869) for the amount of the arrears, together with an account exhibiting the grounds on which demand had been made, was served on C, and that no written authority under s. 76 had been given by B to A. *Held* that it lay upon A and B to show that they had conformed to the provisions of the law, or at least had acted with the *bond-fide* intention of distraining the complainant's crops; and that the conviction was right. *Held* also that, as under s. 74 standing crops and ungathered products may, notwithstanding distraint, be reaped and gathered by the cultivator, A had no right, even if he was acting *bond fide*, to restrain C from cutting his crops.—*Jhumuk Noniah v. Shadashib Roy*, I. L. R., 7 Cal. 26 [see p. 323 of this book].

4. CRIMINAL TRESPASS—*House-breaking by night—Intent—Penal Code (Act XLV. of*

Criminal Trespass (contd.)—

1860), ss. 441 and 456. When a stranger, uninvited and without any right to be there, effects an entry into the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and, when an attempt is made to capture him, uses great violence in his efforts to make good his escape, a Court should presume that the entry was made with an intent such as is provided for by s. 441 of the Penal Code. An accused person in the middle of the night effected an entry into a house occupied by two widows, members of a respectable family. On an alarm being given, and an attempt made to capture him, he made use of great violence, and effected his escape. Upon these facts, he was charged with offences under ss. 456 and 323 of the Penal Code. The defence set up was an *alibi*, which was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the house, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts convicted the accused under s. 456. It was contended that, as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal. *Held* that, under the circumstances of the case, the Court ought to presume that the entry was effected with such intent as is provided for by s. 441, and that the conviction should be upheld.—*In the Matter of the Petition of Koilash Chandra Chakrabarty*; *Koilash Chandra Chakrabarty v. The Queen-Empress*, I. L. R., 16 Cal. 657 [see p. 946 of this book].

See ACQUITTAL.

» FISHERY, 1.

» SEPARATE TRIAL, 3.

» SUMMARY TRIAL, 3, 5.

Crops—

Distrain of. See CRIMINAL TRESPASS, 3.

Right to Standing. See POSSESSION, 7.

Cross-examination—

CROSS-EXAMINATION—*Witness called by the Court—Right to cross-examine—Evidence Act (I. of 1872), s. 165.* Witnesses summoned on behalf of the prosecution, and not called, ought to be placed in the box for cross-examination, in order that the defence may have the opportunity of exercising this right, and, *à fortiori*, if such a witness is called and examined by the Court under s. 165 of the Evidence Act, the prisoner should be allowed to cross-examine.—*Empress v. Grish Chunder Talukdar*, I. L. R., 5 Cal. 614 [see p. 237 of this book].

I. L. R., Cal. 127.

Cross-examination—

Accused's Right of. See RECOGNIZANCE, 2.

Accused subjected to. See RIGHT OF REPLY, 1; SEPARATE CHARGES, 2.

By Sessions Judge. See CONFESSION, 7.
Documents put in during. See RIGHT OF REPLY, 2.

Recalling Witnesses for. See WITNESSES FOR PROSECUTION, 2.

Tendering Witnesses for. See RIGHT OF REPLY, 3.

Culpable Homicide—

1. CULPABLE HOMICIDE—*Rashness—Negligence—Penal Code (Act XLV. of 1860), ss. 304, 304A, 336, 337, 338—Enhancement of sentence.*] S. 304A of the Penal Code does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result; and if such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under s. 336, 337, 338, or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender, and placed in their appropriate place in the class of offences of the same character. *Nidamarti Nagabhushanam* (7 Mad. H. C. Rep. 119) cited and approved.—*Empress v. Ketabdi Mundul*, I. L. R., 4 Cal. 764 [see p. 202 of this book].

2. CULPABLE HOMICIDE—*Penal Code (Act XLV. of 1860), s. 300, excepts. 4, 5.*] Except. 5 to s. 300 refers to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be the likely result; but it does not refer to the running of a risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated. *Per Broughton, J.*—Except. 5 to s. 300 is not applicable to the case of a premeditated fight, but points to a case of a different character, such as *suttee*.—*Empress v. Rohimuddin*, I. L. R., 5 Cal. 31 [see p. 211 of this book].

3. CULPABLE HOMICIDE—*Penal Code (Act XLV. of 1860), ss. 304, 304A—Causing death*

Culpable Homicide (contd.)—

by negligence.] A snake-charmer exhibited in public a venomous snake, whose fangs he knew had not been extracted; and to show his own skill and dexterity, but without any intention to cause harm to any one, placed the snake on the head of one of the spectators. The spectator tried to push off the snake, was bitten, and died in consequence. *Held* that the snake-charmer was guilty, under s. 304 of the Penal Code, of culpable homicide not amounting to murder, and not merely of causing death by negligence, an offence punishable under s. 304A. *Queen v. Poonai Fattamah* (12 W. R., Crim. Rul., 7) distinguished.—*Empress v. Gonesh Dooley and Gopi Dooley*, I. L. R., 5 Cal. 351 [see p. 227 of this book].

4. CULPABLE HOMICIDE—*Riot—Unlawful assembly—Fight between two contending factions, each armed with deadly weapons—Penal Code (Act XLV. of 1860), s. 300, except. 5.*] Where death results in a fight between two bodies of men deliberately fighting together, a greater proportion of the men composing both sides being armed with deadly weapons, and it being further apparent from the evidence that the man slain was an adult, and that no unfair advantage was taken by the one side or the other during the fight, the offence committed is culpable homicide, but does not amount to murder.—*Samshere Khan v. Empress*, I. L. R., 6 Cal. 154 [see p. 262 of this book].

See APPEAL, 1.

" JURY, 9.

" RASH AND NEGLIGENT ACT, 1.

Cumulative Sentence—

See SENTENCE, 2, 3, 4, 7.

Cup (Brass), Theft of—

See STOLEN PROPERTY, 2.

Currency Note—

See GOVERNMENT CURRENCY NOTE.

Currency Office—

See ATTEMPT TO CHEAT.

Custody—

Escape from. See ESCAPE.

Of Infant. See UNLAWFUL DETENTION.

D.**Date of Document—**

Alteration of. See EVIDENCE, 2.

Deadly Weapons—

Fight between two Contending Factions with. See CULPABLE HOMICIDE, 4.

Death—

Caused by Negligence. See CULPABLE HOMICIDE, 1, 3.

Caused by Rupture of Spleen. See RASH AND NEGLIGENT ACT, 1.

Death (contd.)—

- Caused by Unskilled Surgical Operation. See RASH AND NEGLIGENT ACT, 2.
- Submitting to Act likely to cause. See CULPABLE HOMICIDE, 2.
- Resulting from Fight. See CULPABLE HOMICIDE, 4.
- Inquiry into Cause of. See INQUIRY INTO CAUSE OF DEATH.
- Omission to report Sudden, Unnatural, or Suspicious. See CAUSING DISAPPEARANCE OF EVIDENCE.
- Special Court at Rangoon to entertain Appeal from Sentence of, passed by Judicial Commissioner. See JURISDICTION, 2.

Declaration of Right—

- Suit for. See PUBLIC NUISANCE, 13.

Declaratory Order—

- Magistrate not authorized to make. See POSSESSION, 8.

Decree—

- See FRAUDULENT EXECUTION OF DECREE.

Deer, Shooting of—

- See CRIMINAL TRESPASS, 2.

Defamation—

DEFAMATION—*Penal Code (Act XLV. of 1860), ss. 52, 499—Exceptions—Bona fides—Practice—Act XVIII. of 1862, ss. 26, 27—Evidence Act (I. of 1872), s. 105.* In all criminal cases tried in the mofussil it is incumbent on the accused, since the passing of the Evidence Act (I. of 1872), to prove the existence (if any) of circumstances which bring the offence charged within the general or special exceptions or provisos contained in any part of the Penal Code or in any law defining such offence. *Query* as to the state of the law in this respect in the Presidency-towns. In dealing with the question of good faith, the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are in substance true, but whether he was informed, and had good reason after due care and attention to believe, that such allegations were true. *Held per Markby, J.*—Although ss. 235 and 237 of Act XXV. of 1861 have been repealed, it may still be inferred from ill. a, s. 439 of the present Criminal Procedure Code, that it is unnecessary specifically to allege in a charge the absence of all general and some at least of the other exceptions mentioned in the Penal Code. The operation of the illustration, however, is strictly confined to the statement of the offence in the charge.—In the Matter of the Petition of Shibo Prosad Pandah, I. L. R., 4 Cal. 124 [see p. 161 of this book].

- See CONTEMPT OF COURT.

Defect—

- Inadmissibility of Secondary Evidence of Confession to Remedy. See CONFES- SION, 4.
- In Confession. See CONFES- SION, 15.
- In Criminal Proceedings not cured by Waiver or Consent of Accused. See IRREGULARITY, 1.
- In Irregular Procedure when Incurable. See SEPARATE CHARGES, 2; SEPARATE TRIAL, 3.
- In Procedure. See SEVERAL OFFENCES.
- In Summing up. See EVIDENCE, 4.

Defence—

- Examination of Witnesses for. See POS- SESSION, 2.
- Witnesses not called for. See RIGHT OF REPLY, 1.

Delegation, Power of—

- See JURISDICTION OF HIGH COURT, 1.

Demolition of Cow-shed—

- See PUBLIC NUISANCE, 13.

Denial of Commission of Grievous Hurt—

- Accused not making a. See EVIDENCE, 5.

Deposit of Cash in Lieu of Security—

- See SECURITY FOR GOOD BEHAVIOUR.

Deposition—

- Of Accused when admissible against him in Subsequent Proceeding. See EVI- DENCE, 7.
- Of Accused when admissible in Evidence. See FALSE EVIDENCE, 3.
- Of Medical Witness. See REFRESHING WITNESS'S MEMORY, 2.
- Where Accused has absconded. See EVI- DENCE, 6.
- Not read over to Accused. See DIS- CHARGE, 9.
- Of Witnesses not the Property of Police. See LEGAL PRACTITIONERS' ACT, 1.

Deputy Commissioner of Police in Calcutta—

- See CONFES- SION, 1.

Desertion by Seamen—

- Imprisonment for. See MERCHANT SEA- MEN'S ACT.

Different Kinds, Offences of—

- See SEVERAL OFFENCES.

Different Persons—

- Offences of the Same Kind committed in respect of. See JOINDER OF CHARGES, 1.

Direction of Law—

- Knowingly Disobeying. See PUBLIC SER- VANT, 1.

Disagreement in Finding of Jurors—

See JURY, 2.

Disappearance of Evidence—

See CAUSING DISAPPEARANCE OF EVIDENCE.

Disbelieved, Evidence Partly—

See JURY, 10.

Discharge—

1. DISCHARGE—*Criminal Procedure Code (Act X. of 1872), ss. 294, 295, 296, 297—Order of discharge under s. 215—Revival of proceedings.*] An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s. 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*. As the case was one of improper discharge, and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under s. 297, have directed a re-trial. The case of Sidya bin Satya (decided by the Bom. High Court, but unreported) differed from.—In the Matter of the Petition of Mohesh Mistree, I. L. R., 1 Cal. 282 [see p. 13 of this book].

2. DISCHARGE—*Criminal Procedure Code (Act X. of 1872), s. 215—Revival of proceedings—Evidence—Magistrate—Competent witness.*] It is illegal and *ultra vires* on the part of a Magistrate to revive before himself criminal proceedings against an accused who has already been discharged under s. 215 of the Criminal Procedure Code where no further evidence is procurable than that which was before the Court on the first occasion. *Per Markby, J.*—When the discharge has been improper, the only proper course open to a Magistrate is to report the case to the High Court for orders, and that Court, if of opinion that the accused has been improperly discharged, will order a re-trial. *Per Curiam.*—A Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. *Per Markby, J.*—Where in such a case he has given his evidence, and convicted the accused, his having so acted makes the conviction bad. *Per Prinsep, J.*—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient, if believed, to support the conviction. This being a proceeding under s. 297 of the Criminal Procedure Code, the Court refused to go into the evi-

Discharge (contd.)—

dence.—*Empress v. Donnelly, I. L. R., 2 Cal. 405* [see p. 52 of this book].

3. DISCHARGE—*Criminal Procedure Code (Act X. of 1872), ss. 195, 295, 296—Jurisdiction—First evidence—Revival of proceedings.*] A Deputy Magistrate having dismissed a case instituted under s. 380 of the Penal Code without taking certain evidence which, in his opinion, would have been of little value, the Magistrate of the District, on the application of the complainant, took such evidence, and committed the accused for trial before the Sessions Court. *Held*, on reference to the High Court, that, as the words "sessions case" in s. 296 of the Criminal Procedure Code have reference only to a case triable exclusively by a Court of Session, the Magistrate's action could not be supported under that section, but that (as further evidence in addition to that taken by the Deputy Magistrate was forthcoming) it was sustainable on the principle laid down in *Empress v. Donnelly (I. L. R., 2 Cal. 405)*.—*Empress v. Hary Doyal Karmokar, I. L. R., 4 Cal. 16* [see p. 156 of this book].

4. DISCHARGE—*Subsequent order remanding case to be re-tried—Criminal Procedure Code (Act X. of 1872), ss. 295, 297—Procedure.*] A Magistrate has no power to remand a criminal case to a Subordinate Magistrate for re-trial after the case has once been dismissed; the courses open to him are (1) to accept a fresh complaint supported by fresh evidence which was not before the Court when the case was dismissed; or (2) if there be no additional evidence to be procured, to report the case for the orders of the High Court under s. 296 of Act X. of 1872.—In the Matter of the Petition of Diahur Dutt, I. L. R., 4 Cal. 647 [see p. 191 of this book].

5. DISCHARGE—*Penal Code (Act XLV. of 1860), ss. 114, 372, 479, 498—Order of commitment by Sessions Judge—Omission to call on accused to show cause against such commitment—Criminal Procedure Code (Act X. of 1872), ss. 296, 283.*] A Sessions Court has no power, under s. 296 of the Criminal Procedure Code, to direct the commitment of a person discharged by a Deputy Magistrate, without first giving such person an opportunity of showing cause against such commitment. But, under s. 296, as amended by Act XI. of 1874, the Court has power to direct the subordinate Court to inquire into any offences for which it considers a commitment should be ordered. When, however, a trial under such a commitment made by order of a Sessions Judge has been duly held, and no actual failure of justice has been caused by the error of the Sessions Judge, s. 283 of the Criminal Procedure Code would

Discharge (contd.)—

be a bar to the reversal of his judgment.—*Empress v. Khamir*, 1 L. R., 7 Cal. 662 [see p. 371 of this book].

6. DISCHARGE—*Magistrate, Power of—Dismissal of complaint—Discharge of accused—Code of Criminal Procedure (Act X. of 1882), ss. 253, 259.* A Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant in warrant-cases not coming within s. 259 of the Code of Criminal Procedure, except in cases coming within the last clause of s. 253 of the same Code.—*Govinda Dass v. Dulall Dass*, 1 L. R., 10 Cal. 67 [see p. 498 of this book].

7. DISCHARGE—*Criminal Procedure Code (Act X. of 1882), ss. 435, 437—Further inquiry, Power of District Magistrate to direct—"Inferior Criminal Court"—Notice to accused.* The words "Inferior Criminal Court" in s. 435 of the Criminal Procedure Code mean inferior so far as regards the particular matter in respect to which the superior Court is asked to exercise its revisional jurisdiction. A criminal charge instituted before a Magistrate of the first class was finally disposed of by him by an order discharging the accused. Subsequently the Magistrate of the District, proceeding under s. 437 of the Code of Criminal Procedure, directed a further inquiry to be made by a Subordinate Magistrate. This order was made without notice to the accused. *Held* that the Magistrate of the District had no jurisdiction to direct a further inquiry. *Seemable*, that, as a matter of strict law, the accused was not entitled to be heard by the District Magistrate before granting the order directing the inquiry.—*Nobin Kristo Mookerjee v. Russick Lall Laha*, 1 L. R., 10 Cal. 268 [see p. 532 of this book].

8. DISCHARGE—*Further inquiry, Powers to direct—Criminal Procedure Code (Act X. of 1882), ss. 253, 437.* An accused, having been discharged after a full inquiry before a competent Court, is entitled to the benefit of such discharge, unless some further evidence is disclosed. Consequently, an order made by a District Judge, directing a further inquiry to be held under s. 437 of the Criminal Procedure Code, in a case where a Magistrate had discharged the accused under s. 253, was not warranted by law, when there had been a full inquiry by a competent Court, and when no further evidence was disclosed, such order being based merely upon the ground that, in the opinion of the District Judge, the evidence recorded was sufficient for the conviction of the accused.—*Jeebunkisto Roy v. Shib Chunder Das*, 1 L. R., 10 Cal. 1027 [see p. 571 of this book].

Discharge (contd.)—

9. DISCHARGE—*Further enquiry and order of commitment passed simultaneously by Sessions Judge—Depositions not read over to accused—Oral evidence—Statement of mukhtar as to faulty record—Criminal Procedure Code (Act X. of 1882), s. 360—Evidence Act (I. of 1872), s. 91.* A Sessions Judge, after hearing a general statement made by a mukhtar engaged in the case, considered that the depositions of certain witnesses taken in the Magistrate's Court did not conform with the requirements of s. 360 of the Code of Criminal Procedure, and refused to admit the depositions as evidence, and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions on behalf of the Crown; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held*, on appeal, that the conviction and sentence must be set aside.—*Adyan Sing v. Queen-Empress*, 1 L. R., 13 Cal. 121 [see p. 694 of this book].

Discretion—

Unwise Exercise of. See REVISION, 1; SANCTION TO PROSECUTE, 10.

Dismissal of Charge—

Order as to Property in Case of. See PROPERTY.

Dismissal of Complaint—

1. DISMISSAL OF COMPLAINT—*Presidency Magistrates' Act (IV. of 1877), s. 124—High Courts' Criminal Procedure Act (X. of 1875), s. 147—Dismissal of complaint after partial hearing for want of attendance of complaint—Institution of fresh proceedings.* An order of dismissal under s. 124 of Act IV. of 1877 does not operate as an acquittal.—*Jogendronath Bose v. Thompson*, 1 L. R., 6 Cal. 523 [see p. 287 of this book].

2. DISMISSAL OF COMPLAINT—*Report of police-officer who is an accused person—Criminal Procedure Code (Act X. of 1882), ss. 200, 203, 437.* Ss. 200 to 203 of the Criminal Procedure Code must be read together, and a Magistrate dismissing a complaint under the provisions of s. 203 on any one of the three grounds, *viz.*:—(1) If he, upon the statement of the complainant, reduced to writing under s. 200, finds no offence has been committed; (2) If he distrusts the statement made by the complainant; and (3) If he distrusts that statement, but his distrust is not sufficiently strong to warrant him in acting upon it, except upon a further enquiry as provided for in s. 202—must record his reasons for so doing, for if such reasons were not recorded it would be impossible for the High Court, exercising its revisional powers under s. 437 of the Criminal Procedure Code, to

Dismissal of Complaint (*contd.*)—consider whether the discretion of such Magistrate has been properly exercised. It was never contemplated that a Magistrate should call for a report from an accused person under s. 202 for the purpose of ascertaining the truth of the complaint if such accused happened to be an officer subordinate to the Magistrate. Where, therefore, a complaint was made against a police-officer, and complainant's statement was duly recorded, and the Magistrate, acting under the provision of s. 202, called for a report from such police-officer, and, acting upon that report, dismissed the complaint under s. 203, *held* that he had acted illegally, and that his order, made under the last-named section, should be set aside, and the case proceeded with according to law from the time at which the complaint was made and the complainant's statement so recorded.—*Baidya Nath Singh v. Muspratt and others*, 1. L. R., 14 Cal. 141 [see p. 723 of this book].

Dismissal of Complaint—

Order as to Property in Case of. See PROPERTY.

Disobedience of Order—

1. DISOBEDIENCE OF ORDER—*Penal Code* (Act XLV. of 1860), s. 188—*Injunction in civil suit.*] S. 188 of the Penal Code applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party. The proper remedy for disobedience of an order of injunction passed by a Civil Court is committal for contempt.—In the Matter of the Petition of Chandrakanta De, 1. L. R., 6 Cal. 445 [see p. 279 of this book].

2. DISOBEDIENCE OF ORDER—*Penal Code* (Act XLV. of 1860), s. 188—*Beng. Act V. of 1876, s. 256—Disobedience of lawful order—Interest of Magistrate in convicting the prisoner—Disqualification of Judge.*] On the 29th of March 1883, the Municipal Commissioners of Commillah at a meeting issued an order under s. 256 of the Bengal Municipal Act of 1876. The accused was tried and convicted before the District Magistrate under s. 188 of the Penal Code, and fined Rs. 100 for having disobeyed that order. The Magistrate, who tried and convicted the accused, was present as Chairman of the Municipal Commissioners at the meeting of the 29th of March, when the order was passed, for disobedience of which the accused was tried and convicted. *Held* that the conviction was illegal, and must be set aside. *Sergeant v. Dale* (L. R., 2 Q. B. D. 558) cited and followed.—*Kharak Chand Pal v. Tarack Chunder Gupta*, 1. L. R., 10 Cal. 1030 [see p. 573 of this book].

See POSSESSION, 18.

Disobeying Direction of Law—

See PUBLIC SERVANT, 1.

Dispute—

As to Possession. See POSSESSION.

As to Right to Collect Rents. See POSSESSION, 14.

Disputed Title—

See PUBLIC NUISANCE, 10, 11.

Disqualification—

Of Judge. See DISOBEDIENCE OF ORDER, 2.

Of Salaried Officer of Municipality. See IRREGULARITY, 2.

Disqualifying Interest—

Of Judge. See IRREGULARITY, 1.

Of Justice of the Peace. See MUNICIPAL OFFENCES, 2.

Dissent of Judge—

From Unanimous Verdict. See JURY, 4, 9.

From Verdict of Majority. See JURY, 2, 9.

Distinct Offences—

Separate Charges for. See SEPARATE CHARGES, 1; SEPARATE TRIAL, 3.

Distinct and Separate Charges tried Simultaneously by Jury:

See SEPARATE CHARGES, 2.

Distrain under Beng. Act VIII. of 1869—

See CRIMINAL TRESPASS, 3.

District Judge directing Further Inquiry—

See DISCHARGE, 8, 9.

District Magistrate—

Directing Commitment. See COMMITMENT, 2.

May Prosecute where Sanction not availed of by Prosecutor. See SANCTION TO PROSECUTE, 2.

Powers of, to direct Further Inquiry. See ACQUITTAL, 2; DISCHARGE, 7.

When no Appeal from Decision of Bench lies to. See APPEAL, 4.

Divisional Bench of High Court—

See JUDGMENT OF HIGH COURT.

Divorce—

See MAINTENANCE, 3.

Document—

Alteration of Date of. See EVIDENCE, 2.

Inspection of. See INSPECTION OF DOCUMENTS.

Put in in Cross-examination. See RIGHT OF REPLY, 2.

Duty—

Of Committing Magistrate. See EVIDENCE, 3.

Of Court as to Bail. See BAIL.

Duty (contd.)—

Neglect of, by Police-constable. See POLICE ACT, 2.

Of Prosecution. See WITNESSES FOR PROSECUTION, 3, 4.

Of Sessions Judge in summing up to Assessors. See ASSESSORS.

Dying Statement to be taken in Accused's Presence—

See CHARGE, 3.

E.

Easement—

See POSSESSION, 26.

Edifice erected on Joint Parcel of Land—

See POSSESSION, 2.

Effect—

Of Possession given by Amin. See POSSESSION, 4.

Of Waiver by Accused. See IRREGULARITY, 1.

Ejectment under Beng. Act VIII. of 1869—

See POSSESSION, 7.

Elephant, Criminal Misappropriation of—

See PROPERTY.

Embankment—

EMBANKMENT—*Addition to existing embankment—Notification, Publication of, under Bengal Embankment Act—Beng. Act II. of 1882 (Bengal Embankment Act), ss. 6, 76, (cl. b), 80.* The words, "shall add to any existing embankment," in cl. b, s. 76 of Beng. Act II. of 1882, are not intended to mean any repair of an existing embankment, even if the effect of such repair be to make the embankment higher or broader, but only mean an extension in the length of an existing embankment. The notification referred to in s. 6 of the Act must be published in the manner provided by s. 80; and it is not sufficient for such notification merely to be published in the *Calcutta Gazette*.—*Goverdhan Sinha v. Empress, I. L. R., 11 Cal. 570* [see p. 635 of this book].

Enforcement of Attendance of Witnesses—

See WITNESSES FOR DEFENCE, 2.

English Memorandum in Respect of Confessions—

See CONFESSION, 13.

Enhancement of Sentence—

ENHANCEMENT OF SENTENCE ON APPEAL—*Criminal Procedure Code (Act X. of 1882), ss. 423, 439—Penal Code (Act XLV. of 1860), s. 330.* A head-constable was convicted under s. 330 of the Penal Code, and at a trial before a Sessions Judge sentenced to four

Enhancement of Sentence (ctd.)—

months' simple imprisonment. The prisoner appealed. The High Court, in dismissing the appeal, directed, as a Court of Revision, that the sentence passed should be enhanced.—*Mehter Ali v. Empress, I. L. R., 11 Cal. 530* [see p. 632 of this book].

See CULPABLE HOMICIDE, 1.

Enticement—

Strict Proof of Marriage in Cases of. See ADULTERY, 1.

Entry in Book—

Absence of. See RIGHT OF REPLY, 2.

Entry in Khata-book—

See STAMP, 4.

Erection of Buildings—

See PUBLIC NUISANCE, 6.

Erection of Edifice on Joint Parcel of Land—

See POSSESSION, 2.

Escape—

1. ESCAPE—*From custody while being taken before Magistrate—Subsequent conviction for such escape—Penal Code (Act XLV. of 1860), ss. 224, 225.* An escape from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour is not punishable under either s. 224 or s. 225 of the Penal Code.—*Empress v. Shasti Churn Napit, I. L. R., 8 Cal. 331* [see p. 391 of this book].

2. ESCAPE—*Arrest under civil process, Escape from—Criminal liability of officer suffering escape—Penal Code (Act XLV. of 1860), s. 223.* S. 223 of the Penal Code applies only to cases where the person who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested under civil process.—*Queen-Empress v. Tafallah, I. L. R., 12 Cal. 190* [see p. 663 of this book].

European British Subject—

EUROPEAN BRITISH SUBJECT—*Criminal Procedure Code (Act X. of 1872), ss. 82, 84.* S. 84 of the Criminal Procedure Code must be construed strictly with s. 72, and, before a European British subject can be considered to have waived the privilege conferred upon him by s. 72, it must appear that his rights under that section have been distinctly made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights. The provisions of s. 72 of the Code of Criminal Procedure, relating to the kind of Court which shall have jurisdiction, and shall not have jurisdiction, to inquire into a complaint, or try a charge against a European British subject, constitute a privilege—

European British Subject (ctd.)—that is to say, they are not so much words taking away jurisdiction entirely, as words which confer on the British subject a right to be tried by a certain class of Magistrates and by no others, which right the Code enables him to give up. No person can by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try by some circumstance not personal to the accused. *The Queen v. Bholanath Sen* (I. L. R., 2 Cal. 23) distinguished. The waiver of privilege spoken of in s. 84 must be an absolute giving up of all the rights, with reference to sch. vii. of the Code of Criminal Procedure, which a European British subject has; and the words 'dealt with as such before the Magistrate' mean everything contained in the chapter—that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which the accused would be liable.—*Empress v. Allen*, I. L. R., 6 Cal. 83 [see p. 253 of this book].

Evidence—

1. EVIDENCE—*Admissibility of—Judgment in civil suit out of which criminal prosecution arises.*] In a suit by A against the obligors of a bond, the Court held, for the reasons stated in its judgment, that the signatures of the obligors were not genuine, and directed the prosecution of A on a charge of forgery. On the trial of A before a jury, this judgment of the Civil Court was put in evidence on behalf of the prosecution, and its contents commented on by the Sessions Judge in his charge to the jury. Held that this judgment had been illegally admitted.—*Gogun Chunder Ghose v. Empress*, I. L. R., 6 Cal. 247 [see p. 269 of this book].

2. EVIDENCE—*Evidence of witness taken upon commission, when admissible in criminal trial—High Courts' Criminal Procedure Act (X. of 1875), s. 76—Presidency Magistrates' Act (IV. of 1877), s. 158—Evidence Act (I. of 1872), s. 33.*] The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X. of 1875, or unless it is admissible under s. 33 of the Evidence Act.—*Empress v. Dabee Pershad*, I. L. R., 6 Cal. 532 [see p. 292 of this book].

3. EVIDENCE—*"Incapable of giving evidence"—Evidence Act (I. of 1872), s. 33—Duty of committing Magistrate—Witnesses—Examination on oath—Statement of witnesses.*] The incapacity to give evidence mentioned in s. 33 of the Evidence Act need not be a permanent incapacity. *In re Pyari*

Evidence (contd.)—

Lall (4 C. L. R. 504) dissented from. The Magistrate to whom a complaint was made examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any and what case against the prisoners; and he did not take down in writing the statements of the persons so examined. Held that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused, or for the purpose of finding out whether there was a case; but that, having done so, he was not bound to take down their statements in writing.—*Empress v. Asgur Hossein*, I. L. R., 6 Cal. 774 [see p. 312 of this book].

4. EVIDENCE—*Evidence Act (I. of 1872), ss. 32 (cl. 1), 33—"Questions in issue"—Charges added at Session—Deposition before Magistrate—Witness dying or absconding—Charge to jury—Omission to notice evidence—Qualification of jurymen.*] In the proceedings before a Magistrate on a charge of causing grievous hurt two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died, in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. Held that the evidence was admissible either under s. 32, cl. 1, or s. 33 of the Evidence Act, notwithstanding the additional charges before the Sessions Court. The question whether the proviso to s. 33 of the Evidence Act is applicable—that is, whether the questions at issue are substantially the same—depends upon whether the same evidence is applicable, although different consequences may follow from the same act. At the trial it was proved that the other witness who had been examined before the Magistrate had disappeared, and that it had been found impossible to serve him with a summons. His deposition was put in and read. Held that it was properly admitted under s. 33. In summing up the case to the jury, the Judge omitted to call their attention to the evidence of the witnesses for the defence. This evidence appeared to the High Court to be untrustworthy. Held that the summing-up was not defective on account of this omission on the part of the Judge. The fact that a person is a clerk in the office of the Magistrate of the District is not sufficient to disqualify him from sitting on a jury.—*Empress v. Rochia Mohato*, I. L. R., 7 Cal. 42 [see p. 326 of this book].

Evidence (contd.)—

5. EVIDENCE—*Evidence Act (I. of 1872), s. 6—Statement made to third person by person injured.*] The only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person, immediately after the commission of the offence. The prisoner did not, when the statement was made, deny that she had done the act complained of. *Held* that the evidence was admissible under s. 6 and s. 8, ill. g, of the Evidence Act.—In the Matter of the Petition of Surat Dhobni, I. L. R., 10 Cal. 302 [see p. 536 of this book].

6. EVIDENCE—*Deposition where accused has absconded—Criminal Procedure Code (Act X. of 1882), s. 512—Record of evidence in absence of accused.*] Where an accused person has absconded, and it is intended to record evidence against him in his absence, it is requisite, under s. 512 of the Code of Criminal Procedure, that the fact of the absconding of the accused should be alleged, tried, and established, before the deposition is recorded.—*Ghurbin v. Empress*, I. L. R., 10 Cal. 1097 [see p. 585 of this book].

7. EVIDENCE—*Deposition of accused person when admissible in evidence against him in subsequent proceeding—Evidence Act (I. of 1872), s. 80.*] A deposition, given by a person, is not admissible in evidence against him in a subsequent proceeding without its being first proved that he was the person who was examined and gave the deposition. A pardon was tendered to an accused, and his evidence was recorded by the Magistrate. Subsequently, the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial, the deposition given by him, before the Magistrate, was put in and used in evidence against him without any proof being given that he was examined as a witness before the Magistrate. *Held* that the deposition was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate.—*Empress v. Durga Sonar*, I. L. R., 11 Cal. 580 [see p. 639 of this book].

Evidence—

Causing Disappearance of. See CAUSING DISAPPEARANCE OF EVIDENCE.

When Confession is Admissible as. See CONFESSION.

Disbelieved in Some Parts. See JURY, 10. Judge giving. See IRREGULARITY, 1.

Of Dying Statement not made in Accused's Presence. See CHARGE, 3.

Of Marriage. See ADULTERY, 1.

On Revision. See POSSESSION, 21.

Exact Nature of Charge to be explained to Accused—

See CHARGE, 4.

Examination—

By Commission. See COMMISSION.

Of Accused by Sessions Judge. See SEPARATE CHARGES, 2.

Of Prisoner by Judge. See RIGHT OF REPLY, 1.

Of Witnesses. See REVIVAL OF PROSECUTION.

Of Witness by Court. See CONFESSION, 7.

Of Witnesses in Absence of Accused. See EVIDENCE, 3.

Of Witnesses for Defence. See POSSESSION, 2.

Of Witnesses for Prosecution. See WITNESSES FOR PROSECUTION.

Excise—

1. EXCISE—*Bengal Excise Act (Beng. Act VII. of 1878), ss. 9, 58, 74—Introduction into Calcutta of spirituous liquor manufactured elsewhere—Limits fixed by Collector—Additional punishment—Alternative sentence of imprisonment.*] The provisions of s. 74 of the Bengal Excise Act as to additional punishment, where there has been a "previous conviction for a like offence," contemplate merely the case of the offender having been already convicted of an offence punishable with a fine of Rs. 200 or upwards, and being again convicted of another offence punishable with the same punishment; it is not necessary that he should have been previously convicted of the same offence. The accused were sentenced by the Presidency Magistrate, under ss. 58 and 74 of the Bengal Excise Act, to fine of Rs. 200 each, in default to three months' imprisonment, and in addition to six months' imprisonment, which was the maximum term that could be awarded under s. 74. *Held* that the sentence of imprisonment was not in excess of the powers given to the Magistrate by s. 12 of the Presidency Magistrates' Act, the imposition of the additional sentence of imprisonment not affecting the Magistrate's powers as regarded the original sentence under s. 58. No limits with regard to any distilleries in Calcutta having been fixed under s. 9 of the Act within which spirituous liquor manufactured otherwise than in that particular distillery shall be introduced or sold without a special pass, and the fixing of such limits being necessary to a conviction of an offence under s. 58, the convictions in this case were set aside.—*Ram Chunder Shaw v. Empress*, I. L. R., 6 Cal. 575 [see p. 293 of this book].

2. EXCISE—*Bengal Excise Act (Beng. Act VII. of 1878), s. 53—Sale by licensed vendor*

I. L. R., Cal. 128.

Excise (contd.)—

contrary to terms of his license.] S. 53 of the Bengal Excise Act does not apply to sales by a licensed vendor contrary to the terms of his license. That section provides for a breach of the condition of a license not covered by the second clause of s. 59 of the Act.—*Empress v. Nobocoomar Pal*, I. L. R., 6 Cal. 621 [see p. 301 of this book].

3. **EXCISE—Sale by wholesale—Sale by servant—Beng. Act VII. of 1878, ss. 15, 59, 60.** A sale of more than twelve quart bottles, or two gallons of spirituous or fermented liquors of the same kind, made at one transaction, is a sale by wholesale. *Quare.*—Whether a sale of twelve quart bottles of one kind of liquor, and three quart bottles of another kind, at the same time, comes within the prohibition in the explanation-clause of s. 15. The licensed retail-vendor himself is the only person liable to conviction under s. 60.—*Empress v. Nuddiar Chand Shaw*, I. L. R., 6 Cal. 832 [see p. 315 of this book].

4. **EXCISE—Sale by servant—Breach of condition of license—Beng. Act VII. of 1878, ss. 41, 42, 59.** The conviction of servants of a licensed vendor of spirits for a breach of the license is not necessarily illegal. *In re Ishur Chunder Shaha* (19 W. R., Cr. Rul., 34) followed. *Empress v. Nuddiar Chand Shaw* (I. L. R., 6 Cal. 832; 8 C. L. R. 152) dissented from. Two servants of a licensed vendor of spirits were charged with having committed two breaches of the condition of the license, and the maximum fine for each breach was inflicted. *Held* that the Magistrate was competent to punish each of the servants separately in this manner. The excise-officer, to whom a licensed vendor of spirits is bound to produce his license, must be an excise-officer of the higher grades, not any police-officer who may be exercising the powers of an excise-officer.—*Empress v. Baney Madhub Shaw*, I. L. R., 8 Cal. 207 [see p. 383 of this book].

5. **EXCISE—Construction of Act—Beng. Act VII. of 1878, ss. 15, 17, 61—Specified quantity of spirits—Maximum amount.** Penal Statutes must be construed strictly, *i.e.*, nothing is to be regarded as within the meaning of the Statute which is not within the letter, and clearly and intelligibly described in the very words of the Statute itself. Where, under s. 15, Beng. Act VII. of 1878, the Chief Commissioner of Assam, exercising the powers of the Board of Revenue, fixed, by a Circular Order, the limit at six quarts bottles of country spirits as allowable for retail-sales, and an accused was charged, under s. 17, with possessing more than that quantity, but the amount he had was less than the amount stated in s. 15, *held* that he

Excise (contd.)—

was not guilty of any offence under s. 61; and that no lesser quantity than that specifically mentioned in s. 15 of country spirits, which might have been declared to be the maximum quantity by any such order made under the provisions of s. 15, could be deemed to be the quantity specified in s. 15 within the meaning of s. 16.—*Empress v. Kola Lalang*, I. L. R., 8 Cal. 214 [see p. 387 of this book].

6. **EXCISE—Excise Act (Beng. Act VII. of 1878), s. 61—Imported liquor—Possession—Pass—Consignee—Agent.** Certain liquors arrived in Calcutta per S.S. *Navarino*, consigned to M. & Co. at Agra, who requested A to pay on their behalf the duty and landing charges, and forward the goods to Agra. While on the way from the steamer to the railway-station, the goods were seized as being in the possession of A without a pass within the meaning of s. 61 of Beng. Act VII. of 1878, and A was convicted and sentenced to a fine under the provisions of that Act. *Held* that the conviction was bad.—*Crown v. Henry Kyte*, I. L. R., 9 Cal. 223 [see p. 468 of this book].

7. **EXCISE—Bengal Excise Act (VII. of 1878), ss. 15, 53, 60, 61—Sale by servant of licensed vendor—Cooly employed by servant—Reference to High Court—Revisional jurisdiction.** The servant of a licensed vendor sold eight quart bottles of country spirit, and employed a cooly to carry them as he directed. The servant was convicted under s. 60, Beng. Act VII. of 1878; and the cooly was convicted under s. 61 of the same Act. It was suggested that the servant should have been convicted under s. 53, and that the cooly had committed no offence. *Held* that the conviction of the cooly was illegal, and must be set aside. *Held* also that the servant was properly convicted, and whether under s. 60 or s. 53 was immaterial. *Queen v. Ishan Chunder Shaha* (19 W. R. Cr. 34) and *Empress v. Baney Madhub Shaw* (I. L. R., 8 Cal. 207; 10 C. L. R. 389) followed. The necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision.—*Empress v. Ishan Chundra De*, I. L. R., 9 Cal. 847 [see p. 491 of this book].

8. **EXCISE—Appeal in criminal case—Criminal Procedure Code (Act X. of 1882), s. 411—Bengal Excise Act (Beng. Act VII. of 1878), ss. 60, 74—Appeal from sentence of Presidency Magistrate—"Like offence"—Punishment on second or subsequent conviction of offence under Bengal Excise Act.** No appeal lies from a sentence of six months' rigorous imprisonment and a fine

Excise (contd.)—

of Rs. 200, or a further period of three months' simple imprisonment, passed by a Presidency Magistrate. The offence of selling wine retail by a person who has only a wholesale license is an offence of a like nature to that of selling wine without a license at all, within the meaning of the term "like offence" as used in s. 74 of the Bengal Excise Act. *Ram Chunder Shaw v. The Empress* (I. L. R., 6 Cal. 575) followed.—*Schein v. Queen-Empress*, I. L. R., 16 Cal. 799 [see p. 985 of this book].

See REASONS FOR CONVICTION, 2.

Excise-license—

Cantonment Magistrate not authorized to cancel. See CANTONMENTS ACT.

Exclusion of Time in obtaining Copy of Judgment—

See APPEAL, 6.

Exclusive Right of Fishery in Public River—

Infringement of. See FISHERY, 1.

Exculpatory Statement—

See CONFESSION, 7.

» FALSE INFORMATION, 1.

Execution of Decree—

See FRAUDULENT EXECUTION OF DECREE.

Execution of Legal Process—

Resistance to. See SENTENCE, 4.

Executive Officer—

Order by. See PUBLIC NUISANCE, 15.

Experts—

Evidence of. See CONFESSION, 14.

Opinions of, how elicited. See STATEMENTS TO POLICE DURING INVESTIGATION, 1.

Explanation of Charge to Accused—

See CHARGE, 2.

Extortion—

EXTORTION—*Abetment—Village Chaukidar—Penal Code (Act XLV. of 1860), s. 384.* The mere fact that the offence of extortion under s. 384 of the Penal Code is committed in the presence of the village-chaukidar, without eliciting any disapproval on his part, will not render him liable as an abettor of the offence.—*Gopal Chunder Sirdar v. Foolmoni Bewa*, I. L. R., 8 Cal. 728 [see p. 416 of this book].

Extra Drill—

See POLICE ACT, 2.

Extraordinary Jurisdiction of High Court—

See POSSESSION, 2.

F.**Fabricating Documents—**

See FORGERY, 2.

Fabricating False Evidence—

See FALSE EVIDENCE, 2.

Fact—

Discovery of, by one Police-officer, though known to another. See CONFESSION, 12.

Facts—

Appeal from Verdict of Jury upon. See APPEAL BY LOCAL GOVERNMENT, 2, Revision on. See REVISION, 3.

Failure of Justice—

See IRREGULARITY.

False Charge—

1. FALSE CHARGE—*Penal Code (Act XLV. of 1860), ss. 182, 211—Preliminary inquiry—Criminal Procedure Code (Act X. of 1872), s. 471.* An offence under s. 211 of the Penal Code includes an offence under s. 182; it is, therefore, open to a Magistrate to proceed under either section, although, in cases of a more serious nature, it may be that the proper course is to proceed under s. 211. See *Rafiee Mahomed v. Abbas Khan* (8 W. R., Cr., 67).—*Bhokteram v. Heera Kolita*, I. L. R., 5 Cal. 184 [see p. 221 of this book].

2. FALSE CHARGE—*Penal Code (Act XLV. of 1860), ss. 211, 109—Charge laid before police-officer.* There is nothing in s. 211 of the Penal Code which limits the penalty there imposed to cases in which attempts have been made to substantiate false charges in a Court of Justice. A false charge made before the police is therefore punishable under this section.—*Ashrof Ali v. Empress*, I. L. R., 5 Cal. 281 [see p. 226 of this book].

3. FALSE CHARGE—*Penal Code (Act XLV. of 1860), s. 211—Prosecution for making a false charge—Opportunity to accused to prove truth of charge.* Before a person can be put upon his trial for making a false charge under s. 211 of the Penal Code, he must be allowed an opportunity of proving the truth of the complaint made by him; and such an opportunity should be afforded to him, if he desires to take advantage of it, not before the police, but before the Magistrate. Magistrates should clearly understand that, whilst the police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of such evidence when collected.—*Government v. Karimdad*, I. L. R., 6 Cal. 496 [see p. 286 of this book].

4. FALSE CHARGE—*Penal Code (Act XLV. of 1860), s. 211—Charge made on report of police that case was false—Charge of giving false information.* A commitment for trial

False Charge (contd.)—

under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons accused, is not illegal, merely because the complaint which the accused made has not been judicially inquired into, but is based on the report of the police that the case was a false one.—*Empress v. Salik Roy*, I. L. R., 6 Cal. 582 [see p. 297 of this book].

5. FALSE CHARGE—*Penal Code (Act XLV. of 1860), s. 211—Making false charge to Court or officer having no jurisdiction.* It is necessary for a conviction under s. 211 of the Penal Code that the false charge should have been made to a Court or officer having jurisdiction to investigate and send it up for trial.—*Empress v. Jamoona*, I. L. R., 6 Cal. 620 [see p. 300 of this book].

6. FALSE CHARGE—*Penal Code (Act XLV. of 1860), s. 211—Opportunity of substantiating charge.* Upon a trial for bringing a false charge with intent to injure, it appeared that the original complaint was lodged in the Court of the Extra Assistant Commissioner, and a local inquiry, by a competent police-officer, was directed. The officer reported that the charge was false, and recommended that the prisoner should be prosecuted. The Extra Assistant Commissioner ordered the papers to be sent to the Deputy Commissioner, who ordered the prosecution, and the prisoner was convicted. *Held* that the conviction was bad. The Extra Assistant Commissioner should, on receipt of the report of the police, have communicated its contents to the prisoner, and afforded her an opportunity of substantiating her complaint, and should then have decided the case.—*Empress v. Grish Chunder Nundi*, I. L. R., 7 Cal. 87 [see p. 335 of this book].

7. FALSE CHARGE—*Plea of guilty—Penal Code (Act XLV. of 1860), s. 211—Record of plea—Explaining charge—Criminal Procedure Code (Act X. of 1872), s. 237.* A prisoner, charged under s. 211 of the Penal Code with having brought a false charge with intent to injure, by accusing A of having caused the death of a person by doing a rash or negligent act not amounting to culpable homicide under s. 304A, stated at the trial that the original complaint made by him was false, and that he made it unthinkingly. The Sessions Judge treated this statement as a plea of guilty, and sentenced the prisoner to rigorous imprisonment. No record of the prisoner's plea, as required by s. 237 of the Criminal Procedure Code, appeared on the proceedings, nor did it appear that the charge had been explained as well as read to the prisoner, and the Judge considered that the original complaint did

False Charge (contd.)—

not amount to a false charge of an offence under s. 304A. *Held* that the conviction was bad.—*Empress v. Gopal Dhanuk*, I. L. R., 7 Cal. 96 [see p. 336 of this book].

8. FALSE CHARGE—*Dismissal of complaint—Prosecution under s. 211 of Penal Code (Act XLV. of 1860)—Criminal Procedure Code (Act X. of 1872), ss. 144, 147, 468, 470, 471.* Where a charge had been preferred against a person, and the Magistrate before whom it was heard, after hearing the statement of the complainant, but not those of his witnesses, dismissed the complaint, and subsequently, on the application of the person charged, granted him leave under s. 470 to prosecute the complainant for bringing a false charge, *held* that the proceedings were not irregular, and that the Magistrate was justified in acting as he had done. *Held* also that there is a distinction in the proceedings to be adopted when a sanction is given under s. 470, and the institution by the Court of its own motion of proceedings under s. 471. *Syed Nissar Hossein v. Ramgolan Sing* (25 W. R., Cr. Rul., 10) dissented from.—*Gyan Chunder Roy v. Protap Chunder Dass*, I. L. R., 7 Cal. 208 [see p. 341 of this book].

9. FALSE CHARGE—*Compoundable offence—Discharge of accused charged under s. 211, Penal Code, upon plea of original charge having been compounded—Penal Code (Act XLV. of 1860), ss. 211, 342, 347—Criminal Procedure Code (Act X. of 1882), s. 345.* The fact that an offence alleged to have been committed has been compounded is no conclusive answer to a charge made against the prosecutor under s. 211 of the Penal Code. A laid a charge against M for wrongful confinement. The police reported the case as a false one; and, A not appearing to prove his complaint, the District Magistrate ordered him to be prosecuted under s. 211 of the Penal Code, and made over the case to a Deputy Magistrate. Upon the hearing of such charge, A pleaded that he had compounded the original charge laid by him against M, and that, therefore, the charge against him under s. 211 could not lie. The Deputy Magistrate, without hearing any evidence, dismissed the case. *Held* that the course so taken was illegal, as such plea was no conclusive answer to a charge under s. 211.—*Empress v. Atar Ali*, I. L. R., 11 Cal. 79 [see p. 596 of this book].

10. FALSE CHARGE—*Penal Code (Act XLV. of 1860), s. 211.* A false charge before the police is a false charge falling within the first portion of s. 211 of the Penal Code. The latter portion of s. 211 of the Penal Code is confined to cases in which criminal proceedings have been instituted, and

False Charge (contd.)—

does not apply to false charge merely. *Empress of India v. Pitam Rai* (I. L. R., 5 All. 215) and *Empress v. Parahu* (I. L. R., 5 All. 593) followed.—*Queen-Empress v. Karim Buksh*, I. L. R., 14 Cal. 633 [see p. 760 of this book].

11. FALSE CHARGE—*Criminal Procedure Code (Act X. of 1882), s. 191—Cognizance of an offence on suspicion—Penal Code (Act XLV. of 1860), s. 211—Police-report—False charge, Prosecution for, without first enquiring into truth of original complaint*] A person having laid an information before the police, the police reported the case as false; the informant then appeared before a Magistrate, asking that his case might be investigated, and his witnesses summoned. This application was refused, and the Magistrate, after perusing the police-report, passed an order directing him to be prosecuted under s. 211 of the Penal Code. *Held* that the application to the Magistrate was "a complaint" within the meaning of s. 191 of the Criminal Procedure Code into which the Magistrate was bound to have enquired. A Magistrate may take cognizance under ss. 201 and 292 of the Criminal Procedure Code of an offence brought to his notice by a police-report which affords ground for a suspicion that an offence has been committed; but, as a matter of sound judicial discretion, a Magistrate should not so proceed and direct that the person suspected be tried until some person aggrieved has complained, or until he has before him a police-report on the subject based on an investigation directed to the offence to be tried, and in cases of alleged false charges until it is clear that the original charge has been either heard and dismissed or abandoned. And before the order to prosecute for the false charge is made, the person who made the original charge should be offered an opportunity of supporting it or abandoning it.—*Queen-Empress v. Sham Lall*, I. L. R., 14 Cal. 707 [see p. 765 of this book].

. See SANCTION TO PROSECUTE, 2, 5, 7, 14.

False Complaint—

Compensation for. See CATTLE-TRESPASS ACT, 1

False Evidence—

1. FALSE EVIDENCE—*Criminal Procedure Code (Act X. of 1872), s. 471—Act XXII. of 1861, s. 16—Order sending case to Magistrate for inquiring into offence of giving false evidence—Preliminary inquiry—Vagueness of charge*] Although s. 16 of Act XXIII. of 1861 gives Civil Courts powers similar to those conferred on Civil and Criminal Courts alike by s. 471 of the Criminal Procedure Code, the whole law as to the procedure in cases within those sec-

False Evidence (contd.)—

tions is now embodied in s. 471 of the Criminal Procedure Code. In a suit brought to recover possession of certain property, the Judge decided one of the issues raised in the plaintiff's favour, but on the important issue as to whether the plaintiff ever had possession, he found for the defendant. The plaintiff was not examined, but on the issue as to possession he called two witnesses. The Judge disbelieved their statements, and, considering that the plaintiff had failed to prove his case, he gave judgment for the defendant, without requiring him to give evidence on that issue. In the concluding paragraph of his judgment, the Judge directed the depositions of the two witnesses above referred to, together with the English memoranda of their evidence, to be sent to the Magistrate with a view to his inquiring whether or not they had voluntarily given false evidence in a judicial proceeding, and he further directed the Magistrate to inquire whether or not the plaintiff had abetted the offence of giving false evidence, on the ground that, as the witnesses were the plaintiff's servants, he must personally have influenced them, and also to inquire whether the plaint which the plaintiff had attested contained averments which he knew to be false. On a motion to quash this order, *held* that, under s. 471 of the Criminal Procedure Code, the Judge has no power to send a case to a Magistrate except when, after having made such preliminary inquiry as may be necessary, he is of opinion that there is sufficient ground (i.e., ground of a nature higher than mere surmise or suspicion) for directing judicial inquiry into the matter of a specific charge, and that the Judge is bound to indicate the particular statements or averments in respect of which he considers that there is ground for a charge into which the Magistrate ought to inquire, and that the order was bad, because the Judge had made no preliminary inquiry, and because it was too vague and general in its character.—*Queen v. Baijoo Lall*, I. L. R., 1 Cal. 450 [see p. 18 of this book].

2. FALSE EVIDENCE—*Penal Code (Act XLV. of 1860), ss. 192, 464, cl. 2—Fabricating false evidence—Forgery—Alteration of date of document.*] Where the date of a document, which would otherwise not have been presented for registration within time, is altered for the purpose of getting it registered, the offence committed is not forgery, where there is nothing to show that it was done "dishonestly or fraudulently," within cl. 2, s. 464 of the Penal Code, but fabricating false evidence within s. 192.—*Empress v. Mir Ekrrar Ali*, I. L. R., 6 Cal. 482 [see p. 282 of this book].

False Evidence (contd.)—

3. FALSE EVIDENCE—*Deposition of the accused when admissible as evidence*—Civil Procedure Code (Act X. of 1877), ss. 173, 182, 183, 647—Evidence Act (I. of 1872), s. 91.] Failure to comply with the provisions of ss. 182 and 183 of Act X. of 1877 (Civil Procedure Code) in a judicial proceeding is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition; and, under s. 91 of Act I. of 1872 (Evidence Act), no other evidence of such deposition is admissible.—*Empress v. Mayadeb Gossami*, I. L. R., 6 Cal. 762 [see p. 311 of this book].

4. FALSE EVIDENCE—*Criminal Procedure Code* (Act X. of 1872), ss. 118, 119—*Penal Code* (Act XLV. of 1860), s. 191.] Neither the words "shall answer all questions" in s. 118 of the Code of Criminal Procedure, nor the words "shall be bound to answer all questions in s. 119 of the same Code, constitute "an express provision of the law to state the truth" within the meaning of s. 191 of the Penal Code. Ss. 118, 119, are merely intended to oblige persons to give such information as they can to the police, in answer to the questions which may be put to them, and they impose no legal obligation on those persons to speak the truth.—*Empress v. Kassim Khan and Empress v. Musamat Dahia*, I. L. R., 7 Cal. 121 [see p. 337 of this book].

5. FALSE EVIDENCE — *Separate trial—Procedure when more than one person is charged with having given false evidence in the same proceeding*—*Criminal Procedure Code* (Act X. of 1882), s. 161—*Penal Code* (Act XLV. of 1860), s. 193.] In order to sustain any conviction for giving false evidence upon an alternative charge when no evidence is offered to prove the falsity of either statement in particular, it must be clear that the two statements are contradictory. The law laid down by the Full Bench in the case of the *Empress v. Kassim Khan* (I. L. R., 7 Cal. 121) has been altered by the provisions of s. 161 of the Criminal Procedure Code (Act X. of 1882), and a witness who makes a false statement to a police-officer, in reply to a question which he is bound to answer, would be guilty of intentionally giving false evidence. When four persons were accused of having given false evidence in the same proceeding, and the Sessions Judge, while professing to try each accused separately, heard the evidence of the witnesses only once, held that this was substantially trying the four prisoners together, and was an improper mode of procedure.—*Nathu Sheikh v. Empress*, I. L. R., 10 Cal. 405 [see p. 540 of this book].

False Evidence (contd.)—

6. FALSE EVIDENCE—*Alternative charge and conviction*—*Penal Code* (Act XLV. of 1860), s. 193—*Criminal Procedure Code* (Act X. of 1882), ss. 233, 555, and Sch. V. XXVIII., II. (4).] A prisoner was convicted on an alternative charge in the form provided by Sch. V., XXVIII., II. (4) of the Criminal Procedure Code (Act X. of 1882), of having given false evidence, such evidence consisting of contradictory statements contained in one deposition while he was under cross-examination and re-examination as a witness in a judicial proceeding. There was no finding as to which of the contradictory statements was false. Held (Norris, J., dissenting) that s. 233 of the Criminal Procedure Code did not affect the matter, and that the conviction was good. *Semble* (per Wilson, J.).—The decision in *Queen v. Bedoo Noshyo* (12 W. R. Cr. 11), though a guide to the discretion of Courts in framing and dealing with charges, was not intended to, and does not, affect the law applicable to the matter.—*Habibullah v. Empress*, I. L. R., 10 Cal. 937 [see p. 558 of this book].

7. FALSE EVIDENCE—*Affidavit affirmed before a Deputy Magistrate—Prosecution on facts stated in an affidavit affirmed before a Deputy Magistrate*—*Penal Code* (Act XLV. of 1860), ss. 193, 199—*Declaration by law receivable as evidence*—*Sanction to prosecute, Order for, quashed*.] A Deputy Magistrate has no power to administer an oath to a person making a declaration in the shape of an affidavit; and such person cannot, on the facts stated in such declaration, be prosecuted for committing an offence either under s. 193 or s. 199 of the Penal Code.—In the Matter of the Petition of Iswar Chunder Guho and others, I. L. R., 14 Cal. 653 [see p. 762 of this book].

8. FALSE EVIDENCE—*Alternative charges—Statement made to police-officer investigating case*—*Penal Code* (Act XLV. of 1860), ss. 191, 193—*Criminal Procedure Code* (Act X. of 1882), s. 161.] An accused was charged with giving false evidence upon an alternative charge, one statement having been made to a police-officer investigating a case of arson, and the other having been made when he was examined as a witness before the Joint-Magistrate when the case was being inquired into. The two statements were contradictory, and no evidence was given to show which of them was false. It was not proved that the statement made to the police-officer was made in answer to questions put by him, and the only evidence given at the trial with regard to the inquiry upon which the police-officer was engaged was to the effect that an inquiry was being made about the burning of

False Evidence (contd.)—

a house. The jury acquitted the accused, and the case was referred to the High Court by the Sessions Judge, who disagreed with the verdict of acquittal. *Held* that the verdict was right. Before a conviction in such a case can be sustained, it must, having regard to the provisions of s. 161 of the Criminal Procedure Code, be clearly proved by the evidence that the statement made to the police-officer was a statement in answer to questions put to the accused by the investigating police-officer, and in the absence of such evidence, even though the statement were proved to be false, a conviction could not be sustained. *Held*, further, that in such a case it is also necessary for the prosecution to establish that the police-constable was making an investigation under Ch. XIV. of the Criminal Procedure Code.—*The Empress v. Baikanta Bauri*, I. L. R., 16 Cal. 349 [see p. 916 of this book].

False Evidence—

Court to await Result of Pending Appeal before Committing for. See APPEAL, 3.

Evidence in Part disbelieved. See JURY, 10. Prosecution for. See SANCTION TO PROSECUTE, 4, 10.

False Information—

1. FALSE INFORMATION—*Penal Code (Act XLV. of 1860), s. 201.* A woman who, with her infant child, eloped from her husband's house, was afterwards arrested on a charge of murdering the child, which was missing. She made three different statements: (1) that she had left it with her husband; (2) that she had been enticed away by one R, who had taken the child from her; (3) that one H had drowned the child. The Sessions Judge believed the last statement, and convicted her under s. 201 of the Penal Code. *Held* that the conviction was wrong, and must be set aside. S. 201 of the Penal Code does not apply to a case where the person, who is the probable or possible offender, makes statements exculpating himself by inculpating another.—*Empress v. Behala Bibi*, I. L. R., 6 Cal. 789 [see p. 314 of this book].

2. FALSE INFORMATION—*Penal Code (Act XLV. of 1860), s. 182—Criminal Procedure Code (Act X. of 1882), s. 195—Sanction to prosecution—Separate convictions for one statement, Illegality of.* An information was given to a police-officer, in the course of which two persons were named in whose houses stolen property belonging to a certain individual would be discovered. On complaint the information was found to be false, and the accused was convicted and punished for two offences under s. 182 as affecting two different persons. *Held* that, although the information related to two

False Information (contd.)—

different persons, the accused could be charged with having made only one false statement, and punished for one offence under s. 182. S. 195 of the Criminal Procedure Code clearly shows that a complaint directly made by a public servant mentioned therein is quite as sufficient as his sanction. *Empress of India v. Radha Kishan* (I. L. R., 5 All. 36) dissented from.—*Poonit Singh v. Madho Bhot*, I. L. R., 13 Cal. 270 [see p. 700 of this book].

3. FALSE INFORMATION—*Penal Code (Act XLV. of 1860), s. 182—Charge made against no specific person—Specific charge.* S. 182 of the Penal Code must be read as an entire section, and, when so read, it applies to those cases in which the police are induced, upon information supplied to them, to do or omit to do something which might affect some *third person*, and which they would not have done had they known the truth of the matter laid before them.—In the Matter of the Petition of Golam Ahmed Kazi, I. L. R., 14 Cal. 314 [see p. 737 of this book].

4. FALSE INFORMATION—*Penal Code (Act XLV. of 1860), s. 177—Furnishing false information for the purpose of preventing the commission of an offence, Meaning of.* The information which, under the second branch of s. 177 of the Penal Code, a person is legally bound to give "for the purpose of preventing the commission of the offence" relates, not to the commission of offences generally, but to the commission of some particular offence.—In the Matter of the Petition of Panatulla; *Panatulla v. Queen-Empress*, I. L. R., 15 Cal. 386 [see p. 816 of this book].

False Statement before Registrar—

See REGISTRATION ACT,

False Statement before Sub-Registrar—

See REVISION, 3.

Feræ Naturæ—

See FISHERY, 2.

Fight between two Contending Factions—

See CULPABLE HOMICIDE, 4.

Fine and Confiscation—

Offence punishable by. See SUMMARY TRIAL, 1.

Fine jointly imposed on two Accused—

See CATTLE-TRESPASS ACT, 2.

First-class Magistrate not inferior to District Magistrate—

See ACQUITTAL, 2.

Fishery—

1. **FISHERY**—*Infringement of exclusive right of fishery in public river—Theft—Criminal misappropriation—Mischief—Criminal trespass—Unlawful assembly—Penal Code (Act XLV. of 1860), ss. 143, 378, 403, 426, 447.* Fish in a public river cannot be said to be property in the possession of the person who may have the fishery-right, and the infringement of that right is not *theft* under s. 378 of the Penal Code. The accused were charged with unlawfully taking fish along with some eleven others in a public river, the right of fishing in which had been let out by the Government to the complainant, and the lower Court, amongst other offences, convicted them of theft, criminal misappropriation, mischief, criminal trespass, and unlawful assembly. *Held* that the conviction was wrong, and that no offence had been committed.—*Bhagiram Dome v. Abar Dome* and another, I. L. R., 15 Cal. 388 [see p. 818 of this book].

2. **FISHERY**—*Fishing in tank connected with a running stream—Theft—Criminal trespass—Penal Code (Act XLV. of 1860), ss. 379, 447.* Accused were charged with having taken fish from a tank belonging to the complainant, and convicted of theft and criminal trespass under ss. 379 and 447 of the Penal Code. It was found that the tank in question was not enclosed on all sides, and was dependent on the overflow of a neighbouring channel which was connected with flowing streams for its supply of fish, that the fish were not reared and preserved in the tank, and that the occurrence complained of took place at a time when the floods were high, and the tank was connected with the streams, so that the fish could leave it at pleasure. *Held* that the fish were *feræ naturæ* and not in "the possession of" the complainant, and consequently no offence had been committed. *Held* further that, had the fish been taken at a time when they were restrained of their natural liberty, and were liable to be taken at the pleasure of the owner of the tank, the conviction would have been upheld. The Meherpore case of 1887 (I. L. R., 15 Cal. 390) distinguished.—*Maya Ram Surma v. Nichala Katani* and others, I. L. R., 15 Cal. 402 [see p. 827 of this book].

Fishing Purposes—

Placing Bamboo Stockade on Navigable River for. See PUBLIC NUISANCE, 1.
Strewing Branches on River for. See PUBLIC SPRING.

Force on Civil Court Peon—

See SENTENCE, 4.

Foreign Language—

Statement made by Accused to Magistrate in, how to be recorded. See CHARGE, 2.

Forfeiture of Recognizance—

See RECOGNIZANCE.

Forged Document—

1. **FORGED DOCUMENT**—*Sessions case—Fraudulent use of forged document as genuine—Penal Code (Act XLV. of 1860), ss. 196, 471.* The offences imputed against an accused, who, in a civil suit, is alleged to have used, as genuine, a document which he knew to be a forged document, is one cognizable under s. 471 of the Penal Code. Such accused should, therefore, be charged under that section, and not under s. 196 of the Code.—*Empress v. Kherode Chunder Mozumdar*, I. L. R., 5 Cal. 717 [see p. 237 of this book].

2. **FORGED DOCUMENT**—*Penal Code (Act XLV. of 1860), ss. 24, 25, 464, 467, 471—Using as genuine a forged document with intent to defraud—A sanad, conferring a title of dignity, is not a valuable security.* The accused, in order to obtain a recognition from a settlement-officer that they were entitled to the title of "Loskur," filed a sanad before that officer, purporting to grant that title. This document was found not to be genuine. The Sessions Judge convicted the accused under ss. 471, 464 of the Penal Code. *Held* on appeal that, even supposing the accused had used the document knowing it not to be genuine, they could not be found guilty, as the intention of the accused was not to cause wrongful gain or wrongful loss to any one; their intention being to produce a false belief in the mind of the settlement-officer that they were entitled to the dignity of "Loskur," and that this could not be said to constitute "an intention to defraud." A sanad, conferring a title of dignity on a person, is not a valuable security within the meaning of the Penal Code.—*Jan Mahomed and Jabar Mahomed v. Empress; Wari Meah v. Empress*, I. L. R., 10 Cal. 584 [see p. 545 of this book].

See JURY, 5.

Forgery—

1. **FORGERY**—*Attempt to commit—Penal Code (Act XLV. of 1860), ss. 465, 511.* A person cannot be convicted of an attempt to commit an offence under s. 511 of the Penal Code, unless the offence would have been committed if the attempt charged had succeeded. A prisoner, who was charged with attempting to commit forgery of a valuable security, was found guilty by the jury of attempting to commit forgery. The jury explained their finding by saying that the prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Company, and that one of these forms had actually been printed and the proof corrected by him;

Forgery (contd.)—

that the prisoner had had an intention of making such addition to the printed form as would make it a false document; and that he did this dishonestly and with intent to commit fraud. The Sessions Judge sentenced the prisoner to rigorous imprisonment for one year under ss. 465, 511 of the Penal Code for attempting to commit forgery. *Held* that the conviction was wrong, and must be set aside.—*Empress v. Riasat Ali, alias Baboo Miya, alias Bodiuzzuma*, 1. L. R., 7 Cal. 352 [see p. 349 of this book].

2. **FORGERY—Penal Code (Act XLV. of 1860), s. 464—Intention in fabricating documents—Fraudulent and dishonest fabrication.** The accused, who was a copyist in the Sub-divisional Office at B, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post, and purporting to have been made by the Sub-divisional Officer of B, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-divisional Officer at B, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-divisional Officer, having some suspicion as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post-office, the accused fabricated a third document, purporting to be a letter from the Sub-divisional Officer to the post-master, asking him to stop the despatch of the demi-official letter. The accused was charged with, and convicted in the Sessions Court of, the offence of forgery, under s. 464 of the Penal Code, in respect of the three documents. *Held* the conviction was right with regard to the two first documents, but with regard to the third document it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of that section.—*Abdul Hamid v. Empress*, 1. L. R., 13 Cal. 349 [see p. 711 of this book].

3. **FORGERY—Intention—Penal Code (Act XLV. of 1860), s. 466.** Where a document is made for the purpose of being used to deceive a Court of Justice, it is made *with the intention* of being used for that purpose. A person, therefore, who, at the request of another sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being,

Forgery (contd.)—

however, in reality no such suit in existence), is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any other person than the person fabricating the document.—*Haradhan Maiti v. Queen-Empress*, 1. L. R., 14 Cal. 513 [see p. 746 of this book].

See EVIDENCE, 1, 2.

» FALSE EVIDENCE, 2.

» SANCTION TO PROSECUTE, 10.

Form and Contents of Judgment—

See JUDGMENT, 2.

Frame of Charge in a Case of Murder—

See CHARGE, 3.

Fraudulent Execution of Decree—

FRAUDULENT EXECUTION OF DECREE—Penal Code (Act XLV. of 1860), s. 210—Civil Procedure Code (Act XIV. of 1882), s. 258—Satisfaction of decree—Execution of decree—Fraudulently executing decree after it has been satisfied when satisfaction has not been certified to Court. A decree-holder having proceeded to execute his decree against his judgment-debtor, the latter objected, stating that the decree had been already satisfied, although the adjustment thereof had not been certified to the Court as required by s. 258 of the Code of Civil Procedure. The judgment-debtor, being under the circumstances compelled to deposit the amount of the decree in Court, applied for and obtained sanction to prosecute the decree-holder for an offence under s. 210 of the Penal Code. It was contended that the case did not fall within that section, as the satisfaction, not having been certified to the Court, could not be recognised by the Court executing the decree, and that consequently no offence had been committed. *Held* that the words, "after it has been satisfied," used in s. 210 of the Penal Code, indicate only the *fact* of the satisfaction of the decree. The *fact* that the satisfaction is of such a nature that the Court executing the decree could not recognise it does not prevent the decree-holder from being properly convicted of an offence under that section.—*Madhub Chunder Mozumdar v. Novodeep Chunder Pundit*, 1. L. R., 16 Cal. 126 [see p. 888 of this book].

Fresh Processes for Witnesses for Defence—

See WITNESSES FOR DEFENCE, 2.

Fresh Sanction—

See SANCTION TO PROSECUTE, 10.

I. L. R., Cal. 129.

Functions of Jury in a Case of Public Nuisance—

See PUBLIC NUISANCE, 3.

Furlough—

See TRANSFER OF MAGISTRATE.

Further Inquiry—

1. FURTHER INQUIRY—*Criminal Procedure Code (Act X. of 1882), s. 437*—*Further inquiry under—Proceedings against accused—Notice.*] No order affecting an accused in a criminal matter should be made without giving him notice so as to enable him to appear and show cause against it. A Sessions Judge has no power, under s. 437 of the Criminal Procedure Code, to direct a particular Magistrate by name to make the further inquiry contemplated by that section. The further inquiry contemplated by s. 437 of the Criminal Procedure Code is an inquiry upon further materials, not a re-hearing of the matter upon the same evidence which was before the Magistrate who held the first inquiry.—*Chundi Churn Bhutta-chajrea v. Hem Chunder Banerjee*, I. L. R., 10 Cal. 207 [see p. 524 of this book].

2. FURTHER INQUIRY—*Criminal Procedure Code (Act X. of 1882), s. 437*—*Power of Sessions Judge to order further inquiry.*] A Sessions Judge is not competent, under s. 437, Criminal Procedure Code, to direct the re-opening of the proceedings, merely because, in his opinion, the Subordinate Magistrate has not rightly appreciated the credit due to the witnesses. "Further inquiry" under that section means the taking of additional evidence, not the re-hearing of the same evidence.—*Darsun Lall v. Jumuk Lall*, I. L. R., 12 Cal. 522 [see p. 680 of this book].

3. FURTHER INQUIRY—*Notice to accused—Discharge by Magistrate—Criminal Procedure Code (Act X. of 1882), s. 437.*] No notice to an accused person is necessary in point of law before an order under s. 437 can be passed; but as a matter of discretion it is proper that such notice should be given. Held by the majority of the Full Bench (Prinsep, Wilson, Tottenham, Norris, Pigot, and O'Kinealy, JJ.), after an enquiry by a Subordinate Magistrate and the discharge of an accused person, a Sessions Judge or Magistrate has jurisdiction, under s. 437 of the Criminal Procedure Code, to order a "further enquiry" or a re-hearing upon the same materials which were before the Subordinate Magistrate, i.e., when no further evidence is forthcoming. But (Prinsep, J., dissenting) the words "further enquiry" in that section mean the enquiry preliminary to trial which regularly results in a charge or discharge, and do not include the trial.

Further Inquiry (contd.)—

And if on the evidence taken the accused ought to be committed, then, in a case triable only at the Sessions, the proper course is to commit under s. 436; in other cases to refer to the High Court. *Per* Prinsep, J.—The word "enquiry" includes a trial, and the "further enquiry" would therefore allow of the framing of a charge, and the cross-examination of witnesses for the prosecution. *Per* Pethe-ram, C.J., and Ghose, J.—The power given by s. 437 of the Criminal Procedure Code to order a further enquiry is confined to cases in which the revising officer is satisfied, for one of the reasons mentioned in s. 435, that the subordinate officer has proceeded on insufficient materials, and that, with a more exhaustive enquiry, further material would be forthcoming. It was not intended that such an enquiry should be granted simply for the reconsideration of evidence.—In the Matter of Hari Dass Sanyal and others v. Saritulla, I. L. R., 15 Cal. 608 [see p. 861 of this book].

See ACQUITTAL, 2.

» DISCHARGE, 7—9.

G.

Gambling—

1. GAMBLING—*Beng. Act II. of 1867, s. 5*—*Unauthorised entry and arrest—Evidence.*] Where a police-officer, unauthorized by a Magistrate or District Superintendent of Police, enters and searches an alleged gaming-house, and arrests persons found therein, a Magistrate is justified in convicting such persons, if it is proved, without resorting to the presumption created by Beng. Act II. of 1867, s. 6, that the house is a gaming-house. *Sreram Chunder Lerkana v. Bipin Dass* (decided on 2nd February 1877; unreported) distinguished.—*Nazir Khan v. Proladh Dutta*, I. L. R., 4 Cal. 659 [see p. 195 of this book].

2. GAMBLING—*Beng. Act II. of 1867, ss. 5, 6*—*Unauthorised entry and seizure.*] A Deputy Inspector of Police is not authorized to enter and search an alleged gaming-house, unless he receives authority so to do from a Magistrate or a District Superintendent of Police. Where such an unauthorized entry and subsequent arrest of persons in a gaming-house takes place, there being no other evidence of an offence under s. 5 of Act II. of 1867, a Magistrate has no evidence before him on which he can convict. The evidence required cannot be presumed under s. 6 of the Act, because that presumption only arises when the proceedings are authorized by s. 5.—*Sreram Chandra Lerkana v. Bepindass*, I. L. R., 4 Cal. 710 [see p. 199 of this book].

Garo Hills—

Withdrawal of Administration of Civil and Criminal Justice from. See JURISDICTION OF HIGH COURT, 2.

Gates placed at End of Private Road—

See POSSESSION, 8.

General Clauses Act—

GENERAL CLAUSES ACT (I. OF 1868), s. 6 —*Murder—Conviction of offence committed before Penal Code came into operation—Reg. IV. of 1797—Act XVII. of 1862.* The prisoner was found guilty, and sentenced, under Reg. IV. of 1797, to transportation for life, for a murder committed in 1861, before the Penal Code came into operation; and the case was sent up to the High Court to confirm the sentence. Reg. IV. of 1797 was repealed by Act XVII. of 1862, and that Act was wholly repealed by Acts VIII. of 1868 and X. of 1872. *Held*, on a reference to a Full Bench, that the conviction was illegal, s. 6 of Act I. of 1868, which provides that the repeal of any Act or Regulation shall not affect any offence committed before the repealing Act shall have come into operation, not being applicable.—*Empress v. Diljour Misser*, I. L. R., 2 Cal. 225 [see p. 35 of this book].

Good Behaviour—

Escape from Custody while being taken to Magistrate to be bound over to be of. See ESCAPE, 1.

Good Faith in performing Surgical Operation—

See RASH AND NEGLIGENT ACT, 2.

Government Currency Note—

GOVERNMENT CURRENCY NOTE—*Theft of—Title of original owner—Appealable order—Criminal Procedure Code (Act X. of 1872), ss. 418, 419—Cashing a currency note—Sale—Contract Act (IX. of 1872), ss. 74, 76, 108.* A Government currency note was stolen from A, and cashed by B in good faith for C. On the conviction of C for theft, the Magistrate ordered the note to be given to B. A appealed to the Sessions Judge, who was of opinion that he was not competent to interfere as a Court of Appeal under s. 419 of the Criminal Procedure Code; but submitted the case for the orders of the High Court. *Held* that the case could be disposed of by the Judge under s. 419 of the Criminal Procedure Code, and that the words "Court of Appeal" in that section are not necessarily limited to a Court before which an appeal is pending. *Held* further that the provisions of s. 76 of the Contract Act did not apply, as the change of a currency note for money is not a contract of sale, and that, as the note came honestly into the hands of B, the order of the Ma-

gistrate was right.—*Empress v. Jogessur Mochi*, I. L. R., 3 Cal. 379 [see p. 120 of this book].

Government Solicitor—

Right of, to conduct Prosecution. See CONDUCT OF PROSECUTION.

Governor-General—

Power of, to delegate Legislative Powers to Lieutenant-Governor. See JURISDICTION OF HIGH COURT, 1, 2.

Grievous Hurt—

See EVIDENCE, 5.
" JURY, 2, 4, 9.
" SENTENCE, 6, 7.

H.

Haut—

Order prohibiting Holding of. See PUBLIC NUISANCE, 18.

High Court—

Jurisdiction of. See JURISDICTION OF HIGH COURT.
Jurisdiction of, to punish summarily. See CONTEMPT OF COURT.
Jurisdiction of, to quash Sanction. See SANCTION TO PROSECUTE, 13, 14.
Power of Interference of, under s. 147, Act X. of 1875. See ACQUITTAL, 1.
Power of, to order Arrest pending Appeal. See ARREST PENDING APPEAL, 1.
Revisional Jurisdiction of. See APPEAL, 5.
Superintendence of. See PUBLIC NUISANCE, 16, 17.
Transfer of Case from Police Magistrate to. See MANDAMUS.

High Seas—

Trial of British Seamen for Offences committed on British Ship on. See MERCHANT SHIPPING ACT.

Hostile Witness—

HOSTILE WITNESS—*Evidence Act (I. of 1872), s. 154.* The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is, not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.—*Kalachand Sircar and others v. Queen-Empress*, I. L. R., 13 Cal. 53 [see p. 689 of this book].

House-breaking by Night—

See CRIMINAL TRESPASS, 4.

House-breaking by Night with Intent to Commit Theft—

See JOINDER OF CHARGES, 1.

Hurt—

See JURY, 2.
» SENTENCE, 7.

Hurt by Dangerous Weapons—

See SENTENCE, 3.

Hurt in Riot—

See SEPARATE TRIAL, 2.

I.**Illegal Gratification—**

1. **ILLEGAL GRATIFICATION—Penal Code** (*Act XLV. of 1860*), cl. 9, s. 21, and s. 161—*Public servant.*] The manager of a Court of Wards' Estate paid into a Bank, carrying on the treasury business of the Government, a sum of money on behalf of Government. B, a poddar in the Bank, demanded and took a reward for the trouble in receiving the money. On B being prosecuted and charged under s. 161 of the Indian Penal Code, *held* that, although the money might have been paid on account of Government, it was on behalf of the Bank, and not on behalf of the Government, that the money was received by the accused; and that the poddar was servant of the Bank only, and not a public servant within the meaning of cl. 9, s. 21 of the Penal Code.—In the Matter of the Petition of Modun Mohun, I. L. R., 4 Cal. 376 [see p. 175 of this book].

2. **ILLEGAL GRATIFICATION — Evidence, Admissibility of—Penal Code** (*Act XLV. of 1860*), ss. 161, 165—*Evidence of subsequent but unconnected receipt, showing footing on which parties stood—Evidence Act* (*I. of 1872*), ss. 5, 13, 14.] The accused was charged with having received illegal gratification from C and Co. on three specific occasions in 1876. In 1876, 1877, and 1878, C and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office. *Held* that evidence of similar, but unconnected, instances of receiving illegal gratifications from C and Co. in 1877 and 1878 was not admissible against him under ss. 5 to 13 of the Evidence Act. *Held per* Garth, C.J. (Maclean, J., concurring).—The evidence was not admissible under s. 14. *Per* Garth, C.J.—S. 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling. *Per* Mitter, J.—If the receipt of the illegal gratifications mentioned in the charge be considered proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favour in the

Illegal Gratification (contd.)—

exercise of his official functions, the alleged transactions of 1877 and 1878 would be relevant under s. 14, but they would not be relevant to establish the fact of payments in 1876.—*Empress v. M. J. Vyapoory Moode-liar*, I. L. R., 6 Cal. 655 [see p. 304 of this book].

Illegal Seizure of Cattle—

See CATTLE-TRESPASS ACT.

Immoral Purpose—

See UNLAWFUL DETENTION.

Imprisonment for Desertion—

See MERCHANT SEAMEN'S ACT.

Improper Discharge—

See DISCHARGE, 1, 2.

Incapable of giving Evidence—

See EVIDENCE, 3.

Incriminating Statement to Police-officer—

See CONFESSION, 11.

Indefinite Period of Imprisonment in Default of Security—

See RECORD OF INFERIOR COURT, 1.

Indian Ports Act (XII. of 1875)—

S. 22. See MASTER AND SERVANT.

Indigo Factory—

Riot committed for Benefit of Manager of. See RIOTING, 1.

Inducement to Confess—

See CONFESSION, 10.

Infant—

Blow intended for another Falling on. See JURY, 2.

Custody of. See UNLAWFUL DETENTION.

Inference adverse to Prosecution :

See WITNESSES FOR PROSECUTION, 3.

Inferior Criminal Court—

See DISCHARGE, 7.

Information to Police—

1. **INFORMATION TO POLICE—Agent of owner of land—Criminal Procedure Code** (*Act X. of 1872*), s. 90.] *Per* Markby, J.—A khazanchi is not an "agent" within the meaning of s. 90 of the Criminal Procedure Code. A dewan may be an "agent" if his master is absent, but the provisions of s. 90 do not apply to a dewan who is acting only under the words of his resident master. *Per* Prinsep, J.—*Quare*.—Whether, according to s. 90, an agent is only responsible for giving information of the occurrence of any sudden or unnatural death.—*Empress v. Achiraj Lal*, I. L. R., 4 Cal. 603 [see p. 189 of this book].

2. **INFORMATION TO POLICE—Omission to give—Criminal Procedure Code** (*Act X. of*

Information to Police (contd.).—1872), s. 90.] The provisions of s. 90 of the Criminal Procedure Code should not be put in force against one who has omitted to give information to the police of an offence having been committed in cases where the police have actually obtained such information from other sources.—*Empress v. Sashi Bhusan Chuckerbutty*, 1. L. R., 4 Cal. 623 [see p. 190 of this book].

See FALSE EVIDENCE, 4, 5, 8.

Infringement of Exclusive Right of Fishery in Public River—

See FISHERY, 1.

Injunction—

See DISOBEDIENCE OF ORDER, 1.

» PUBLIC NUISANCE, 17.

Inquiry into Cause of Death—

INQUIRY INTO CAUSE OF DEATH—Report by Magistrate—Privileged communication—Judicial proceeding—Finding—Coroner's inquest—Criminal Procedure Code (Act X. of 1872), ss. 127, 133, 135, 296—Evidence Act (I. of 1872), s. 124.] Where the Magistrate of a division held an inquiry, under s. 135 of the Criminal Procedure Code, into the cause of the death of a person found dead under suspicious circumstances, and, without making a specific charge against any person, drew up a report embodying the result of his inquiry, and sent the report to the Magistrate of the district, and subsequently proceedings were taken against one of the witnesses, which ultimately resulted in an acquittal, *held* by the High Court that, there being nothing in the language of s. 135 requiring the Magistrate holding such an inquiry either to make a report or to come to a finding, the report actually sent could not be considered as part of a judicial proceeding, and that, therefore, the High Court had no power to send for it under s. 296 of the Criminal Procedure Code. No analogy exists between a Coroner's inquest and an inquiry into the cause of death under the Criminal Procedure Code.—In the Matter of Troylokhanath Biswas and Ram Churn Biswas, 1. L. R., 3 Cal. 742 [see p. 138 of this book].

Insane Person—

See LUNATIC.

Insolvent—

Arrest of, for Arrears of Maintenance.
See MAINTENANCE, 2.

Inspection of Documents—

INSPECTION OF DOCUMENTS—Discovery—Power of Court to order inspection—Criminal Procedure Code (Act X. of 1882), ss. 94-99—Search-warrant, Form and validity of.] A and T, the latter of whom was the book-keeper in the firm of J. M. & Co., were

Inspection of Documents (ctd.).—charged, on the complaint of that firm, with cheating by having dishonestly induced them to deliver to A certain sums of money between 1882 and 1887, and with having abetted each other in the commission of the said offence. The offence charged was carried out by T omitting to make entries in the account-books of sums due by A to the firm, and by making false entries therein of payments by A. Whilst the charge was pending, the Presidency Magistrate, before whom the charge had been made, granted a search-warrant in the following terms: "To Inspector M.—Whereas A and another have been charged before me with the commission or suspected commission of the offence of cheating, and it has been made to appear to me that the production of khatta-books for the years 1882 to 1887 is essential to the inquiry now being made, or about to be made, into the said offence or suspected offence, this is to authorize and require you to search for the said property in the house of A, No. 13, Pollock Street, and, if found, to produce the same forthwith before this Court." In execution of this warrant certain books and papers found in the house of A were seized and taken possession of by the police, and of those books and papers the Magistrate, on the application of the prosecution, made an order for inspection. On a rule granted by the High Court to show cause why the order for inspection should not be set aside, it was contended that the search-warrant had been granted without proper judicial inquiry and upon insufficient materials; that it was bad on the face of it, as it did not "specify clearly," as directed in form viii., Sch. V. of the Criminal Procedure Code, whose khatta-books were to be produced; and that there was nothing in the criminal law to enable a Court to make an order for inspection of documents by the prosecution in a criminal case. *Held per* Norris, J., that, assuming the contention as to the search-warrant arose on the rule as granted, the warrant must be looked at as a whole, and, so looked at, it sufficiently clearly showed that it was the khatta-books of A which were referred to as being essential to the inquiry, and the objects of the directed search; nor was there anything to show that the warrant was issued otherwise than regularly and in due course. *Per* Norris, J.—Though the Courts in England have constantly refused to compel discovery in criminal cases, on the ground that no man should be compelled to produce evidence to criminate himself, the Legislature in this country has authorized the production, and under certain circumstances the compulsory production, of an accused person's documents in Court. When once an

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accused person's documents are in the possession of the Court by virtue of the due execution of a search-warrant issued under the provisions of s. 96 of the Criminal Procedure Code, there is no distinction between such documents and those of any description found upon his person at the time of his arrest, or on his premises at the time of, or subsequent to, his arrest, and it was never doubted that the latter may be used in evidence against him. If, as laid down in the case of *Dillon v. O'Brien* (20 Irish L. R. 300), the right to seize and detain property of any description in the possession of a person lawfully arrested for treason, felony, or misdemeanor, rests "upon the interest which the State has in a person justly or reasonably believed to be guilty of a crime being brought to justice, and in a prosecution once commenced being determined in due course of law," a right to inspect such property must exist, as well as a right to seize and detain it, and the proper persons to inspect it are those conducting the prosecution. It would, moreover, be unreasonable that the police or those conducting the prosecution should not have an opportunity of inspecting and examining documents, &c., found on a prisoner when arrested, or on his premises at the time of, or subsequent to, his arrest, before tendering them in evidence. *Per Ghose, J.*—The contention as to the validity of the search-warrant did not arise on the rule as granted, but *semble*, that the search-warrant was bad in law, no summons under s. 94 of the Criminal Procedure Code having been, in the first instance, issued for the production of the documents, and there being no evidence to show that they would not be produced on summons only; that, although the warrant was not specific, still, inasmuch as no objection was raised to the form of the warrant before the Magistrate, and the accused had not been prejudiced by reason of the specification of the documents being somewhat indistinct, and it was clear what was really meant, the objection as to the form of the warrant should be disallowed. *Per Ghose, J.*—There is no doubt that, by the criminal law of this country as laid down in the Criminal Procedure Codes since 1861, an accused person may be compelled to furnish evidence, the production of which might have the effect of criminating him. The Magistrate has to determine, at the time when he makes an order under s. 94 of the Criminal Procedure Code, or issues a search-warrant under s. 96, whether the documents are necessary for the inquiry; but, when they are brought into Court, the inspection should not rest with the Magistrate, who does not prosecute, and has no interest, one way or the other, in the result of the prosecution.

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It is reasonable that those who conduct the prosecution should have such inspection, for the production of such documents is for the purpose of using them in evidence, and this could not be done unless the prosecution had an opportunity of inspecting them. In the case of a search or seizure by the police under Ch. XIV. of the Criminal Procedure Code, the prosecutor would necessarily have an opportunity of looking at the documents and articles seized, and there is no reason why he should not have the same opportunity or privilege where, under the order of the Court, any particular document or other thing is seized under a search-warrant, and brought up to the Court. Bearing in mind the purpose for which any document or thing is seized and brought before the Court, it seems that the Legislature, while providing for the seizure and production in Court of documents, &c., intended by implication that the prosecution should, under the order of the Court, have the power to inspect them, and determine whether they should go in as evidence. *Held, per Curiam*—for the reasons above given—that the Magistrate had power to allow the inspection, but such inspection must be limited to the books named in the search-warrant.—In the *Matter of the Petition of Ahmed Mahomed; Mahomed Jackariah & Co. v. Ahmed Mahomed*, I. L. R., 15 Cal. 109 [see p. 785 of this book].

Institution of Criminal Prosecution Pending Appeal in Civil Court—

See APPEAL, 3.

Intention—

In Fabricating Documents. See FORGERY, 2, 3.
Of Saving Person from Legal Punishment. See PUBLIC SERVANT, 1.
Presumption as to. See CRIMINAL TRESPASS, 4.
To commit Theft. See CONFESSION, 12.
To defraud. See JURY, 5.
To evade Payment of Stamp-duty. See STAMP, 1.

Interest of Magistrate in Convicting—

See DISOBEDIENCE OF ORDER, 2.

Interim Suspension of Pleader—

See LEGAL PRACTITIONERS' ACT, 1.

Intermediate Holders—

See POSSESSION, 1.

Interpretation of Statement made by Accused to Magistrate in Foreign Language—

See CHARGE, 2.

Intervenor—

See POSSESSION, 6.

Investigation—

In Presidency-town. See *CONFESSION*, 15.
Statement of Accused to Police-officer during. See *CONFESSION*, 14.

Irregularity—

1. *IRREGULARITY—Effect of waiver by prisoner—Disqualifying interest of Judge—Judge giving evidence.*] The jailor of a district jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was inquired into by the District Magistrate, and the jailor was, by the Magistrate's order, placed on trial before a Bench of Magistrates, consisting of the District Magistrate himself, L, the Officiating Superintendent of the Jail, and three other Honorary Magistrates. The prisoner and his pleaders were alleged to have stated before the commencement of the trial on being questioned that they had no objection to the composition of the Bench, but, after the charges had been framed, the prisoner's Counsel objected to the Bench as formed. The District Magistrate directed the Government pleader to prosecute, and both the District Magistrate and L gave evidence for the prosecution. After the case for the prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oil-seed than he actually purchased, and that he had received payment for certain oil at a higher rate than he credited to Government. The monies, the receipts of which were the subject of the first charge, were obtained by the prisoner on the strength of certain vouchers which he had induced L to sign as correct, and L had sanctioned the sale at the rates credited to Government. Upon the prisoner's giving the names of the witnesses he intended to call in his defence, L was deputed by his brother Magistrates to examine some of them who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction, *held* that L had a distinct and substantial interest which disqualified him from acting as Judge. *Held* further that, although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution. *Held* further that the recording the state-

Irregularity (contd.)—

ments of the prisoner's witnesses was irregular. Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.—*Queen v. Bholanath Sen*, 1. L. R., 2 Cal. 23 [see p. 23 of this book].

2. *IRREGULARITY—Bench of Magistrates—Municipal offence—Salaried officer of Municipality, Disqualification of—Criminal Procedure Code (Act X. of 1882), s. 555.*] Notwithstanding anything contained in s. 555 of the Criminal Procedure Code, a conviction for an offence against any municipal law or regulation, had before a Bench of Magistrates, which includes a salaried officer of the Municipality, is bad.—*Nobin Krishna Mookerjee v. Chairman of Suburban Municipality*, 1. L. R., 10 Cal. 194 [see p. 523 of this book].

3. *IRREGULARITY—Bench of Magistrates—Order irregularly made—Hearing of part of case by one Bench, and decision by another.*] Where, in a summary case, a Bench of Magistrates, after recording the evidence for the prosecution, postponed the case for the hearing of evidence for the defence; and on the day fixed for hearing, another Bench of Magistrates, none of whom had been members of the former Bench, recorded the evidence for the defence, and acquitted the accused, *held*, on a reference to the High Court, that the order must be set aside as being irregularly made. See *Sufferuddin v. Ibrahim* (1. L. R., 3 Cal. 754) and *Tarada Baladu v. Queen* (1. L. R., 3 Mad. 112).—*Ram Sunder De v. Rajab Ali* and another, 1. L. R., 12 Cal. 558 [see p. 665 of this book].

4. *IRREGULARITY—Criminal Procedure Code (Act X. of 1882), ss. 234, 537—Charge of three offences of the same kind—Irregularity occasioning a failure of justice.*] An accused was charged with criminal breach of trust as a public servant in respect of three separate sums of money deposited in the Savings Bank under three separate accounts. The third of these charges related to the misappropriation of Rs. 195 composed of two separate sums of Rs. 150 and Rs. 45, alleged to have been misappropriated on the 16th and 25th November respectively. These sums the accused in his statement at the trial stated he had paid over on those dates to the depositor, and produced an account-book showing entries of such payments on those dates. This statement was proved to be untrue, and the accused was convicted. On an application to quash the conviction, on the ground that the trial had been held in contra-

Irregularity (contd.)—

vention of s. 234 of the Code of Criminal Procedure, *held* that the entries in the account-books did not clearly show that the misappropriation of the sum of Rs. 195 took place on two dates, or consisted of two transactions, the entries having been made for the purpose of concealing the criminal breach of trust; and that, under the circumstances, the criminal breach of trust with regard to the Rs. 195 was really one offence, and could be included in one charge. *Semble* (*per Petheram, C.J.*).—That, if a man were tried for four specific offences of the same kind at one trial, such a procedure would not be merely an irregularity which could be cured by s. 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless possibly it could be cured by some subsequent proceeding by striking out some portion of the charge.—In the *Matter of Luchminarain*, I. L. R., 14 Cal. 128 [see p. 720 of this book].

5. **IRREGULARITY—Rioting, Counter charges of—Cross cases taken—Criminal Procedure Code (Act X. of 1882), s. 537—Irregularity prejudicing the accused—“Failure of justice.”**

A Magistrate, there being counter-charges of rioting and assault before him, took up and tried one of such cases, and, having heard the evidence for the prosecution, called on the counter-case, and in this latter case examined as witnesses some of the accused in the first case, eventually convicting the accused in the first case. *Held* that such a procedure constituted a grave irregularity, but that, under the circumstances of the particular case, the irregularity was cured by s. 537 of the Criminal Procedure Code.—*Bachu Mullah and others v. Sia Ram Singh and others*, I. L. R., 14 Cal. 358 [see p. 740 of this book].

See PUBLIC NUISANCE, 18.

» REGISTRATION ACT.

Irregular Procedure—

Consent by Pleaders on Behalf of Accused to. See SEPARATE CHARGE.

J.**Jaintia Hills, &c.—**

Extension of Act XXII. of 1869 to. See JURISDICTION OF HIGH COURT, 2.

Joinder of Charges—

1. **JOINDER OF CHARGES—Offences of the same kind committed in respect of different persons—Criminal Procedure Code (Act X. of 1872), ss. 452, 453, 455.]** Where an accused was charged under one charge including four counts, *vis.*, (1) house-breaking by night with intent to commit theft in the house of A; (2) theft from the same house; (3) house-breaking by night with a like intent

Joinder of Charges (contd.)—

in the house of B; (4) theft from that house; and where he pleaded guilty to the first and third charges, *held* that the case was within the terms of s. 453, and that the words “offences of the same kind” are not to be limited by the explanation to that section, but include a case like this, where a man has, within a year, committed two offences of house-breaking. *Held* also that the words “offences of the same kind” are not limited to offences against the same person. *Per Field, J.*—The explanation to s. 453 must be understood as extending, and not as limiting, the meaning of that section. *Per Norris, J.*—Care should be taken that accused persons are not prejudiced by charges being joined, and the Court should at all times be anxious to lend a willing ear to any application upon their behalf by separation of charges, and for separate trials upon separate charges. *Empress v. Murari* (I. L. R., 4 All. 147) dissented from.—*Manu Miya v. Empress*, I. L. R., 9 Cal. 371 [see p. 471 of this book].

2. **JOINDER OF CHARGES—Summons and warrant-cases—Criminal Procedure Code (Act X. of 1882), ss. 247, 253.]** In the investigation of a complaint, which forms the subject of two distinct charges arising out of the same transaction, one of which is a summons, and the other a warrant-case, the procedure should be that prescribed for warrant-cases.—*Rajnarin Koonwar v. Lala Tamoli kaut*, I. L. R., 11 Cal. 91 [see p. 604 of this book].

Joint Fine—

See CATTLE-TRESPASS ACT, 2.

Joint Hearing of Case of Several Claimants—

See POSSESSION, 22.

Joint Parcel of Land—

Edifice erected on. See POSSESSION, 2.

Judge—

Disagreeing with Verdict of Acquittal of Jury. See FALSE EVIDENCE, 8.

Disqualifying Interest of. See IRREGULARITY, 1.

Judgment—

1. **JUDGMENT—Judgment, Contents of—Criminal Procedure Code (Act X. of 1882), ss. 367, 424, 426.]** A Sessions Judge, after hearing an appeal, gave the following judgment: “It is urged that the evidence is quite untrustworthy, and that the decision should be reversed. The depositions have been gone through, and commented on at considerable length. The Court finds no ground for interference. The appeal is dismissed.” *Held* that this was not a sufficient compliance with ss. 367, 424 of Act X. of

Judgment (contd.)—

1882, and that the case should be re-tried.—*Kamruddin Dai v. Sonatun Mandal*, I. L. R., 11 Cal. 449 [see p. 630 of this book].

2. JUDGMENT—*Form and contents of judgment—Criminal appeal to Magistrate—Criminal Procedure Code (Act X. of 1882), ss. 367, 424.*] A Magistrate, after hearing an appeal from the Deputy Magistrate, gave the following judgment: "I see no reason to distrust the finding of the lower Court. The sentence passed, however, appears harsh. I reduce the term of imprisonment to fifteen days. The fines and terms of imprisonment in default will stand. *Held*, following the decision in *Kamruddin Dai v. Sonatun Mandal* (I. L. R., 11 Cal. 449), that it was not a judgment within the meaning of ss. 367 and 424 of the Criminal Procedure Code.—In the Matter of the Petition of *Ram Das Maghi* and another, I. L. R., 13 Cal. 110 [see p. 693 of this book].

Judgment—

Exclusion of Time in obtaining Copy of. See APPEAL, 6.

In Civil Suit out of which Criminal Prosecution arises. See EVIDENCE, 1.

Of Acquittal, Appeal from. See APPEAL, 1.

Of High Court. See REVIEW OF JUDGMENT OF HIGH COURT.

Judgment-debtor—

Resistanceto Arrest of. See SENTENCE, 4.

Judicial Commissioner—

Special Court at Rangoon has Power to entertain Appeal from Sentence of Death if passed by. See JURISDICTION, 2.

Judicial Court—

Power to question Legality of Order of Executive Officer. See PUBLIC NUISANCE, 15.

Judicial Proceeding—

See INQUIRY INTO CAUSE OF DEATH.

Julkur—

Dispute regarding a. See POSSESSION, 17, 19.

Jungle—

Order to Police-constable to cut down. See POLICE ACT, 2.

Jurisdiction—

1. JURISDICTION—*Sessions Court, Jurisdiction of—Power to commit to itself cases not triable exclusively by Court of Session—Criminal Procedure Code (Act X. of 1872), ss. 231, 471, 472.*] A Court of Session has no power to commit to itself for trial a case not triable exclusively by such Sessions Court. The words "commit the case itself" in s. 471 of the Code of Criminal Procedure

Jurisdiction (contd.)—

cannot (when read in connection with s. 231) be held to empower a Sessions Court to commit such a case to itself.—*Empress v. Putteh Jyab Khan*, I. L. R., 4 Cal. 570 [see p. 187 of this book].

2. JURISDICTION—*Special Court at Rangoon—Case transferred—Criminal Procedure Code (Act X. of 1872), s. 64—Burma Courts' Act (XVII. of 1875), s. 35.*] The Special Court of British Burma has power to entertain an appeal from a sentence of death or other sentence passed by the Judicial Commissioner, in a case transferred by him to his own Court from that of the Sessions Judge, under the powers conferred by s. 64 of the Code of Criminal Procedure and s. 35 of Act XVII. of 1875 (The Burma Courts' Act), the hearing subsequent to the transfer being an exercise of original jurisdiction on the part of the Judicial Commissioner.—*Empress v. Tsit Ooe*, I. L. R., 4 Cal. 667 [see p. 196 of this book].

3. JURISDICTION—*Appeal—Jurisdiction—Time from which an order of appointment dates.*] An Assistant Magistrate convicted an accused on the 12th August, and by an order of even date, such Magistrate was invested with power to act as a Magistrate of the first class, although the fact that he had been so invested with full powers was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate, and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that, after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate, *held* that, even supposing the Lieutenant-Governor's order conferred first-class powers upon the Assistant Magistrate from the moment it was made, it must be shown, before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction. *Quare*.—Whether an order investing a Magistrate with first-class powers is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate. — *Mohamed Eshak Chundro Marwari v. Mohamed Eshak*, I. L. R., 6 Cal. 476 [see p. 280 of this book].

4. JURISDICTION—*Tributary Mehals—Criminal Procedure Code (Act X. of 1872), s. 70—Foreign Jurisdiction and Extradition Act (XXI. of 1879), s. 9—Regs. XII., XIII., and XIV. of 1805.*] The prisoners, residents of the District of Singhbhum, a district in British India, were convicted, under s. 331 of the Penal Code, at Singhbhum, of an offence committed in Mohurbhunj. *Per*

I. L. R., Cal. 130.

Jurisdiction (contd.)—

Garth, C.J., Pontifex and Morris, JJ.—The territory of Mohurbhunj is not within the limits of British India; but, under the provisions of s. 9 of Act XXI. of 1879, a conviction in British India is good. *Per* Mitter, J.—Mohurbhunj is within the limits of British India; but, seeing that the Tributary Mehals constitute a 'district' within the meaning of the Criminal Procedure Code, and that the Superintendent of these Mehals has been vested with the powers of a Sessions Judge under an order of the Government of India, a conviction under the Penal Code (having regard to the provisions of s. 70 of the Criminal Procedure Code) ought not to be set aside. *Per* Prinsep, J.—Mohurbhunj is within the limits of British India; but the Acts which extend to British India do not extend to Mohurbhunj. The territory having been expressly placed beyond the ordinary legislation, the law in force in British India cannot come into operation there until this exemption has been removed.—*Empress v. Keshub Mohajun*; *Empress v. Udit Prasad*, I. L. R., 8 Cal. 985 [see p. 441 of this book].

5. JURISDICTION — *Officer invested with special powers* — *Ss. 30, 34, 209, Criminal Procedure Code (Act X. of 1882)*.] An officer invested with special powers under s. 34 of the Code of Criminal Procedure should rarely, if ever, try a case himself under s. 209 of the Code of Criminal Procedure, where it appears from some of the evidence that the accused might have been charged with an offence beyond the jurisdiction of the Magistrate to take cognizance of.—*Empress v. Paramananda*, I. L. R., 10 Cal. 85 [see p. 500 of this book].

6. JURISDICTION—*Powers of Second-class Magistrates* — *Reference to District Magistrate—Committal to Court of Session—Criminal Procedure Code (Act X. of 1882), s. 239.*] An Assistant Magistrate convicted a person under ss. 406 and 417 of the Penal Code, and referred the case to the District Magistrate for sentence under the provisions of s. 349 of the Code of Criminal Procedure. The District Magistrate was of opinion that the offence was one properly punishable under s. 420 of the Penal Code, and one which the Assistant Magistrate had no jurisdiction to deal with, and that therefore the reference under s. 349 was *ultra vires* and illegal. On a reference to the High Court, *held* that the Assistant Magistrate was not wholly without jurisdiction, as he was competent to commit the accused to the Court of Session, though not to hold a trial, and that the District Magistrate might, if he thought proper, commit the accused to the Court of Session.—

Jurisdiction (contd.)—

Abdul Wahab v. Chandia, I. L. R., 13 Cal. 305 [see p. 708 of this book].

7. JURISDICTION—*Tributary Mehals—Kheonjur—"Local Area"—Code of Criminal Procedure (Act X. of 1882), ss. 182 and 531.*] The Penal Code and Criminal Procedure Code have no application to the Tributary Mehal of Kheonjur, which is on precisely the same footing in that respect as Mohurbhunj. Certain persons, officers of the Maharajah of Kheonjur, one of whom was a resident of the Cuttack district, and the others residents of Kheonjur, were charged before the Deputy Magistrate of Tajpore with certain offences under the Penal Code. They were convicted, and on appeal to the Sessions Judge the conviction was upheld. It was found by the Sessions Judge that the scene of the occurrence which gave rise to the charges was within the Territory of Kheonjur. *Held* that the Deputy Magistrate and Sessions Judge had no jurisdiction to try the case, and that the conviction must be set aside. *Held* further that ss. 182 and 531 of the Criminal Procedure Code had no application to the case. The words "local area" used in s. 182 only apply to a "local area" over which the Criminal Procedure Code applies, and not to a local area in a foreign country or in other portions of the British Empire to which the Code has no application; and similarly s. 531 only refers to districts, divisions, subdivisions, and local areas governed by the Code of Criminal Procedure.—*In the Matter of Bichitranund Dass and others v. Bhugbut Perai*; *In the Matter of Bichitranund Dass and others v. Dukhajana*, I. L. R., 16 Cal. 667 [see p. 953 of this book].

Jurisdiction—

- Over European British Subject. See EUROPEAN BRITISH SUBJECT.
- Of Civil as opposed to Military Court. See MUTINY ACT.
- Of High Court to punish Summarily. See CONTEMPT OF COURT.
- Of High Court to Quash Sanction. See SANCTION TO PROSECUTE, 13, 14.
- Of Sessions Judge. See SANCTION TO PROSECUTE, 15.
- To Make Order for Protection of Property. See PUBLIC NUISANCE, 5.

Jurisdiction of High Court—

1. JURISDICTION OF HIGH COURT—*Act VI. of 1835—Act XXII. of 1869, s. 9—24 and 25 Vic., c. 67, s. 23; c. 104, ss. 9, 11, 13—3 and 4 Will. IV., c. 85—16 and 17 Vic., c. 95—17 and 18 Vic., c. 77—Delegation, Power of.*] By Act XXII. of 1869, certain districts were removed from the juris-

Jurisdiction of High Court (ctd.)—diction of the High Court, and by s. 5 the administration of civil and criminal justice was vested in such officers as the Lieutenant-Governor of Bengal should appoint. By s. 9 the Lieutenant-Governor was empowered to extend all or any of the provisions of the A&T to the Cossyah and Jynteah Hills. By a notification in the *Calcutta Gazette* of 4th October 1871, the Lieutenant-Governor extended the provisions of the A&T to the Cossyah and Jynteah Hills, and directed that the Commissioner of Assam should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of that district. The two prisoners were tried for murder in April 1876, and were, on conviction, sentenced by the Chief Commissioner of Assam to transportation for life. On appeal by the prisoners to the High Court, held by the majority of a Full Bench (Garth, C.J., Macpherson and Pontifex, JJ., dissenting) that the High Court has jurisdiction to entertain the appeal, and such jurisdiction was not taken away by A&T XXII. of 1869. *Per Curiam*.—The Governor-General in Council had power by legislation to remove the districts from the jurisdiction of the High Court. *Per* Jackson, Ainslie, and Markby, JJ. (Kemp, J., concurring).—The Governor-General in Council had no power to delegate his legislative functions to the Lieutenant-Governor of Bengal in the way he had done in A&T XXII. of 1869. The power of delegation cannot be considered as validated by any long course of practice, nor as sanctioned by the tacit recognition of Parliament; A&T XXII. of 1869 is therefore so far invalid. *Per* Macpherson, J. (Pontifex, J., concurring).—Such delegation is nowhere expressly prohibited, and does not bring the A&T under any of the restrictive provisions of the Indian Council's A&T. *Per* Garth, C.J., and Macpherson, J. (Pontifex, J., concurring).—The power of delegation now questioned had been exercised in many cases for a series of years previous to the passing of the Indian Council's A&T, and that A&T (the framers of which must have been cognizant of such course of practice) must be taken as impliedly approving of and sanctioning such practice, which it would otherwise have declared illegal. *Per* Garth, C.J., Jackson, Markby, and Ainslie, JJ. (Kemp, J., concurring).—The High Court has power to question the validity of the legislative acts of the Governor-General in Council. *Per* Macpherson, J. (Pontifex, J., concurring).—The High Court has no such power if satisfied that the act is not within any of the prohibitions of the Indian Council's A&T.—In the Matter of the Petition of Burah and Book Singh, 1. L. R., 3 Cal. 63 [see p. 67 of this book].

Jurisdiction of High Court (ctd.)—

2. JURISDICTION OF HIGH COURT—*Legislative Power of Governor-General in Council—Delegation—Conditional legislation—24 and 25 Vic., c. 104—Act XXII. of 1869, s. 9.* By the terms of the Act 24 and 25 Vic., c. 104, the exercise of jurisdiction in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not exclusive of, the general legislative power of the Governor-General in Council. An exercise of legislative authority by the Governor-General in Council, whereby any place or territory is removed from the jurisdiction of the High Courts, is one expressly contemplated by the Stat. 24 and 25 Vic., c. 104, and by the Letters Patent issued under that Statute. By the 9th section of Act XXII. of 1869, passed by the Governor-General of India in Council, the Lieutenant-Governor of Bengal was empowered, from time to time, to extend, *mutatis mutandis*, to the Jaintia, Naga, and Khasi Hills, the provisions contained in other sections of the Act, whereby the administration of civil and criminal justice within the district called the Garo Hills was, from a date to be fixed by the said Lieutenant-Governor, to be withdrawn from the jurisdiction of the Courts of civil and criminal judicature constituted by the Regulations of the Bengal Code and the Acts of the Legislature of British India, and to be vested in such officers as the Lieutenant-Governor might appoint. Held by a majority of the Calcutta High Court that, as the Indian Legislature was to be regarded as an agent or delegate acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself, the above provisions, purporting to authorize the Lieutenant-Governor of Bengal to extend Act XXII. of 1869 to the Jaintia, Naga, and Khasi Hills, since they involved a delegation of legislative power, were void and of no effect. Held by the Judicial Committee of the Privy Council that the decision of the majority of the High Court was erroneous, and rested on a mistaken view of the powers of the Indian Legislature. The Legislature has powers expressly limited by the Act of the Parliament which created it, but has, when acting within those limits, plenary powers of legislation as large and of the same nature as those of Parliament itself. When plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may be well exercised either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is not uncommon, and, in many circumstances, may be highly convenient.—*Empress v.*

Jurisdiction of High Court (ctd.)—*Burah, L. L. R., 4 Cal. 172* [see p. 166 of this book].

3. **JURISDICTION OF HIGH COURT—Tributary Mehals—Mohurbhunj—British India.** A British subject, residing in Midnapore, in Bengal, was charged before the Maharaja of Mohurbhunj with having committed the offence of defamation in Mohurbhunj in the Tributary Mehals. On an application made by the accused to the Magistrate of Midnapore, objecting to be tried by the Raja of Mohurbhunj, the Commissioner of Cuttack, who was also Superintendent of the Tributary Mehals, directed that the case should be transferred to Midnapore, and tried by the Magistrate of that district, who had the power of an Assistant Superintendent of the Tributary Mehals. The accused, while being tried, moved the High Court to set aside the proceedings at Midnapore, on the ground that, the offence not having been committed within the district, the Magistrate was acting without jurisdiction. *Held* that the proceedings were without jurisdiction. *Per Cunningham, J.*—The Tributary Mehals are now, as they were in 1874, a portion of British India, which the Government of India has been pleased to exempt from the ordinary law and jurisdiction of the Courts, and to govern by means of special officials and enactments. Whatever may be the powers of Government as to Mohurbhunj, those powers do not extend to empowering the legally constituted tribunals of a British district to follow in that district, and in the case of residents in it, any procedure, and to exercise any other jurisdiction than that created by the law. *Per Prinsep, J.*—The territory of Mohurbhunj is a part of British India, but at present not subject to any laws not specially extended to it. The Tributary Mehals being British India, and being excluded from the operation of all the laws in force in British India, unless expressly extended to them, the orders of Government conferring powers on particular officers over criminal offences committed within those Mehals are *ultra vires*.—*Hursee Mahapatro v. Dinobundro Patro, I. L. R., 7 Cal. 523* [see p. 357 of this book].

4. **JURISDICTION OF HIGH COURT—Appeal—Revision—Offence committed out of British India.** The High Court has no power, either by way of appeal or revision, to interfere with a sentence passed by the Superintendent of the Tributary Mehals when exercising jurisdiction over offences committed in Mohurbhunj, a place not situated within the limits of British India. *Empress v. Keshub Mohajun (I. L. R., 8 Cal. 918)* and *Hursee Mahapatro v. Dinabundhu Patro (I. L. R., 7 Cal. 523)* referred to.—*Em press v. Hurro Kole, I. L. R., 9 Cal. 28* [see p. 470 of this book].

Juror refusing to act—*See PUBLIC NUISANCE, 8.*

Jury—

1. **JURY—Criminal Procedure Code (Act X. of 1872), s. 263—High Court, Power of—Jury, Verdict of acquittal by.** Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by s. 457 of the Criminal Procedure Code, *held* that the High Court could, on the case coming before them under s. 263 of the Criminal Procedure Code, find the prisoners guilty of such offence.—*Empress v. Harai Mirdha and Umed Sardar, I. L. R., 3 Cal. 189* [see p. 115 of this book].

2. **JURY—Criminal Procedure Code (Act X. of 1872), s. 263—Verdict—Disagreement in finding of jurors—Dissent of Judge from verdict of majority—High Court, Power of.** An accused struck a woman, carrying an infant in her arms, violently over head and shoulders. One of the blows fell on the child's head, causing death. *Held* that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt. Where a jury are not unanimous in their finding, and the Judge dissents from the opinions expressed by them, on the case being referred under s. 263 of Act X. of 1872, the High Court is competent to find the prisoner guilty, notwithstanding an acquittal by the majority of the jury. It is the duty of a Judge in sending up a case to the High Court under ss. 263, 464 of the Criminal Procedure Code, when he disagrees with a verdict of acquittal, to state the offence which, in his opinion, has been committed.—*Empress v. Sahae Rae, I. L. R., 3 Cal. 623* [see p. 136 of this book].

3. **JURY—Assessors—Trial by jury of a case properly triable with assessors—Appeal on facts—Act VIII. of 1871, s. 80—Criminal Procedure Code (Act X. of 1872), s. 233.** *Per Maclean, J. (Mitter, J., dubitante).*—The trial by a jury of an offence triable with assessors is not invalid on that ground, but an accused who would have been entitled to an appeal on the facts, if the case had been tried with assessors, is not debarred from that right merely by the fact that the trial by jury is not invalid.—*Empress v. Mohim Chunder Rai, I. L. R., 3 Cal. 765* [see p. 151 of this book].

4. **JURY—Verdict on offence proved, though not independently charged—Unanimous verdict—Dissent of Judge—Procedure in such cases—Criminal Procedure Code (Act X. of 1872), ss. 263, 457—Penal Code (Act XLV. of 1860), ss. 149, 325.** The accused were

Jury (contd.)—

charged under s. 149, coupled with s. 325, of the Penal Code, with, while being members of an unlawful assembly, committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly, but unanimously found two of the accused guilty of grievous hurt under s. 325. Held that such verdict was, under s. 457 of the Code of Criminal Procedure, legally sustainable, although that offence did not form the subject of a separate charge. S. 457 enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence. It is only in a case where the jury are not unanimous that a Court may require them to retire for further consideration. Where a verdict is unanimous, it must be received by the Judge, unless contrary to law. Where a Judge dissents from the unanimous finding of a jury given in accordance with the law, the only procedure open to him to follow is that laid down in the fifth clause of s. 263 of the Code of Criminal Procedure.—*Government of Bengal v. Mahaddi*, I. L. R., 5 Cal. 871 [see p. 242 of this book].

5. JURY—*Criminal Procedure Code (Act X. of 1872), s. 263—Discretion of Court—Verdict of jury—Forgery and abetment—Acquittal by jury—Disagreement by Judge—Principles guiding the Court's discretion under s. 263 of the Criminal Procedure Code (Act X. of 1872)—"Fraudulently and dishonestly uttering"—Intention—Inference of fraud.* Notwithstanding the large discretionary powers vested in the High Court under s. 263 of Act X. of 1872, the Court will adhere generally to the principle of the Courts in England, *vis.*, that the Court will not set aside the verdict of a jury unless it be perverse and patently wrong, or may have been induced by the error of the Judge; and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to. Where a person, in the course of an action brought against him to gain possession of a property, used a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudulent. A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction; and such an intention is a necessary inference which the jury should be directed to draw,

Jury (contd.)—

if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged. Under s. 263 of the Code of Criminal Procedure, a Court is authorized to ask the jury such questions as are necessary to ascertain what their verdict really is; but where the verdict, although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question.—*Empress v. Dhunum Kaze*, I. L. R., 9 Cal. 53 [see p. 458 of this book].

6. JURY—*Trial by—Jurisdiction of Judge—Evidence of approver—Corroboration—Confession of one of several prisoners.* It is open to a Judge in charging the jury to express his opinion as to the effect of a certain portion of the evidence; but he should always be careful to add that it is for the jury to form their own opinion. Exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence such as is ordinarily required to make it safe to convict a particular prisoner. Confessions of prisoners are not, as against their fellow-prisoners who were not present when the confessions were made, such corroborative evidence of the statement of an approver as would justify the conviction of the other prisoners thereon. Confessions of two of several accused persons made in the absence of the others are of no weight as against the latter. Such confessions, as well as the statements of approvers, are always regarded as tainted; because, from the position occupied by the persons making them, they are not entitled to the same weight as the evidence of ordinary witnesses. An accused person is not bound to account for his movements at or about the time an offence was committed, unless there has been given legal evidence sufficiently *prima facie* to convict him of the offence.—*Empress v. Bepin Biswas*, I. L. R., 10 Cal. 970 [see p. 564 of this book].

7. JURY—*Misdirection—S. 26 of the Charter of 1865—Charge, Misunderstanding of.* Mere misunderstanding on the part of bystanders in Court, or Counsel engaged in a case, of expressions used by a Judge in charging a jury (where it appears that the expressions used by the Judge were such as ought to have been understood by any reasonable man, having regard to what was proved in the case, and what was said to the jury afterwards), will not constitute misdirection.—*Empress v. Shib Chunder Mitter*, I. L. R., 10 Cal. 1079 [see p. 580 of this book].

8. JURY—*Misdirection of—Burmah Courts' Act of 1875, s. 80—Reference to High Court.* Three persons, who were attacked and wounded in an affray, informed the police on the

Jury (contd.)—

same day that the persons who had attacked them were A, B, and C. Eighteen days afterwards the same complainants gave to the Magistrate inquiring into the case the names of four other persons, who, they said, with the three persons first accused, formed the attacking party. The seven accused were tried jointly for the offence before the Additional Recorder of Rangoon and a jury. In his charge to the jury the Additional Recorder omitted to call their attention to the fact that four out of the seven accused had not been mentioned by the prosecutors until after eighteen days had passed over. The prisoners were convicted. *Held* that the Additional Recorder misdirected the jury; that under the circumstances the misdirection prejudiced the four persons last accused; and that the verdict must be set aside as far as they were concerned.—*Leiu Tu v. Empress*, 1. L. R., 11 Cal. 10 [see p. 590 of this book].

9. **JURY—Verdict in accordance with charge—Verdict disagreed with by Judge—Reference under s. 307, Act X. of 1882.]** The Court will not interfere with the finding of a jury, unless their verdict is shown to be manifestly erroneous. A prisoner was charged under ss. 302, 304 of the Penal Code, and the Judge at the trial added a further charge under s. 325. The Judge in his charge to the jury directed them that, in the event of their finding the charges under ss. 302, 304, unsustainable, they might find the prisoner guilty under s. 325. The jury unanimously acquitted the prisoner under the charge framed under s. 302, and a majority of them acquitted him under the charge framed under s. 304; but a majority of them found him guilty under the charge framed under s. 325. The Judge disagreed with their finding as regarded the charge framed under s. 304, and referred the case to the High Court under s. 307 of the Criminal Procedure Code. The High Court refused to interfere with the verdict, on the ground that the verdict could not be said to be manifestly erroneous, the Judge having heard the evidence, and having expressed his opinion to the jury that they might find the prisoner guilty under s. 325.—*Empress v. Jacquet*, 1. L. R., 11 Cal. 85 [see p. 600 of this book].

10. **JURY—Charge to—Criminal Procedure Code (Act X. of 1882), s. 298—Duty of Judge when the jury are uncertain as to the offence committed—Evidence disbelieved in some parts, and accepted in others.]** A jury, after retiring, returned to the box, and, after unanimously finding both prisoners not guilty of the charges framed against them, stated to the Judge that they thought an of-

Jury (contd.)—

fence had been committed by one of the prisoners, but were uncertain as to the section of the Penal Code applicable to his case; the Judge thereupon made over to them a copy of the Penal Code, leaving them to decide under what section the offence fell. *Held* that he had failed in his duty, and that he should have asked the jury what doubts they had as to the crime which had been committed, and should have explained to them the law, and informed them what offence the facts would prove against the prisoner if they believed those facts. Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts, and to convict the prisoner thereunder.—*Jaspeth Singh v. Queen-Empress*, 1. L. R., 14 Cal. 164 [see p. 727 of this book].

11. **JURY—Sessions Judge, Opinion of—Criminal Procedure Code (Act X. of 1882), s. 307—High Court, Power of.]** In the exercise of its powers under s. 307 of the Code of Criminal Procedure, the High Court will form and act upon its own view of what the evidence in its judgment proves; but, in doing so, the opinion of the Sessions Judge, no less than the verdict of the jury, is entitled to its proper weight. *Reg. v. Khandera Bajirav* (1. L. R., 1 Bom. 10), *Empress v. Mukhun Kumar* (1 C. L. R. 275), *Empress v. Dhunum Kazee* (1. L. R., 9 Cal. 53), *Queen-Empress v. Mania Dayal* (1. L. R., 10 Bom. 497), *Queen v. Ram Churn Ghose* (20 W. R. Cr. 33), *Queen v. Sham Bagdi* (13 B. L. R. Ap. 19), 20 W. R. Cr. 73), *Queen v. Hurro Manjhee* (14 B. L. R. Ap. 2; 21 W. R. Cr. 4), *Queen v. Wuzir Mundul* (25 W. R. Cr. 25), *Queen v. Nobin Chunder Banerjee* (13 B. L. R. Ap. 20; 20 W. R. Cr. 70), referred to.—*Queen-Empress v. Itwari Saho*, 1. L. R., 15 Cal. 269 [see p. 808 of this book].

Jury—

Appeal upon Facts from Verdict of. See

APPEAL BY LOCAL GOVERNMENT, 2.

Charges, Distinct and Separate, tried Simultaneously by. See SEPARATE CHARGES, 2.

Charge to. See EVIDENCE, 4.

Functions of a, in a Case of Public Nuisance. See PUBLIC NUISANCE, 3.

Illegally Constituted. See PUBLIC NUISANCE, 8.

Judge disagreeing with Verdict of Acquittal of. See FALSE EVIDENCE, 8.

Minority of, refusing to act. See PUBLIC NUISANCE, 12.

Misdirection to. See PREVIOUS CONVICTION, 1; REFRESHING WITNESS'S MEMORY, 2.

Jury (contd.)—

Questioning of, as to Verdict. See RIGHT OF REPLY, 1.

Verdict of. See APPEAL, 1.

Juryman—

Qualification of. See EVIDENCE, 4.

Justice of the Peace—

Disqualifying Interest of. See MUNICIPAL OFFENCE, 2.

Jynteeah, Naga, and Khasi Hills :

Extension of Act XXII. of 1869 to. See JURISDICTION OF HIGH COURT, 2.

K.

Khasi Hills—

Extension of Act XXII. of 1869 to. See JURISDICTION OF HIGH COURT, 2.

Khata-book—

Entry in. See STAMP, 4.

Kheonjur—

Tributary Mehal of. See JURISDICTION, 7.

Kidnapping—

1. KIDNAPPING—*Abetment—Penal Code (Act XLV. of 1860), ss. 109, 363—Right to custody of children.*] A mother cannot have a right to the custody of her legitimate children adversely to the father. Ordinarily, the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as a taking out of his keeping. But where a Hindu woman left her husband's house, taking with her her infant daughter, and went to the house of A, and on the same day the daughter was married to B, the brother of A, without the father's consent, it was held that A was rightly convicted under ss. 109, 363 of the Penal Code of abetting the offence of kidnapping.—*Empress v. Prankrishna Surma*, I. L. R., 8 Cal. 969 [see p. 438 of this book].

2. KIDNAPPING—*Guardianship of illegitimate child—Lawful guardian—Penal Code (Act XLV. of 1860), ss. 361, 366.*] The mother of an illegitimate child is its proper and natural guardian during the period of nurture. And where the mother, on her death-bed, entrusts the care of such child to a person who accepts the trust, and maintains the child, such a person is "lawfully entrusted" with the care and custody of the minor within the meaning of s. 361 of the Penal Code. The explanation of the words "lawful guardian" in s. 361 is intended to obviate the difficulty the prosecution might be put to in being bound to prove strictly in cases of abduction that the person from whose care the minor had been abducted was the guardian of such minor within the meaning of the le-

Kidnapping (contd.)—

gal acceptance of the word.—*Empress v. Pemantle*, I. L. R., 8 Cal. 971 [see p. 439 of this book].

Knowledge of Offence being Committed—

See CAUSING DISAPPEARANCE OF EVIDENCE.

Kobiraj—

Surgical Operation of Unskilled. See RASH AND NEGLIGENT ACT.

L.

Lawful Custody—

Escape from. See ESCAPE.

Lawful Order—

See DISOBEDIENCE OF ORDER.
» POLICE ACT, 2.

Leave Overstayed without Permission—

See POLICE ACT, 1.

Legal Practitioners' Act—

1. LEGAL PRACTITIONERS' ACT (XVIII. OF 1879), ss. 15, 40—*Interim suspension — Police-papers.*] Depositions of witnesses, or confessions taken at a police-investigation, are not, as far as their subject-matter is concerned, any more the property of the police than the property of the prisoners; and a pleader is not guilty of misconduct of any kind in making use of such documents for the benefit of his client, when delivered to him by the client, however improperly the client may have become possessed of such documents, provided the pleader is neither party nor privy to their obtainment. The power of *interim* suspension given under s. 14 (cl. 5) of Act XVIII. of 1879, when read with s. 40 of the same Act, can only be exercised after the pleader has been heard in his defence, and pending the investigation and orders of the High Court.—*In the Matter of the Petition of Kristo Lal Nag*, I. L. R., 10 Cal. 256 [see p. 526 of this book].

2. LEGAL PRACTITIONERS' ACT (XVIII. OF 1879), s. 32, *Construction of—Outsider practising as mukhtar, his liability to punishment—Mukhtars, their functions—Civil Procedure Code (Act XIV. of 1882), s. 37.*] Act XVIII. of 1879 is an amending as well as a consolidating Act, and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers, and duties of the mukhtars practising in the Subordinate Courts. When a person other than a duly certificated and enrolled mukhtar constantly, and as a means of livelihood, performs any of the functions or

Legal Practitioners' Act (contd.)—
powers which the rule framed by the High Court in accordance with the provisions of the Legal Practitioners' Act says are the functions and powers of a mukhtar, he practises as a mukhtar, and is liable to a penalty under s. 32 of the Act. The words "any person" in s. 32 embrace pure outsiders as well as duly qualified and enrolled mukhtars who have failed to take out their certificate. G N, though not a certificated mukhtar, was in the habit of appointing and instructing pleaders in the Civil Courts on account of certain persons who paid him a regular monthly salary for so doing. In a proceeding against him under the Legal Practitioners' Act, G N made this statement: "I receive a letter from the mofussil from a person and act for him, he sending the vakalatnama with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family, and lives in a separate village." *Held* that G N was neither a private servant nor a recognised agent of any of his employers within the meaning of s. 37 of the Civil Procedure Code, and was liable to a penalty under s. 32 of the Legal Practitioners' Act for having practised as a mukhtar. *Held* also that, having regard to the Court in which G N practised, the words in s. 32, "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorising him so to practise in such Court," were equivalent to the words "to a fine not exceeding Rs. 250."—In the Matter of the Petition of Girhar Narain; Tussudq Hosain and others v. Girhar Narain and others, I. L. R., 14 Cal. 556 [see p. 751 of this book].

Legal Process—

Resistance to Execution of. See SENTENCE, 4.

Legal Punishment—

Intention to save Person from. See PUBLIC SERVANT, 1.

Legality of Order—

Power of Judicial Court to Question. See PUBLIC NUISANCE, 15.

Legislative Powers—

Delegation of. See JURISDICTION OF HIGH COURT, 1, 2.

Letters Patent, 1865—

S. 26. See MERCHANT SHIPPING ACT.
" CONFESSION, 1.

Libel on Judge—

See CONTEMPT OF COURT.

License—

Carrying on Business without. See MUNICIPAL OFFENCES, 2, 3.

License (contd.)—

Keeping Animals without. See MUNICIPAL OFFENCES, 4.

To Possess Arms. See ARMS ACT.

To Sell Liquor, Cantonment Magistrate not authorized to cancel. See CANTONMENTS ACT.

Lieutenant-Governor—

Legislative Power delegated to. See JURISDICTION OF HIGH COURT, 1, 2.

Order of, conferring First-class Powers on Assistant Magistrate. See JURISDICTION, 3.

Like Offence—

See EXCISE, 8.

Limit on Number of Charges—

See SEPARATE CHARGES, 1.

Local Area—

Meaning of. See JURISDICTION, 7.

Local Government—

Appeal by. See APPEAL, 1.

May empower any Officer to conduct Prosecution. See CONDUCT OF PROSECUTION.

Lost Halves of Currency Notes—

Application for Payment of. See ATTEMPT TO CHEAT.

Lunatic—

LUNATIC—*Security—Criminal Procedure Code (Act X. of 1872), ss. 426, 432—Jurisdiction of Criminal Courts.*] The authority of the Criminal Courts over an accused, declared under s. 426 of the Criminal Procedure Code to be of unsound mind, ceases after the transmission of such accused to the place of safe custody appointed by the Local Government, and such authority can only be revived under the circumstances mentioned in s. 432.—*Empress v. Joy Hari Kor*, I. L. R., 2 Cal. 356 [see p. 46 of this book].

M.

Magistrate—

How to record Statement made by Accused in Foreign Language. See CHARGE, 2.

Of first class not Inferior to District Magistrate. See ACQUITTAL, 2.

When not a Competent Witness. See DISCHARGE, 2.

Maintenance—

1. MAINTENANCE—*Criminal Procedure Code (Act X. of 1872), Ch. XLI.—Custody of illegitimate child.*] In determining questions under ch. 41 of Act X. of 1872, as to the maintenance of wives and families in certain cases, a Magistrate has no power to enter into any question as to the lawful guardianship of a child. There is nothing

Maintenance (contd.)—

in the Code which would warrant a Magistrate in ordering a mother to surrender her illegitimate child to its father, although such child be of the age of maturity. A refusal by the mother to make over the custody of the child in such a case would be no ground for stopping an allowance previously ordered.—*Lal Das v. Nekunjo Bhaishiani*, I. L. R., 4 Cal. 374 [see p. 174 of this book].

2. MAINTENANCE—*Insolvent Act* (11 and 12 Vic., c. 11), s. 12—*Arrears of maintenance—"Debt or liability"—Protection-order—Arrest of insolvent—Presidency Magistrates' Act* (IV. of 1877), s. 234.] Arrears of maintenance, included in the schedule filed by an insolvent, are a debt or liability within the meaning of s. 13 of the Insolvent Act (11 and 12 Vic., c. 21); and an insolvent, who has obtained a protection-order, is not liable for arrest or imprisonment in respect of such. *Quere.*—Whether the protection-order protects the insolvent from proceedings in respect of any maintenance accruing subsequently to the filing of the schedule.—*Tokce Bibee v. Abdool Khan*, I. L. R., 5 Cal. 536 [see p. 228 of this book].

3. MAINTENANCE—*Presidency Magistrates' Act* (IV. of 1877), ss. 234, 235—*Effect of divorce on maintenance-order.*] A Presidency Magistrate is competent to stay an order for maintenance granted under s. 234 of Act IV. of 1877, and to refuse to issue his warrant under the 3rd clause of that section, and to try all questions raised before him which affect the right of a woman to receive maintenance. There can be no distinction raised between a dissolution of marriage obtained under the Indian Divorce Act and a dissolution obtained under the Mahomedan law. It is only on proof of the existence of the relationship of husband and wife that a Magistrate can make an order under s. 234 granting maintenance to a wife; but where proof has been given that such relationship has ceased to exist, he may stay an order already made under that section.—*Abdur Rohoman v. Sakhina*; *Sobhan v. Shubraton*; *Ossuff v. Shama*, I. L. R., 5 Cal. 558 [see p. 232 of this book].

4. MAINTENANCE—*Mutta form of marriage—Criminal Procedure Code* (Act X. of 1872), s. 536—*Mahomedan law—Shia sect.*] Under the law of the Shia sect of Mahomedans, a mutta wife is not entitled to maintenance; but such a provision of the law does not interfere with the statutory right to maintenance given by s. 536 of the Code of Criminal Procedure. The mutta form of marriage does not admit of repudiation under the law of the Shia sect of Mahomedans. *Quere.*—Whether the form of divorce called zihar

Maintenance (contd.)—

may be exercised in the mutta form of marriage.—*Luddun Sahiba v. Mirza Kamar Kudar*, I. L. R., 8 Cal. 736 [see p. 418 of this book].

5. MAINTENANCE—*Criminal Procedure Code* (Act X. of 1882), ss. 488, 489.] A Magistrate has no power, under s. 488 of the Code of Criminal Procedure, to make an order for maintenance at a progressively increasing rate. He may, however, under s. 489, from time to time, alter the rate of the monthly allowance granted as maintenance under s. 488.—*Upendra Nath Dhal v. Soudamini Dasi*, I. L. R., 12 Cal. 535 [see p. 680 of this book].

6. MAINTENANCE—*Criminal Procedure Code* (Act X. of 1882), s. 488—*Evidence Act* (I. of 1872), s. 120—*Bastardy proceedings—Order of affiliation—Evidence.*] Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings within the meaning of s. 120 of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf. Upon a summons, charging that the defendant, having sufficient means, had refused to maintain his child by his nika wife whom he had subsequently divorced, the Magistrate found that the marriage had not been proved, but that, upon the other evidence adduced, including the similarity of the features and the name of the child with those of the defendant, who did not appear before him during the proceedings, but with whom he stated that he was well acquainted, the child was the illegitimate child of the defendant. He accordingly made an order for maintenance under the section. *Held* that, under the circumstances, he was wrong in taking into account the similarity of the names and the features of the child and the defendant; but, as there was ample evidence of the paternity, he was justified in making the order he did, as it was immaterial for the purpose of determining the liability of the defendant to maintain the child, whether the mother had been married to the defendant or not.—*Nur Mahomed v. Bismulla Jan*, I. L. R., 16 Cal. 781 [see p. 980 of this book].

Manager—

Of Tea-garden ordered to discontinue Holding of Market. See PUBLIC NUISANCE, 17.

Of Indigo-factory for whose Benefit Riot committed. See RIOTING, 1.

Mandamus—

MANDAMUS—*High Courts' Criminal Procedure Act* (X. of 1875), s. 147—*Transfer of case before Police Magistrate to High Court—Power to issue mandamus.*] A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The

I. L. R., Cal. 131.

Mandamus (contd.)—

Police Magistrate heard the evidence for the prosecution, and, without disbelieving it, decided that it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a mandamus to the Magistrate to commit the defendants; it was not a case where the Magistrate had declined jurisdiction; he had exercised his jurisdiction, and heard the case. *Held* also it was not a case which the Court could transfer under s. 147 of the High Courts' Criminal Procedure Act.—*Malcolm v. Gasper*, I. L. R., 2 Cal. 278 [see p. 39 of this book].

Market—

Order to discontinue Holding of. See PUBLIC NUISANCE, 17.

Marriage—

Evidence of. See ADULTERY, 1.

Master and Servant—

MASTER AND SERVANT—*Criminal act of servant—Non-liability of master—Indian Ports Act (XII. of 1873), s. 22.* The servants of a contractor, who had engaged to discharge ballast from a ship lying in the port of Calcutta, threw the ballast into the river within the limits of the port, and thus committed an offence under s. 22 of the Indian Ports Act (XII. of 1875). It did not appear that the contractor had abetted the offence. *Held* that he was not, in the absence of proof of abetment, liable for the acts of his servants.—*Chundi Churn Mookerjee v. Empress*, I. L. R., 9 Cal. 849 [see p. 493 of this book].

Material Error—

See REVISION, 1.

Medical Witnesses—

Evidence of. See STATEMENTS OF POLICE DURING INVESTIGATION, 1.

Deposition of. See REFRESHING WITNESS'S MEMORY, 2.

Memorandum—

Made in English in Respect of Confessions.

See CONFESSION, 13.

Made by Police-officer. See REFRESHING WITNESS'S MEMORY, 1.

Memory—

See REFRESHING WITNESS'S MEMORY.

Merchant Seamen's Act—

MERCHANT SEAMEN'S ACT (I. OF 1859), s. 83—17 & 18 Vic., c. 104, ss. 243 (cls. 1 and 2), 288—*Merchant Shipping Act, 1854—43 & 44 Vic., c. 16, s. 10—Merchant Seamen (Payment of Wages and Rating) Act, 1880—Imprisonment for desertion.* The amendment of cls. 1 and 2 of s. 243 of 17 and 18 Vic., c. 104, by 43 and 44 Vic., c. 16, s. 10, does not affect the liability of seamen in Calcutta to imprisonment for offences

Merchant Seamen's Act (contd.)—

under s. 83, cls. 1 and 2 of A&I. of 1859.—*J. Bruce v. C. Cronin*, I. L. R., 12 Cal. 438 [see p. 670 of this book].

Merchant Shipping Act—

MERCHANT SHIPPING ACT, 1854 (17 AND 18 VIC., c. 104), s. 267—*Trial of British seamen for offences committed on British ship on the high seas—Procedure at such trial—Murder—Admiralty Courts—British seamen on British ship—Letters Patent, High Court, 1865, cl. 26—Case certified by Advocate-General.* A British seaman, who stood charged with the murder of a fellow-sailor on board a British ship on the high seas, was tried by a Judge of the High Court under the Code of Criminal Procedure; the chief evidence against the prisoner being that given in the depositions of the captain and second officer of the ship, taken on commission; this evidence was admitted in evidence, and the prisoner was convicted and sentenced. It was objected that, under s. 267 of the Merchant Shipping Act of 1854, the prisoner ought to have been tried in every respect as though the trial had been held at the Central Criminal Court in London, and that the law of evidence to be applied was that prevailing in England. *Held* on a case certified by the Advocate-General under cl. 26 of the Letters Patent that the prisoner had been properly tried according to the ordinary practice of the High Court, and that the evidence was admissible against him.—*Queen-Empress v. Barton*, I. L. R., 16 Cal. 238 [see p. 899 of this book].

Military Court—

See MUTINY ACT.

Milkman keeping Animals without License—

See MUNICIPAL OFFENCES, 4.

Misappropriation—

See IRREGULARITY, 4.

Mischief—

1. MISCHIEF—*Penal Code (Act XLV. of 1860), ss. 341, 425—Wrongful restraint—Invasion of right causing wrongful loss.* Where complainant had, for the purpose of removal, placed certain goods upon a cart, and accused came and unyoked the bullocks, and turned the goods off the cart on to the road, and complainant thereupon went away at once, leaving them lying there, *held* that, under these circumstances, a conviction under s. 341 of the Penal Code could not be sustained; but that there was such "mischief" as to bring the offence within s. 425. *Held* also that s. 425 does not necessarily contemplate damage of a destructive character. It requires merely that there should be an invasion of right, and diminution of

Mischief (contd.)—

the value of one's property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it. —In the Matter of the Petition of Juggeshwar Dass and others; Juggeshwar Dass and others v. Koylash Chunder Chatterjee, 1. L. R., 12 Cal. 55 [see p. 657 of this book].

2. MISCHIEF—Penal Code (Act XLV, of 1860), s. 425—Revenue sale—Damage done between date of sale and grant of certificate—Wrongful loss to property held under incomplete title.] The damage contemplated in s. 425 of the Penal Code need not, necessarily, consist in the infringement of an existing, present, and complete right, but it may be caused by an act done now with the intention of defeating and rendering infructuous a right about to come into existence. Any person who contracts to purchase property, and pays in a portion of the purchase-money, has such an interest in that property, although his title may not be complete, or his right final and conclusive, that the destruction of such property may cause to him wrongful loss or damage within the meaning of s. 425.—Dharma Das Ghose v. Nusseruddin, 1. L. R., 12 Cal. 669 [see p. 686 of this book].

See FISHERY, 1.

" POSSESSION, 2.

" SUMMARY TRIAL, 3.

Misdirection—

See JURY, 7, 8.

" PREVIOUS CONVICTION, 1.

" REFRESHING WITNESS'S MEMORY, 2.

" WITNESSES FOR PROSECUTION, 3.

Misunderstanding of Charge to Jury—

See JURY, 7.

Mohurbhunj—

Offence committed in. See JURISDICTION, 4; JURISDICTION OF HIGH COURT, 3.

Movements—

Accused not bound to account for his. See JURY, 6.

Mukhtar—

Statement of, as to Faulty Record. See DISCHARGE, 9.

Functions of. See LEGAL PRACTITIONERS' ACT, 2.

Municipal Acts—

See MUNICIPAL OFFENCES.

" DISOBEDIENCE OF ORDER, 2.

Municipal Corporation not a Public Servant—

See SANCTION TO PROSECUTE, 1.

Municipal Offences—

1. MUNICIPAL OFFENCES—Beng. Act III. of 1864, ss. 2, 10, 11, 13, 15, 16, 57, 58—

Municipal Offences (contd.)—

Municipal Commissioners, Power of, to close or divert a public highway—Calcutta Municipal Act (Beng. Act VI. of 1863), ss. 109, 110.] Beng. Act III. of 1864, which vests public highways in Municipal Commissioners for the purposes of the Act, does not, by so vesting them, give power to the Municipal Commissioners, nor a fortiori to the Vice-Chairman alone, to stop up or divert such public highways.—Jodoonath Ghose v. Brojonath Dey, 1. L. R., 2 Cal. 425 [see p. 59 of this book].

2. MUNICIPAL OFFENCES—Justice of the Peace—Disqualifying interest—Summons issued at instance of, and determined by, a servant of the prosecutor—Evidence, Refusal to hear—Finality of assessment—Beng. Act IV. of 1875, ss. 75, 77, 78, 79, 346, 351—High Courts' Criminal Procedure Act (X. of 1875), s. 147.] A, alleged to have carried on business in Calcutta without having taken out a license under Beng. Act IV. of 1876, was summoned at the instance of the Corporation by B, a servant of the Corporation, and also a Justice of the Peace. The case was subsequently heard by B, and it was shown that notice of the assessment under class ii., sch. 3, had been duly served on A, and that, though he then denied his liability to take out any license, and stated that he carried on no business as alleged, he had not appealed against the assessment under s. 79. It was further shown that the assessment had been confirmed by the Chairman of the Corporation, but that the amount had not been paid. A thereupon tendered evidence to show that he was not liable to take out any license; but B refused to hear such evidence, and, convicting A, sentenced him to pay a fine. On an application, under the above circumstances, to the High Court under s. 147, Act X. of 1875, held that the finality of the decision of the Chairman referred to in s. 79 has only reference to the class under which a particular person, who is admittedly bound to take out a license under s. 75, should be assessed, and not to the case where the liability to take out a license at all is denied, this being a question which can only be determined judicially after taking evidence by a competent Court in a prosecution under s. 77, and that, therefore, the refusal of B to hear the evidence tendered by A on this point was illegal. Held also that the proceedings and ultimate conviction of A were illegal, inasmuch as B, being a servant of the prosecutor, i.e., the Corporation, had such an interest as might give him a bias in the matter, and that consequently he ought not to have sat as Justice of the Peace, either at the granting or upon the hearing of the summons.—Wood v. Corporation of the Town

Municipal Offences (contd.)—

of Calcutta, I. L. R., 7 Cal. 322 [see p. 344 of this book].

3. MUNICIPAL OFFENCES—*Calcutta Municipal Consolidation Act (Beng. Act IV. of 1876), s. 77—License—Assessment—Fine—Boarding-house-keeper.* In order to obtain a conviction under s. 77, Beng. Act IV. of 1876, for keeping a boarding-house without taking out a license, it must be shown that the accused held himself out to the public as one whose business or profession it is to receive boarders for profit. In order to pass a proper sentence of fine under s. 77, Beng. Act IV. of 1876, evidence should be given of the amount of assessment on the accused's house or place of business, and of the amount payable on account of the license which the accused should have taken out.—*J. Wood v. Corporation for the Town of Calcutta*, I. L. R., 8 Cal. 891 [see p. 434 of this book].

4. MUNICIPAL OFFENCES—*Beng. Act IV. of 1876, s. 248—Conviction for keeping animals without license—Continuing offence between date of summons and date of conviction—Second prosecution for same offence on different date.* Under s. 248 of Beng. Act IV. of 1876, a milkman, who has been convicted and fined for keeping an animal without a license, cannot again be prosecuted for the continuance of the same offence before conviction, nor can he be separately prosecuted for the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction. In a summons taken out on the 27th March against a milkman for an offence under s. 248, Beng. Act IV. of 1876, the offence was stated to have been committed on the 16th March; the case was fixed for the 8th April, when the defendant was convicted and fined by the Magistrate. Another summons had been taken out against him on the same day (27th March) for a similar offence stated to have been committed on the 25th March. *Held* that he could not be convicted on the second charge.—In the Matter of the Corporation of the Town of Calcutta *v. Matoo Bewah and others*, I. L. R., 13 Cal. 108 [see p. 692 of this book].

5. MUNICIPAL OFFENCES—*Bench of Magistrates, Power of—Beng. Act V. of 1876, ss. 180, 215, 216—Omission to remove obstruction.* A notice was issued under s. 215, Beng. Act V. of 1876, requiring A to remove an alleged obstruction. The requisition was not complied with, and A was prosecuted for non-compliance therewith, under s. 216, before a Bench of Honorary Magistrates. *Held* that the Court had power to inquire whether the alleged obstruction was, in point of fact, an obstruction or not.—*Municipal*

Municipal Offences (contd.)—

Committee of Dacca v. Someer, I. L. R., 9 Cal. 38 [see p. 457 of this book].

Municipal Officer on Bench of Magistrates—

See IRREGULARITY, 2.

Murder—

Appeal from Acquittal on Charge of Murder. See APPEAL, 1.

Before Penal Code came into Force. See GENERAL CLAUSES ACT.

Charge of, when Body not Forthcoming. See CONFESSION, 12.

Confession of a Woman in a Case of. See FALSE INFORMATION, 1.

Frame of Charge in a Case of. See CHARGE, 3.

Judge disagreeing with Jury in a Case of. See JURY, 9.

Mode of recording Confession in a Case of. See CONFESSION, 15.

Statement of Accused in Answer to a Charge of. See PLEA OF GUILTY.

On High Seas. See MERCHANT SHIPPING ACT.

Mutiny Act—

MUTINY ACT, s. 101—*Jurisdiction of Civil (as opposed to Military) Court—Offence committed by British soldier.* S. 101 of the Mutiny Act does not deprive the Civil (as opposed to Military) Courts of jurisdiction over British soldiers committing offences within the territorial limits of those Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief. The section is merely permissive of a military trial being held.—*Empress v. Maguire*, I. L. R., 5 Cal. 124 [see p. 216 of this book].

N.**Naga Hills—**

Extension of Act XXII. of 1869 to. See JURISDICTION OF HIGH COURT, 2.

Navigable River—

Obstruction on Tidal. See PUBLIC NUISANCE, 1.

Necessity for explaining Charge to Accused—

See CHARGE, 2.

Neglect of Duty by Police-constable—

See POLICE ACT, 2.

Negligence—

See CULPABLE HOMICIDE, 1, 3.

Nepal—

Dishonestly retaining in British Territory Property stolen in. See STOLEN PROPERTY, 1.

Notice of Assessment—

See MUNICIPAL OFFENCES, 2.

Notice to Accused—

See DISCHARGE, 7.

” FURTHER INQUIRY.

” SANCTION TO PROSECUTE, 11.

Notice to Parties to Attend—

See POSSESSION, 6.

Notification—

Extending Act XXII. of 1869 to Cossyah and Jynteeah Hills. See JURISDICTION OF HIGH COURT, 1.

Publication of, under Bengal Embankment Act (II. of 1882), ss. 6, 76 (cl. b), 80. See EMBANKMENT.

Nuisance—

Abatement of. See POSSESSION, 2.

Number of Charges—

Limit on. See SEPARATE CHARGES, 1.

O.

Obligation to answer Questions put by Police—

See FALSE EVIDENCE, 4, 5, 8.

Obligors of a Bond—

Criminal Prosecution against. See EVIDENCE, 1.

Obscene Representations and Words—

See TRANSFER OF CASE, 3.

Obstruction—

Of Public Road. See PUBLIC NUISANCE, 10—14.

Of Public Ways. See PUBLIC NUISANCE, 7, 9, 11, 14.

Omission to remove. See MUNICIPAL OFFENCES, 5.

On Pathway. See PUBLIC NUISANCE, 3.

On Public Thoroughfare. See PUBLIC NUISANCE, 3, 9.

On Tidal Navigable River. See PUBLIC NUISANCE, 1.

Occurrence of Sudden or Unnatural Death—

See INFORMATION TO POLICE.

Offence—

Punishable by Fine and Confiscation. See SUMMARY TRIAL, 1.

Splitting-up of. See SUMMARY TRIAL, 2, 4.

Offences—

Of Different Kinds. See SEVERAL OFFENCES.

Of the Same Kind. See SEPARATE TRIAL, 1.

Of the Same Kind committed in respect of Different Persons. See JOINDER OF CHARGES, 1.

Omission—

To give Information to Police. See INFORMATION TO POLICE.

To remove Obstruction. See MUNICIPAL OFFENCES, 5.

To report Sudden, Unnatural, or Suspicious Death. See CAUSING DISAPPEARANCE OF EVIDENCE.

One Statement—

Illegality of Separate Convictions for. See FALSE INFORMATION, 2.

One Year—

Offences committed within. See JOINDER OF CHARGES, 1.

Offences of the Same Kind committed within. See SEPARATE CHARGES, 1.

Opinion—

Of Experts how elicited. See STATEMENT TO POLICE DURING INVESTIGATION, 1.

Of Experts to Cause of Death. See CONFESSION, 14.

Of Sessions Judge as to Worthlessness of Evidence. See ASSESSORS.

Opportunity—

Of showing Cause against Commitment. See DISCHARGE, 5.

To prove Truth of Original Charge. See FALSE CHARGE, 3, 11; SANCTION TO PROSECUTE, 5, 7, 8, 11.

To show Cause before furnishing Security. See SECURITY FOR GOOD BEHAVIOUR, 4.

Oral Evidence—

As to Statements made by Witnesses in Magistrate's Court. See DISCHARGE, 9.

Order—

As to Property regarding which Offence committed. See PROPERTY.

By Executive Officer. See PUBLIC NUISANCE, 15.

Disobedience of. See DISOBEDIENCE OF ORDER.

Person affected by. See COPIES OF DEPOSITIONS.

Prohibiting holding of Hât. See PUBLIC NUISANCE, 18.

Of Appointment to run from what Date. See JURISDICTION, 3.

Of Public Servant, Disobedience to. See POSSESSION, 18.

To abate Nuisance. See PUBLIC NUISANCE.

To abstain from collecting Rent. See PUBLIC NUISANCE, 19.

Ouster—

Without Authority of Civil Court. See POSSESSION, 4.

Overstaying Leave without Permission—

See POLICE ACT, 1.

Owner's Consent—

Property removed with Criminal Intent, but with. See ABETMENT OF ABETMENT.

P.**Parda-nashin Female—**

Right of, to be examined on Commission. See COMMISSION, 1, 3.

Pardon—

1. PARDON—*Criminal Procedure Code (Act X. of 1872), s. 349—Acquittal of prisoner—Withdrawal of pardon granted to approver after judgment of acquittal—Conviction trial improperly originated—Power of High Court to set aside.* At a sessions trial, the Judge, after acquitting the prisoner, passed an order, withdrawing a pardon already granted to an approver (who had given his evidence as such approver before the Sessions Court), and ordered his commitment. The approver was charged, tried, and found guilty. *Held* by Mitter, J., that the order withdrawing the pardon and committing the approver was contrary to the provisions of s. 349 of the Criminal Procedure Code, the words "before judgment has been passed" being words inserted in the section to put a limit to the time within which the power of withdrawal of the pardon conferred in the Court of Session may be actually exercised; and that therefore the trial of the approver was illegal. The power of directing commitments conferred upon the Sessions Court by s. 349 of the Criminal Procedure Code can be exercised only before judgment has been passed. *Held* by Maclean, J., that it is not necessary that the order should be made before judgment is passed, but that it must appear to the Judge, before he passes judgment, that the conditions of the pardon have not been complied with; and that, in the present case, it was impossible to hold that, because the actual order of commitment of the accused was written (although in the judgment) after the acquittal, therefore it did not appear to the Judge before passing judgment that there were grounds for his order. *Per* Maclean, J.—The High Court may, without reference to the Local Government, set aside a conviction made upon a trial improperly originated. — *Empress v. Nobin Chunder Banikya*, I. L. R., 8 Cal. 560 [see p. 402 of this book].

2. PARDON—*Criminal Procedure Code (Act X. of 1882), s. 337, read with s. 338—Offences not exclusively triable by Court of Session.* A Sessions Judge cannot tender a pardon to an accused under s. 338 of the Criminal Procedure Code, where the offence for which he has been committed is not "triable exclusively by the Court of Session."—*Em-*

Pardon (contd.)—

press v. Sadhee Kasal, I. L. R., 10 Cal. 936 [see p. 557 of this book].

See EVIDENCE, 7.

Part of Evidence Disbelieved—

See JURY, 9.

Parties Opposed in Rioting—

See SEPARATE CHARGES, 2.

Pathway, Obstruction on—

See PUBLIC NUISANCE, 3.

Pendency of Appeal—

Power of High Court to order Arrest during. See ARREST PENDING APPEAL.

Pendency of Appeal in Civil Court—

Court not to commit for Perjury during. See APPEAL, 3.

Peon of Civil Court—

Assault on. See SENTENCE, 4.

Perjury—

Evidence partly disbelieved in a Case of. See JURY, 10.

Court to await Result of Pending Appeal before committing for. See APPEAL, 3.

Permanent Injunction—

See PUBLIC NUISANCE, 17.

Permission—

Overstaying Leave without. See POLICE ACT, 1.

To conduct Prosecution. See CONDUCT OF PROSECUTION.

Perpetual Injunction—

See PUBLIC NUISANCE, 17.

Person Affected by Order—

See COPIES OF DEPOSITIONS.

Piles, Operation for—

See RASH AND NEGLIGENT ACT, 2.

Plaint, False Averments in—

See FALSE EVIDENCE, 1.

Pleader—

Interim Suspension of. See LEGAL PRACTITIONERS' ACT, 1.

Pleaders—

Consenting on Behalf of Accused to Irregular Procedure. See SEPARATE CHARGES, 2.

Witnesses when to be left to be dealt with by. See CONFESSION, 7.

Plea of Guilty—

PLEA OF GUILTY—*Charge of murder, Statement by accused in answer to—Penal Code (Act XLV. of 1860), ss. 302, 300, except 1 and expl.—Criminal Procedure Code (Act X. of 1882), ss. 271, 299.* An accused person, in answer to a charge of murder,

Plea of Guilty (contd.)—

stated that he had killed his wife ; but that he had done so in consequence of his having discovered her in an act of adultery on the previous day. *Held* that such a statement did not amount to a plea of guilty on the charge ; and that it was the duty of the Court to try whether the provocation, therein disclosed, was sufficiently grave and sudden to reduce the offence.—*Netai Luskar v. Empress*, 1. L. R., 11 Cal. 410 [see p. 626 of this book].

Poddar of Bank—

See ILLEGAL GRATIFICATION, 1.

Police—

Depositions of Witnesses not the Property of the. See LEGAL PRACTITIONERS' ACT, 1.

False Information to. See FALSE INFORMATION.

Omission to give Information to. See INFORMATION TO POLICE.

Obligations to answer Questions put by. See FALSE EVIDENCE, 4, 5, 8.

Statements to. See STATEMENTS OF WITNESSES TO POLICE DURING INVESTIGATION.

Surety-bond for producing a Person before the. See SECURITY TO PRODUCE PERSON BEFORE POLICE.

Police Act—

1. POLICE ACT (V. OF 1861), s. 29—*Overstaying leave without permission.*] The failure of a police-constable to resume his duty on the expiration of his leave does not constitute an offence under s. 29, Act V. of 1861.—*Empress v. Janokinath Gupta*, 1. L. R., 6 Cal. 625 [see p. 303 of this book].

2. POLICE ACT (V. OF 1861), s. 29—*Police-constable — "Neglect of duty" — "Lawful order" — Extra drill.*] A District Superintendent of Police directed his constables to cut down the jungle in the vicinity of their lines, and, on their refusal to comply, ordered them extra drill every day. One of such constables not turning out to such extra drill was thereupon prosecuted and convicted of neglect of duty under s. 29, Act V. of 1861. *Held* that s. 29 provided for no such offence, and that any neglect of duty short of a violation of duty does not amount to an offence under that section. *Held* further that the omission to attend such extra drill did not amount to an offence under that section, as the words "lawful order" used in the section mean an order which the authority mentioned therein is competent to make, and it did not appear that a District Superintendent of Police was competent to order his constables to cut down the jungle in the vicinity of their lines, and, on their refusal to do so, to order them extra drill.—

Police Act (contd.)—

In the Matter of the Petition of Bhola Nath Das, 1. L. R., 12 Cal. 427 [see p. 668 of this book].

3. POLICE ACT (V. OF 1861), s. 29—*Power to make rules under Act V. of 1861—District Superintendent of Police, Power of—A rule or regulation and a lawful order distinguished.*] There is no express power given by Act V. of 1861 to any officer save the Inspector-General of Police to make rules ; therefore the violation of a general rule alleged to have been made by a District Superintendent of Police to the effect that constables are to be within the lines at a particular time or at roll-call is not punishable under s. 29 of the Act. *Semle.*—The violation of a special order made by a District Superintendent of Police requiring the presence of an officer or of certain officers within the police-lines, and issued expressly to him or each of them, would come within s. 29 of the Act as being not "a rule or regulation," but a "lawful order," made by a competent authority, and relating to the duties of the officer or officers.—In the Matter of the Petition of Abdul Hossein ; *Queen-Empress v. Abdul Hossein*, 1. L. R., 15 Cal. 194 [see p. 806 of this book].

Police-constable—

Neglect of Duty by. See POLICE ACT, 2.

Police-diaries—

See STATEMENTS TO POLICE DURING INVESTIGATION, 2.

Police-investigation—

Depositions taken at, not the Property of Police. See LEGAL PRACTITIONERS' ACT, 1.

Police-magistrate—

Transfer of Case to High Court from. See MANDAMUS.

Police-officer—

Admission made to, before Arrest, is Admissible. See ADMISSION.

Confession made to. See CONFESSION, 12. Deputy Commissioner held to be a. See CONFESSION, 1.

Incriminating Statement to. See CONFESSION, 11.

Investigating Case, Statement made to. See FALSE EVIDENCE, 8.

Memorandum made by. See REFRESHING WITNESS'S MEMORY, 1.

Statement of Accused to, during Investigation. See CONFESSION, 14.

Who is an Accused Person, Report of. See DISMISSAL OF COMPLAINT, 2.

Police-papers—

When not the Property of Police. See LEGAL PRACTITIONERS' ACT, 1.

Police-papers (contd.)—

Statements to. See STATEMENTS OF WITNESSES TO POLICE DURING INVESTIGATION, 2.

Police-report—

Incorporation of, by Reference. See POSSESSION, 9, 10.

Possession—

1. POSSESSION—*Criminal Procedure Code (Act X. of 1872), s. 530—Constructive possession—Intermediate holders.* In a case of disputed possession between two rival zamindars, constructive possession through intermediate holders (ticcadars), to whom the raiyats pay rents, is not such possession as is contemplated by s. 530 of the Criminal Procedure Code.—*Empress v. Thakoor Dyal Singh*, I. L. R., 3 Cal. 320 [see p. 116 of this book].

2. POSSESSION—*Criminal trespass—Land held by joint-owners—Abatement of nuisance—Riot—Mischief—Penal Code (Act XLV. of 1860), ss. 141, 147, 425—Examination of witnesses for defence—Criminal Procedure Code (Act X. of 1872), ss. 219, 359, 362—High Court, Extraordinary Jurisdiction—High Court Charter, cl. 15.* A, a joint-owner of a parcel of land, erected on it an edifice without the consent and against the will of B, another joint-owner. A dispute having arisen in consequence, the Magistrate held an inquiry, and made an order under s. 530 of the Criminal Procedure Code, awarding to A exclusive possession of the part of the land on which the edifice had been erected. *Held per Jackson, J.* that such order was erroneous, as the matter was not one to which s. 530 could apply. B subsequently brought a suit in the Civil Court to establish his title to joint-possession of the whole parcel, and for a declaration that A was not entitled to erect any edifice thereon; and he further prayed that such edifice should be removed. B obtained a decree, whereupon his servants went on the land, and pulled it down. They were charged before the Deputy Magistrate with having committed mischief, and on this convicted and fined. *Held per Jackson, J.*, that, as there had been no causing of wrongful loss, the accused had not been guilty of mischief. On the 8th October, the accused, who were the servants of B, found the men in the employ of A were putting up this erection, a nawbut-khana, again, and accordingly protested against its erection, pulled down the bamboos, thrust aside the servants of A, throwing to the ground one man who was clinging to the bamboos. On the 9th October 1877, these servants were charged before the Magistrate with rioting, and, being called upon for their defence, named several witnesses,

Possession (contd.)—

and summonses on the following morning were issued for their appearance, but they were not found. The accused then applied for further time for the appearance of the witnesses. This the Magistrate refused to grant, and convicted the accused on 12th October 1877. *Held per Jackson, J.*, that, this being a warrant-case, it was the duty of the Magistrate to summon the witnesses that might be offered by the accused, and that he might at his discretion have adjourned the case. *Held further per Jackson, J.*, that the meaning of s. 359 of the Criminal Procedure Code is that, if among the persons named by the accused as witnesses the Magistrate considers that any witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material; but that the section is not intended to enable the Magistrate to inquire into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused; and further that in the present case there was not any purpose of vexation or delay, and that by the refusal to grant further time the accused had been probably prejudiced in their defence. *Held further per Jackson, J.*, that, as the accused were not on the land in question as members of an unlawful assembly, nor for any unlawful purpose, the conviction, as well as the procedure, was illegal. *Held per Cunningham, J.*, that the accused were merely exercising the remedy of abating a private nuisance, and were exercising a legal right of self-defence. *Held further per Cunningham, J.*, that the acts of the complainants in erecting the nawbut-khana amounted to mischief, and came within the purview of s. 425 of the Penal Code. *Held further per Ainslie and McDonnell, JJ.*, that the High Court, in the exercise of its powers of extraordinary jurisdiction, cannot, in criminal matters, interfere, unless all other remedies provided by law have been previously exhausted. Therefore, where parties who had been convicted of riot by a Magistrate, and who, having a right of appeal to the Sessions Court, instead of doing so, moved the High Court under cl. 15 of the Charter, the Court would not interfere until that remedy had been resorted to.—*Denonath Ghattack v. Rajcoomar Singh*, I. L. R., 3 Cal. 573 [see p. 126 of this book].

3. POSSESSION—*Bench of Magistrates—Jurisdiction—Criminal Procedure Code (Act X. of 1872), ss. 50, 530.* A Bench of Magistrates has no power to deal with cases coming under s. 530 of the Criminal Procedure Code. A Bench may be empowered

Possession (contd.)—

under s. 50 of the Code "to try such cases or such class of cases only, and within such limits, as the Government may direct." The definition of the term "trial" shows that it refers to trials for offences, and these do not come within the miscellaneous matters mentioned in s. 530.—*Sufferuddin v. Ibrahim*, I. L. R., 3 Cal. 754 [see p. 145 of this book].

4. POSSESSION—*Batwara proceedings*—*Possession given by amin, Effect of—Criminal Procedure Code (Act X. of 1872), s. 530.* The possession given by an amin in a batwara proceeding is simply one of ownership, and not of occupancy. Such possession cannot, therefore, in proceedings under s. 530 of the Code of Criminal Procedure, be held to oust tenants occupying lands previous to such delivery of possession.—*Mackenzie v. Shere Bahadoor Sahi*, I. L. R., 4 Cal. 378 [see p. 177 of this book].

5. POSSESSION—*Ouster without authority of Civil Court—Peaceful possession—Criminal Procedure Code (Act X. of 1872), s. 530.* Ouster by one person of another lawfully in possession of property confers no rights on the former which can be recognized in proceedings taken under s. 530 of the Code of Criminal Procedure. The Court should refer back to a time previous to the quarrel when such possession was peacefully enjoyed by one or other of the disputants.—In the Matter of the Petition of Mohesh Chunder Khan, I. L. R., 4 Cal. 417 [see p. 177 of this book].

6. POSSESSION—*Criminal Procedure Code (Act X. of 1872), s. 530—Powers of Magistrate under—Notice to parties to attend, Form of—Intervenor.* The power given to a Magistrate to make a binding declaration as to the possession of any property is an exceptional one, and s. 530 of the Criminal Procedure Code limits the exercise of that power to cases in which the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists; it is this likelihood, with the consequent necessity for immediate action, which alone warrants action by the Magistrate. The grounds for his belief as to the existence of a likelihood of a breach of the peace must be recorded. Although no particular mode of giving notice, calling upon parties to attend under this section before the Magistrate, has been provided, yet the language of the section indicates that the notice shall be addressed to known individuals, and not be in the form of a public proclamation or citation. There is no provision in the Criminal Procedure Code for allowing an intervenor to come in, in the middle of proceedings held by a Ma-

Possession (contd.)—

gistrate under this section.—In the Matter of the Petition of Kunund Narain Bhooop, I. L. R., 4 Cal. 650 [see p. 192 of this book].

7. POSSESSION—*Ejectment—Beng Act VIII. of 1860, s. 53—Right to standing crops on land.* The effect of an order of ejectment under s. 53 of the Rent Act is to dispossess the raiyats, not only of the land, but also of the crop standing thereon, the object of such an ejectment being to terminate completely the connection between the parties as landlord and tenant.—*Durjan Mahton v. Wajib Hossein*, I. L. R., 5 Cal. 135 [see p. 219 of this book].

8. POSSESSION—*Right of way—Criminal Procedure Code (Act X. of 1872), s. 532.* Gates having been placed at one end of a private road by a person claiming to be its sole proprietor, with the intention of preventing the use of such private road by the public between the hours of sunset and sunrise, and the Deputy Commissioner of Darjeeling, acting for the public, having obtained from the Magistrate an order under s. 532 of the Criminal Procedure Code "that possession of the private road be not taken by the person claiming to be proprietor to the exclusion of the public . . . until he shall have obtained the decision of a competent Civil Court adjudging him to be entitled to exclusive possession," held that, there being no evidence of any one having exercised, or claimed to exercise, the right of passing over the road between sunset and sunrise, there was no dispute under s. 532 of the Criminal Procedure Code; and that the order of the Magistrate was made without authority, and must be set aside. S. 532 does not enable a Magistrate to make a purely declaratory order. It only enables him to prevent arbitrary interruptions by any person of rights actually enjoyed, which have been exercised by the public or a person or class of persons.—*Maharajah of Burdwan v. Chairman of the Darjeeling Municipality*, I. L. R., 5 Cal. 194 [see p. 223 of this book].

9. POSSESSION—*Criminal Procedure Code (Act X. of 1872), ss. 491, 530—Dispute likely to cause breach of the peace—Decision on title by Civil Court—Police-report, Incorporation of, by reference.* On the 20th of March 1879, A applied to have certain lands, which he had lately purchased, registered in his name. The order of the Deputy Collector, declaring that A had proved possession, and was entitled to registration, was not passed until the 24th December 1879. Prior to A's purchase, B and C had, on the 6th March 1879, obtained registration of the same property. The proceedings were sent to the Commissioner, who, on the 29th September 1880, declared A to be entitled to the land;

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Possession (contd.)—

and in October the registration in the names of B and C was cancelled, and A's name was finally registered. In July 1880, proceedings under s. 530 of the Criminal Procedure Code were commenced upon the petition of certain raiyats, who alleged that other raiyats, at the instigation of A, were going to do acts which would lead to a breach of the peace. The Deputy Magistrate, the same person who as Deputy Collector had decided the land-registration case in favour of A, proceeded under s. 530 to consider the question as to who was in possession, and found that B and C were in possession. *Held* that the Deputy Magistrate could not, in these proceedings, set aside the order which he had made in the registration-case, as that order could only be set aside in a regular suit. The proceedings recorded by the Deputy Magistrate did not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question, between A on the one side, and B and C on the other; nor did it set forth the grounds upon which he was so satisfied that such dispute existed. *Held* that the proceeding was therefore defective. In the proceedings, the Magistrate referred to a police-report, which, however, did not show that a breach of the peace was imminent. *Held* that, although this report might be taken to be incorporated by reference, yet that it was not sufficient to justify the order. *Per* Field, J.—Unless the parties are able to show that there is such a dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand, and not proceed further. When the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party, and the proper course for the Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under s. 491 of the Criminal Procedure Code, and require from such person security to keep the peace.—*Gobind Chunder Moitra v. Abdool Sayad*, I. L. R., 6 Cal. 835 [see p. 317 of this book].

10. POSSESSION—*Criminal Procedure Code (Act X. of 1872), s. 530—Record of grounds—Police-report, Incorporation of—Evidence of possession—Evidence of title.* In proceedings under s. 530 of the Criminal Procedure Code, the Magistrate recorded the following words: "Whereas from the police-report a breach of the peace probable," and found that certain persons were in possession. *Held* that, although the record of grounds was unsatisfactory, as the initial proceeding did not contain within itself all which the law requires to be recorded, *vis.*,

Possession (contd.)—

in the first place, that the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists, and in the second place, the ground upon which he is so satisfied; yet that, as the police-report from which the grounds for apprehending a breach of the peace appeared was incorporated by reference, the final order was not defective. *In re* Gobind Chunder Maitra (I. L. R., 6 Cal. 835) distinguished. No sufficient evidence of possession was produced before the Magistrate, but evidence as to the title of the person in whose favour the Magistrate found was given, and the Magistrate based his decision upon the latter evidence, and determined the case with reference to the merits of the claims of the parties to the right of possession. *Held* that, although the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession, he was wrong in basing his decision on the evidence of title, and his order was set aside.—*Kali Kristo Thakur v. Golam Ali Chowdhry*, I. L. R., 7 Cal. 46 [see p. 329 of this book].

11. POSSESSION—*Breach of the peace—Criminal Procedure Code (Act X. of 1872), s. 530—Omission of Magistrate to record preliminary proceeding.* In order to justify a Magistrate in interfering under s. 530 of the Criminal Procedure Code, it is necessary that he should be satisfied that there exists a dispute concerning land which is likely to induce a breach of the peace—i. e., there must be a reasonable apprehension that a disturbance of the peace is likely to occur, rendering it necessary for him to take immediate steps to prevent it, and not merely that it is probable a breach of the peace may occur if proceedings under s. 530 be not taken. *Quære.*—Whether it is necessary that a preliminary proceeding should first be recorded to give the Magistrate jurisdiction.—*Damodur Bidyadhar Mohapatro v. Syamanund Dey*, I. L. R., 7 Cal. 385 [see p. 352 of this book].

12. POSSESSION—*Possession, Order of Criminal Court as to—Dispute likely to cause breach of the peace—Duty of Magistrate—Criminal Procedure Code (Act X. of 1882), s. 145.* It is the duty of a Magistrate, before taking proceedings under s. 145 of the Criminal Procedure Code, to satisfy himself whether there is any dispute likely to cause a breach of the peace, and that the suggested apprehension of a breach of the peace is not merely colourable, and made to induce him to deal with matters properly cognizable by the Civil Court.—*Obhoy Chandra Mookerjee v. Mohamed Sabir*, I. L. R., 10 Cal. 78 [see p. 499 of this book].

13. POSSESSION—*Possession, Inquiry as to—Time at which Magistrate is to deter-*

Possession (contd.)—

mine who was in possession—Actual possession—Criminal Procedure Code (Act X. of 1885), s. 142. Under s. 145 of the Criminal Procedure Code, the Magistrate has to find which of the parties is in possession of the subject-matter of the dispute at the time when he is inquiring into the matter, which, in the contemplation of the law, is identical with the time of the institution of the proceedings, and not at any time previous thereto, and he has no concern as to how the party then in actual possession obtained possession, but has only to pass an order retaining him in possession.—*Ambler v. Pushong*, 1. L. R., 11 Cal. 365 [see p. 620 of this book].

14. POSSESSION—*Dispute as to the right to collect rents—Criminal Procedure Code (Act X. of 1882), s. 145—Tangible immoveable property—Act X. of 1872, s. 530.* A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Code of Criminal Procedure.—*Promatha Bhusana Deb Roy v. Doorga Churn Bhat-tacharji*, 1. L. R., 11 Cal. 413 [see p. 628 of this book].

15. POSSESSION—*Criminal Procedure Code (Act X. of 1882), s. 145—Procedure under that section—Attendance of witnesses—Process to enforce attendance.* Proceedings under s. 145 of the Criminal Procedure Code should on all points of procedure be regarded as summons-cases, and, although it is discretionary with a Magistrate to issue a summons on a witness in such a case, yet, when any one of the parties applies at a proper time for process to secure the attendance of his witnesses, the Magistrate should not arbitrarily refuse his assistance; and, where such refusal is made, it is incumbent on the Magistrate to record his reason for such refusal.—*Hurendro Narain Singh Chowdhry v. Bhubani Prea Baruani*, 1. L. R., 11 Cal. 762 [see p. 651 of this book].

16. POSSESSION—*Criminal Procedure Code (Act X. of 1882), s. 145—Inquiry as to possession—“Actual possession.”* Under s. 145 of the Criminal Procedure Code, a Magistrate has to look to the “actual possession,” that is, the possession, however obtained, of the party in possession at the time of the inquiry. *Ambler v. Pushong* (1. L. R., 11 Cal. 365) followed.—*Chunder Koomar Poddar v. Chundra Kanta Ghose* and another, 1. L. R., 12 Cal. 521 [see p. 679 of this book].

17. POSSESSION—*Criminal Procedure Code (Act X. of 1882), s. 145—“Tangible immoveable property”—Julkur, Dispute regarding a.* A dispute concerning the right to fish in a julkur is not a dispute concerning any “tangible immoveable property with-

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in the meaning of s. 145 of the Code of Criminal Procedure. Enquiries under s. 145 should be directed to the question as to which party is in possession of the subject of dispute before any proceedings in the Court have been taken in the matter.—*Krishna Dhone Dut and others v. Troilokia Nath Biswas and others*, 1. L. R., 12 Cal. 539 [see p. 683 of this book].

18. POSSESSION—*Criminal Procedure Code (Act X. of 1882), s. 145—Penal Code (Act XLV. of 1860), s. 188—Disobedience to order of public servant—Inquiry as to possession—Parties to inquiry.* In May 1883 the District Magistrate of Tipperah held an inquiry as to the possession of certain lands claimed by A and B, and, having found on the evidence taken by him that A was in possession, he passed an order on the 21st of May 1883, declaring that A was entitled to hold possession of the disputed land until evicted in due course of law, and forbidding B and all others to disturb A's possession until such disturbance should be effected in due course of law. Previously to November 1885, B sold an eight-anna share of his interest in the disputed land to C, who at the time of his purchase had notice of the order of the 21st of May 1883. In November 1885, B and others went to the disputed lands, and attempted to turn A out of possession by force, and to compel the tenants of the lands to pay rent and give kabuliats to B and C. At the time that B and his companions went to the disputed land, the latter were aware of the order of the 21st of May 1883, though none of them was a party to the inquiry then made by the District Magistrate. In December 1885, they were all tried, and found guilty of disobedience to an order duly promulgated by a public servant. *Held* that the conviction was right. *Semble*, that a reference by a Magistrate to a police-report which clearly sets out the probability of a breach of the peace is a sufficient statement of the reasons for the Magistrate's being satisfied of the existence of a dispute likely to cause a breach of the peace, within the meaning of s. 145 of the Code of Criminal Procedure.—*Goluck Chandra Pal and others v. Kali Charan De*, 1. L. R., 13 Cal. 175 [see p. 696 of this book].

19. POSSESSION—*Criminal Procedure Code (Act X. of 1882), s. 145—Julkur right—Tangible immoveable property—Dispute regarding a julkur.* A dispute concerning a julkur-right is not a dispute concerning “tangible immoveable property” within the meaning of s. 145 of the Code of Criminal Procedure, and cannot be inquired into by a Magistrate under the provisions of that

Possession (contd.)—

section.—*Anund Moyi Dabia v. Shurnomoyi*, I. L. R., 13 Cal. 179 [see p. 699 of this book].

20. **POSSESSION—Criminal Procedure Code (Act X. of 1882), s. 145—Title—Symbolical possession.** A Magistrate, trying a case under s. 145 of the Criminal Procedure Code, in determining the question of possession, took into consideration the question of title. *Held* that he had a right to discuss the question of title, if in his opinion it was material upon the question of possession; and that the mere fact that he had considered and discussed the question of title, would not invalidate his decision on the point of possession, provided that there was evidence before him as to who was in possession. *Semle*.—In the absence of any other evidence of possession, a Magistrate would be justified in finding possession to be with a person to whom symbolical possession has been shown to have been given in execution of a decree, although possibly slight evidence would be sufficient to rebut such evidence of possession.—*Raja Babu v. Muddun Mohun Lall*, I. L. R., 14 Cal. 169 [see p. 730 of this book].

21. **POSSESSION—Criminal Procedure Code (Act X. of 1882), s. 145—Order passed under s. 146 on proceedings taken under s. 145, Criminal Procedure Code—Power of Court on revision—Evidence on revision.** Where a Magistrate has passed an order under s. 145 of the Criminal Procedure Code, whereas the proper order in the case should have been one under s. 146, the High Court on revision will make the order which the lower Court ought to have made. Case in which the High Court on revision entered into the whole of the evidence in the case. *Raja Baboo v. Muddun Mohun Lall* (I. L. R., 14 Cal. 169) explained.—*Reid v. Richardson*, I. L. R., 14 Cal. 361 [see p. 742 of this book].

22. **POSSESSION—Criminal Procedure Code (Act X. of 1882), s. 145—Joint-hearing of the case of several claimants—Possession—Number of plots, Dispute as to—Practice.** A Magistrate, proceeding under s. 145 of the Criminal Procedure Code, in a case in which one party (thirty-nine in number) claimed to be the tenants of 708 bighas of land belonging to one Tofuzul Hossein, and the members of the other party (seventeen in number) claimed to hold the same land in separate parcels as their maurasi jote, tried the question of possession as between the two parties in one case, notwithstanding the protest of the maurasi claimants to this mode of procedure, and decided that possession was with the party of thirty-nine, directing that they as a body should remain in possession until ousted by the order of a Civil

Possession (contd.)—

Court. *Held* that the course pursued by the Magistrate at the hearing was prejudicial to the case of the maurasi claimants; and that the form of his order was open to the objection that it would render it necessary for the party out of possession to make all the persons declared to be in possession defendants in any civil suits brought to recover possession of the land. *Azim Mollah v. Satoo Poramanick* (10 C. L. R. 523) distinguished.—*Kutuhul Singh and others v. Uma Singh and others*, I. L. R., 15 Cal. 31 [see p. 783 of this book].

23. **POSSESSION—Criminal Procedure Code (Act X. of 1882), s. 145—Dispute as to right to collect rents—Tangible immoveable property.** A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Criminal Procedure Code. *Harak Narain Singh v. Luchmi Bux Roy* (5 C. L. R. 287) and *Sutherland v. Crowdy* (18 W. R. Cr. 11; 9 B. L. R. 229) referred to. *Pramatha Bhusana Deb Roy v. Doorga Churn Bhattarcharji* (I. L. R., 11 Cal. 413) followed. Where a dispute arose as to the right to collect the rents of certain land, the ownership of which was claimed by both A and B, and the tenants who had been paying rent to A refused to pay rent to A and attorned to B, *held* that the conduct of the tenants in attorning to B was not an assertion of possession adverse to A such as to put an end to the relation of landlord and tenant between them and A and to A's right to collect the rents. Such attornment, therefore, did not deprive A of his right to have recourse to s. 145 in case of a likelihood of a breach of the peace, so as to have his possession of the right to collect the rents maintained, pending proceedings in a civil suit.—In the *Matter of Sarbananda Basu Mozumdar and another v. Pran Sankar Roy Chowdhuri and others*, I. L. R., 15 Cal. 527 [see p. 839 of this book].

24. **POSSESSION—Criminal Procedure Code (Act X. of 1882), s. 145—Time at which Magistrate has to determine who was in possession—Undisturbed possession immediately before dispute.** In an enquiry under s. 145 of the Criminal Procedure Code, where the property in dispute was forest-land, the right to possession of which was exercised by cutting and removing timber from time to time, the Magistrate found that the men of the first party had been driven away by those of the second, and had been unable to enter the forest and remove the timber alleged to have been cut by them; that this happened before the time of the initial proceedings, and continued to the date of the hearing; and that the men of the second party had been able to bring

Possession (contd.)—

out of the forest the timber which had been cut. Upon these findings he came to the conclusion that the possession of the second party had been established, and made an order under the section in their favour. *Held* that, having regard to the nature of the property in dispute, these facts could not constitute legal possession of the second party at the time the proceedings were instituted. *Held* further that, in like cases, having regard to the nature of the property in dispute, and the mode in which possession may be exercised over it, in order to find which party was in possession when the proceedings were instituted, it is necessary to inquire which party was in undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one on which the dispute arose; and whichever party be found to have been in possession on that occasion should be presumed to have possession at the time when the proceedings were commenced. — Jagat Kishore Acharjya Chowdhuri v. Khajah Ashanullah Khan Bahadur, I. L. R., 16 Cal. 281 [see p. 904 of this book].

25. POSSESSION—*Criminal Procedure Code (Act X. of 1882), s. 145* — *Dispute as to right to collect rents—Tangible immoveable property.* A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Criminal Procedure Code, and the operation of that section cannot be limited by any rule which would depend upon the area of the property in dispute. Where, in such a dispute, which related to two pergunnahs comprising more than three hundred distinct villages, it was admitted by the petitioner that the opposite party had been in possession by receipt of rent from the tenants up to a period some three months anterior to the institution of the proceeding, but she alleged that she had succeeded in inducing the tenants to attorn to her by payment of rent to the officers appointed by her since such period; and where the Deputy Commissioner, after recording a certain amount of evidence, refused to examine any more witnesses, on the ground that the enquiry would extend to an inordinate length and be extremely expensive, and passed an order under the section, *held* that, even though it might be established that the Deputy Commissioner's action in excluding evidence was illegal, it did not follow, having regard to the circumstances of the case, that the High Court would be justified in exercising its revisional powers. *Held* further that a payment of rent for a short time to the petitioner, even if proved, would not

Possession (contd.)—

amount to dispossession of the opposite party. Sarbananda Basu Mozumdar v. Pran Sankar Roy Chowdhuri (I. L. R., 15 Cal. 527) followed.—Abhayessari Debi v. Shidhesari Debi, I. L. R., 16 Cal. 513 [see p. 934 of this book].

26. POSSESSION—*Easement—Burden of proof—Act X. of 1882, s. 147.* The right to restrain another from exercising ordinary proprietary rights over his own land is of the nature of an easement different from the ordinary rights of owners of land; the burden of proof would therefore lie upon the party alleging such right.—Hari Mohun Thakur v. Kissen Sundari, I. L. R., 11 Cal. 52 [see p. 593 of this book].

Possession—

False Evidence in a Case for. See FALSE EVIDENCE, 1.

Of Property after Theft, Presumption as to. See STOLEN PROPERTY, 2.

Suit for Confirmation of. See PUBLIC NUISANCE, 13.

Post-mortem Examination—

Signs observed at, may be put to Expert Witnesses. See CONFESSION, 14.

Power—

Of Delegation of Legislative Functions. See JURISDICTION OF HIGH COURT, 1.

Of District Magistrate to direct Further Inquiry. See ACQUITTAL, 2; DISCHARGE, 7.

Of High Court to interfere under s. 147, Act X. of 1875. See ACQUITTAL, 1.

Prejudice—

By omitting to record Confession in the Form of Question and Answer. See CONFESSION, 9, 13.

Irregular Trial causing. See SEPARATE TRIAL, 1.

Where Exact Nature of Charge not explained to Accused. See CHARGE, 4.

Preliminary Inquiry—

See FALSE EVIDENCE, 1.

Preliminary Proceeding—

See POSSESSION, 11.

Preliminary Sanction—

See SANCTION TO PROSECUTE.

Presidency-town—

Investigation in. See CONFESSION, 15.

Presumption—

As to Entry in House. See CRIMINAL TRESPASS, 4.

As to Possession of Property after Theft. See STOLEN PROPERTY, 2.

Previous Conviction—

1. PREVIOUS CONVICTION—*Irrelevant evidence of character—Quantum of punish-*

Previous Conviction (contd.)—

ment—Evidence Act (I. of 1872), s. 54.] In charging the jury upon the trial of a prisoner for being dishonestly in the possession of stolen goods, the Judge directed the jury to consider the proof of previous convictions for theft as evidence from which inference might fairly be drawn as to the character of the accused. *Held* that this amounted to a misdirection; for, though s. 54 of the Evidence Act declares that "the fact that the accused person has been previously convicted of an offence is relevant," yet the same section also declares that "the fact that he has a bad character is irrelevant," and that the evidence was irrelevant and inadmissible. Except under very special circumstances, the proper object of using previous convictions is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged.—*Roshun Doosadh v. Empress, I. L. R., 5 Cal. 768* [see p. 239 of this book].

3. **PREVIOUS CONVICTION—Sentence—***Penal Code (Act XLV. of 1860), s. 75—Previous conviction.*] The object of s. 75 of the Penal Code is to provide for an additional sentence, not a less severe sentence, on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient.—*Sheo Saran Tato v. Empress, I. L. R., 9 Cal. 877* [see p. 495 of this book].

3. **PREVIOUS CONVICTION—Evidence, Admissibility of—***Previous conviction for purpose of increasing the evidence at the trial against accused—Evidence Act (I. of 1872), s. 54—Criminal Procedure Code (Act X. of 1882), s. 310.*] Under s. 54 of the Evidence Act a previous conviction is in all cases admissible in evidence against an accused person.—*Queen-Empress v. Kartick Chunder Das, I. L. R., 14 Cal. 721* [see p. 774 of this book].

Previous Conviction—

Enhancement of Sentence for. See **SENTENCE, 5.**

Printing of Forms—

See **FORGERY, 1.**

Private Defence of Property—

See **RIOTING, 2.**

Private Nuisance—

See **POSSESSION, 2.**

Private Road—

Gates placed at End of. See **POSSESSION, 8.**

Privilege of European British Subject—

See **EUROPEAN BRITISH SUBJECT.**

Privileged Communication—

See **INQUIRY INTO CAUSE OF DEATH.**

Property—

PROPERTY—Regarding which offence has been committed, Order as to—*Criminal Procedure Code (Act X. of 1882), s. 517—Discharge of accused.*] On the dismissal of a charge against certain persons of criminal misappropriation of an elephant, the Magistrate, under s. 517 of the Criminal Procedure Code, ordered the elephant to be given to the Executive Engineer of the district, holding that it was the property of Government. *Held* that the dismissal of the charge being in fact a finding that no offence had been committed in respect of the elephant, the Magistrate's order was illegal, and must be set aside. In setting it aside the High Court held, however, following *In re Annopurna Bai (I. L. R., 1 Bom. 630)*, that they had no power to order restitution of the elephant.—In the Matter of the Petition of *Basudeb Surma Gossain* and another; *Basudeb Surma Gossain v. Naziruddin, I. L. R., 14 Cal. 834* [see p. 780 of this book].

Property—

Magistrate's Jurisdiction to make an Order for Protection of. See **PUBLIC NUISANCE, 5.**

Removal of, with Criminal Intent, but with Owner's Consent. See **ABETMENT OF ABETMENT.**

Resistance to Attachment of. See **PUBLIC SERVANT, 3.**

Right of Private Defence of. See **RIOTING, 2.**

Prosecution—

Conduct of. See **CONDUCT OF PROSECUTION.**

Duty of. See **WITNESSES FOR PROSECUTION, 3, 4.**

Prosecutor's Right of Reply—

See **RIGHT OF REPLY.**

Provocation—

See **PLEA OF GUILTY.**

Publication—

Of Libel on Judge. See **CONTEMPT OF COURT.**

Of Notification under Bengal Embankment Act, I. of 1882. See **EMBANKMENT.**

Public Highway—

Obstruction on. See **PUBLIC NUISANCE, 10—14.**

Stopping up. See **MUNICIPAL OFFENCES, 1.**

Public Nuisance—

1. **PUBLIC NUISANCE—Penal Code (Act XLV. of 1860), ss. 268, 282, 290—Obstruction on tidal navigable river.**] Persons placing

Public Nuisance (contd.)—

a bamboo stockade across a tidal navigable river for the purpose of fishing, although leaving in such stockade a narrow opening for the passage of boats, which passage was, however, kept closed except on the actual passage of a boat, were charged at the instance of a sub-divisional officer with causing an obstruction under s. 283 of the Penal Code. *Held* that, although it was doubtful whether s. 283 applied to the case, they had committed an offence under s. 268 of the Penal Code, and were punishable under s. 290 of that Code.—In the Matter of the Petition of Umesh Chandra Kar and another, I. L. R., 14 Cal. 656 [see p. 763 of this book].

2. PUBLIC NUISANCE — *Order under s. 518 of Act X. of 1872—Limit of order.* *Per Ainslie, J.*—In dealing with the civil rights of a subject under s. 518 of the Criminal Procedure Code, it is incumbent on the Magistrate to limit the operation of his order to such reasonable time as may be necessary to enable him to hold a full and sufficient inquiry as to whether the act prohibited as likely to cause a breach of the peace is within, or is in excess of, the legal right of the person forbidden to do it; and, if necessary, to deal with the case under the other provisions of the Criminal Procedure Code, which enable him to meet cases of probable breach of the peace. *Per Broughton, J.*—Where an order on the face of it appears to have been made without jurisdiction, no subsequent explanation can make it good.—*Abdool v. Lucky Narain Mundul*, I. L. R., 5 Cal. 132 [see p. 217 of this book].

3. PUBLIC NUISANCE — *Obstruction — Pathway—Order of Magistrate—Functions of jury—Procedure to be observed by Magistrate—Criminal Procedure Code (Act X. of 1872), ss. 521, 523, 532.* Before a Magistrate can make an order under s. 521 of the Code of Criminal Procedure to remove an obstruction from a path alleged to be a public thoroughfare, he must first, in a proceeding held under s. 532, have come to the conclusion that the path is open to the use of the public. The only functions which a jury appointed under s. 523 can exercise are to consider whether the order made by the Magistrate under s. 521 is reasonable and proper, it being no part of their duty to determine the rights of parties in property. *Held* therefore that, where a Magistrate, through a mistaken view of the law, ordered the removal of an obstruction on a pathway under s. 521, and had further submitted this order to the consideration of a jury appointed under s. 523, before he had himself come to a conclusion whether such pathway was a public thoroughfare, the only course left open to him under such circumstances was

Public Nuisance (contd.)—

to stay all proceedings initiated under s. 521, and take action under s. 532.—In the Matter of the Petition of Chundernah Sen, I. L. R., 5 Cal. 875 [see p. 244 of this book].

4. PUBLIC NUISANCE — *District Magistrate, Power of—Withdrawal of case—Criminal Procedure Code (Act X. of 1872), s. 521.* Where a Magistrate, in a proceeding under s. 521 of the Code of Criminal Procedure, satisfies himself that there is no necessity for proceeding further under that section, he is competent to let the matter drop. *In re Shonai Paramanick* (1 C. L. R. 486) followed.—*Issur Chunder Nath v. Kali Churn Nath*, I. L. R., 8 Cal. 883 [see p. 433 of this book].

5. PUBLIC NUISANCE — *Jurisdiction—Protection of property—Criminal Procedure Code (Act X. of 1872), s. 518.* A Magistrate has no jurisdiction to make an order under s. 518 of the Code of Criminal Procedure merely for the protection of property.—*Empress v. Prayag Singh*, I. L. R., 9 Cal. 103 [see p. 464 of this book].

6. PUBLIC NUISANCE — *Criminal Procedure Code (Act X. of 1882), s. 133—Nuisance—Erection of buildings—Unconditional order.* Every order made under s. 133 of the Code of Criminal Procedure (Act X. of 1882) must appoint a time within which, and a place where, the person to whom it is directed may appear before the Magistrate, and move to have the order set aside or modified. No unconditional order can be made under that section.—*Empress v. Brojokanto Roy Chowdhuri*, I. L. R., 9 Cal. 637 [see p. 488 of this book].

7. PUBLIC NUISANCE — *Right of way used by the public—Criminal Procedure Code (Act X. of 1882), ss. 133, 134, 135, 136, 137.* The powers embodied in ss. 133, 134, 135, 136, 137, of the Criminal Procedure Code, with regard to the obstruction of public ways, are not intended to be exercised where there is a *bond-fide* dispute as to the existence of the public right. Where there is such a dispute, the Court should pass no order under those sections, until the public right has been established by proper legal proceedings, civil or criminal.—*Basaruddin Bhuiah v. Bahar Ali*, I. L. R., 11 Cal. 8 [see p. 589 of this book].

8. PUBLIC NUISANCE — *Criminal Procedure Code (Act X. of 1882), ss. 133, 138, 139—Jury refusing to act—Jury illegally constituted.* One out of five jurors appointed under s. 138 of Act X. of 1882 declined to act on the jury. Two out of the remainder of the jury were in favour of a temporary order under s. 133 being maintained, whilst the other two were against its being so maintained. The Deputy Magistrate declined to pass any order under s. 139 of the Code of Criminal Pro-

Public Nuisance (contd.)—

cedure, as a majority of the jurors did not find the temporary order to be reasonable and proper; and he therefore struck off the case. *Held* that the course taken by the Deputy Magistrate was irregular; and ordered that a fresh jury be summoned, and the case inquired into anew.—*Uma Churn Mundley v. Joshein Sheikh*, I. L. R., 11 Cal. 84 [see p. 599 of this book].

9. PUBLIC NUISANCE—Obstruction—Inquiry under s. 133, *Criminal Procedure Code (Act X. of 1882)*—Previous orders when no bar to such inquiry.] An application was made under s. 133 of the Criminal Procedure Code (Act X. of 1882) for the removal of an obstruction in a public thoroughfare; but after a personal local inspection by the Magistrate, and without any evidence being taken, the parties were referred to a civil suit, and the order was refused, the Magistrate holding that the way was not a public way. A civil suit was then filed, and during its pendency a second application was made under s. 133 of Act X. of 1882 with a like object, which was refused on the ground that the civil suit was pending, and that there was no likelihood of a breach of the peace. The civil suit resulted in the way being held to be a public thoroughfare. A third application was then made under s. 133 to have the obstruction removed, but the Magistrate held that, in face of the two previous orders, he could not interfere. *Held* that the order of the Magistrate was wrong, upon the ground that he was bound to make such inquiry; and as there never had been any inquiry into the matter, the first decision being no decision at all, but a mere dictum of the Magistrate upon a personal local investigation without hearing evidence, and thus not on judicial inquiry; and the second decision being based merely upon the pendency of the civil suit, and the previous improper order, and that neither of these orders operated, therefore, as a bar to the Magistrate inquiring into the matter of the present complaint.—*Makhan Lal Saha v. Makhan Chora Saha*, I. L. R., 11 Cal. 271 [see p. 614 of this book].

10. PUBLIC NUISANCE—*Criminal Procedure Code (Act X. of 1882)*, ss. 133, 135—Application for order to remove obstruction—Disputed title—Jurisdiction of Criminal Court.] Where an application is made under s. 133 of the Criminal Procedure Code, calling on a person to remove an obstruction, and such person *bond fide* raises a question of title, *held* that the case then becomes one for a Civil Court. The section contemplates only an inquiry as to the existence or non-existence of the obstruction complained of, not an inquiry into disputed questions of

Public Nuisance (contd.)—

title.—*Askar Mea v. Sabdar Mea*, I. L. R., 12 Cal. 137 [see p. 662 of this book].

11. PUBLIC NUISANCE—*Criminal Procedure Code (Act X. of 1882)*, s. 133—Removal of obstruction in public way—Question of title.] The powers given by s. 133 and the following sections of the Criminal Procedure Code, 1882, as to the removal of obstructions in public ways, are not intended to be exercised when there is a *bond fide* dispute as to the existence of the public right; the procedure under those sections not contemplating an inquiry into disputed questions of title.—*Lal Miah and another v. Nazir Khalashi and others*, I. L. R., 12 Cal. 696 [see p. 668 of this book].

12. PUBLIC NUISANCE—*Criminal Procedure Code (Act X. of 1882)*, s. 133—Public way—Nuisance—Removal of obstruction—Jury—Majority of jury.] When a minority of a jury appointed under the provisions of s. 133 of the Criminal Procedure Code do not act, the Magistrate cannot proceed under that section upon a report submitted by the majority.—In the Matter of Durga Charan Das v. Sashi Bhushan Guho and others, I. L. R., 13 Cal. 275 [see p. 703 of this book].

13. PUBLIC NUISANCE—*Criminal Procedure Code (Act X. of 1882)*, s. 133—Removal of nuisance—Public way—Suit for declaration of right and confirmation of possession—Cause of action.] On the 6th of July 1882 the Joint-Magistrate of Krishnagur, on a complaint made by A, ordered B to demolish a cow-shed which he had built some months previously, the land on which the cow-shed had been built being part of a public way. Thereupon B brought a suit against A for a declaration of his right to enjoy the land as his private property and for confirmation of possession. The plaintiff did not allege that B, in causing the Magistrate to initiate proceedings against A, had been actuated by malicious motives, and had acted with the intention of wrongfully injuring the plaintiff. *Held* that the suit would not lie. *Mutty Ram Sahoo v. Mohi Lal Roy* (I. L. R., 6 Cal. 291) dissented from.—*Khodabakhsh Mundul and others v. Monglai Mundul and others*, I. L. R., 14 Cal. 60 [see p. 718 of this book].

14. PUBLIC NUISANCE—*Criminal Procedure Code (Act X. of 1882)*, ss. 133—137, Course to be followed in the administration of—Obstruction to highway—Claim of title—Bona fides of claim of title, Right of Magistrate to enquire into—Jurisdiction.] The mere assertion of a claim of title made without reasonable ground, or honest belief in it, or honest intention to support it, will not oust a Criminal Court of its jurisdiction under ss. 133—137 of the Crimi-

Public Nuisance (contd.)—

nal Procedure Code. In proceedings under s. 133 of the Criminal Procedure Code with reference to obstructions to public ways, it is open to the Magistrate to enquire into the *bona fides* of the claim; and where he decides against its *bona fides*, he must state reasons for his decision, which will be subject to revision by the High Court. Such a claim must be set up at or before the hearing and not afterwards. *In re Chundernath Sen* (I. L. R., 5 Cal. 875; 6 C. L. R. 379), *Chuni Lall v. Ram Kishen Sahoo* (I. L. R., 15 Cal. 460), *Mutty Ram Sahoo v. Mohi Lall Roy* (7 C. L. R. 433; I. L. R., 6 Cal. 201), and *R. v. Sandford* (30 L. T. 601) referred to.—*Luckhee Narain Banerjee v. Ram Kumar Mukherjee*, I. L. R., 15 Cal. 564 [see p. 842 of this book].

15. PUBLIC NUISANCE—*Temporary order in urgent case of—Order by Executive Officer—Power of Judicial Courts to question the legality of such order.* Where an executive officer makes an order or issues a notification under the provisions of the Code of Criminal Procedure, it is not within the province of judicial authority to question the propriety or legality of such order or notification until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notification. It then becomes the duty of the judicial authority to consider whether the order is properly made or not.—*D. R. Daly v. Surjanarain Dass*, I. L. R., 6 Cal. 88 [see p. 256 of this book].

16. PUBLIC NUISANCE—*Temporary order in urgent case of—Superintendence of High Court—Act 24 and 25 Vic., c. 104, s. 15—Order under Criminal Procedure Code (Act X. of 1872), s. 518.* The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code. — In the Matter of the Petition of Chunder Nath Sen, I. L. R., 2 Cal. 293 [see p. 44 of this book].

17. PUBLIC NUISANCE—*Temporary order in urgent case of—Superintendence of High Court—Criminal Procedure Code (Act X. of 1872), ss. 297, 518—Injunction—Review of order—Revival of order which has been quashed—High Court, Superintendence of—Reference—Charter Act, 24 and 25 Vic., c. 104, s. 15.* On the 7th of June 1881, the Assistant Commissioner of Hylakandi, in Sylhet, passed an order under s. 518 of the Criminal Procedure Code, that the manager of a certain tea-garden should discontinue holding a market on Thursdays until further notice. On the 25th of August 1881, the Assistant Commissioner reviewed this order, and having come to the conclusion that he had no power

Public Nuisance (contd.)—

to issue a permanent injunction, struck the case off the file, at the same time referring the matter to the Deputy Commissioner. The latter declined to interfere, informing the Assistant Commissioner that he saw no illegality in his order. Thereupon the Assistant Commissioner passed an order declaring that his order of the 7th of June 1881 remained in full force. On a reference to the High Court, made by the Officiating Sessions Judge of Sylhet under s. 297 of the Code of Criminal Procedure, *held* that, the Magistrate having, on the 25th of August 1881, set aside his order of the 7th of June 1881, and struck the case off the file, he had no power to revive it without a fresh proceeding. *Held* also that the Magistrate had no power to pass a perpetual injunction under s. 518 of the Code of Criminal Procedure. *Gopi Mohun Mullick v. Taramoni Chowdhurani* (I. L. R., 5 Cal. 7) followed. *Held* also that orders made under s. 518 of the Code of Criminal Procedure not being orders made in a judicial proceeding, the High Court had no power to deal with them under s. 297 of the Code of Criminal Procedure; but the order of the 6th of September 1881 being illegal, the High Court would set it aside under s. 15 of the Charter Act, 24 and 25 Vic., c. 104. In the Matter of the Petition of Chunder Nath Sen (I. L. R., 2 Cal. 293) followed.—*Bradley v. Jameson*, I. L. R., 8 Cal. 580 [see p. 408 of this book].

18. PUBLIC NUISANCE—*Temporary order in urgent case of—Criminal Procedure Code (Act X. of 1882), ss. 134, 144—Penal Code (Act XLV. of 1860), s. 188—Disobeying order of public servant—Trader at hât—Order prohibiting holding of hât.* A District Magistrate, by an order made under s. 144 of the Criminal Procedure Code, after stating that it appeared that one "G C S has recently established a hât at S in the vicinity of K, an old-established hât, and held it on the same days, and that in consequence of the establishment of the new hât, and the endeavours made to induce or force people to frequent the new hât instead of the old one, a serious breach of the peace or riots are imminent," ordered "that the said G C S and all other persons abstain from holding such hât" on those days. The order was duly made and promulgated, but not strictly in accordance with s. 134 of the Code, and the orders of Government made thereunder. Notwithstanding the order, one P C A was found exposing goods for sale as a trader at the hât on one of the prohibited days, and he was thereupon charged with disobeying the order of the Magistrate, and convicted of an offence under s. 188 of the Penal Code. *Held* that the conviction was bad, as P C A did not come within the description of the

I. L. R., Cal. 133.

Public Nuisance (contd.)—

persons intended by the order to be prohibited from "holding" the hât, which referred to "holding" as owner or manager, not as a trader. *Held* also that the terms of s. 134 of the Code, and the notification made by Government thereunder as to promulgation and issue of an order, are directory, but an omission to follow strictly such direction, though it is an irregularity, does not invalidate the order: where therefore it is shown that the order has been brought to the actual knowledge of the person sought to be affected by it, such omission does not prevent the case coming within s. 188 of the Penal Code.—In the Matter of the Petition of Parbutty Charan Aich; Parbutty Charan Aich v. Queen-Empress, I. L. R., 16 Cal. 9 [see p. 879 of this book].

19. PUBLIC NUISANCE—*Temporary order in urgent case of—Superintendence of High Court—Criminal Procedure Code (Act X. of 1882), s. 144—Charter Act 24 & 25 Vic., c. 104, s. 15—Order to abstain from certain act.* A Deputy Commissioner passed an order, under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or through any of her officers or servants, from the ryots of two specified pergunnahs; and also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or erecting any *adda* or *kuchari* in such pergunnahs for a period of two months. Upon an application to set aside such order, *held* that the High Court had jurisdiction, under s. 15 of the Charter Act, to set it aside if it were made without jurisdiction. *Held* further that the acts which the petitioner was directed to abstain from were not acts which come within the meaning of the words "a certain act" as used in s. 144 of the Code of Criminal Procedure, and that the order should be set aside.—Abayeswari Debi v. Sidheswari Debi, I. L. R., 16 Cal. 80 [see p. 882 of this book].

Public Reservoir—

See PUBLIC SPRING.

Public River—

Fishing in. See CRIMINAL TRESPASS, 1.
Right of Fishing in. See FISHERY, 1.
Strewing Branches on, for Fishing Purposes. See PUBLIC SPRING.

Public Road—

Obstruction on. See PUBLIC NUISANCE, 10—14.
Stopping up. See MUNICIPAL OFFENCES, 1.

Public Servant—

1. PUBLIC SERVANT—*Penal Code (Act XLV. of 1860), ss. 217, 218—Evidence that offence has been committed.* It is sufficient for the purpose of a conviction under s. 217 of the Penal Code that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he has done this with the intention of saving a person from legal punishment; it is not necessary to show that in point of fact the person so intended to be saved had committed an offence, or was justly liable to legal punishment.—*Empress v. Amiruddeen*, I. L. R., 3 Cal. 412 [see p. 123 of this book].

2. PUBLIC SERVANT—*Penal Code (Act XLV. of 1860), ss. 21, 109.* A person appointed by the Government Solicitor, with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as Prosecutor in the Calcutta Police Courts, is a public servant within the meaning of s. 21 of the Penal Code.—*Empress v. Butto Kristo Doss*, I. L. R., 3 Cal. 497 [see p. 125 of this book].

3. PUBLIC SERVANT—*Resistance to—Warrant—Return of warrant—Penal Code (Act XLV. of 1860), s. 183.* A person was convicted under s. 183 of the Penal Code for offering resistance to the attachment of property by a public servant. The offence was committed on the 4th of February 1883, but the warrant under which the public servant acted was returnable on or before the previous day. *Held* that the conviction was bad.—*Anand Lall Bera v. Empress*, I. L. R., 10 Cal. 18 [see p. 497 of this book].

Public Servant—

Disobedience to Order of. See POSSESSION, 18; PUBLIC NUISANCE, 18.

False Information to. See FALSE INFORMATION.

Municipal Corporation not a. See SANCTION TO PROSECUTE, 1.

Receiving Illegal Gratification. See ILLEGAL GRATIFICATION.

Public Spring—

PUBLIC SPRING—*Penal Code (Act XLV. of 1860), s. 277—Reservoir.* The words "public spring or reservoir" used in s. 277 of the Penal Code do not include a public river. The strewing of branches in a river for fishing purposes *held* therefore to be no offence under that section.—*Empress v. Halodhur Poroe*, I. L. R., 2 Cal. 383 [see p. 47 of this book].

Public Thoroughfare—

Obstruction on. See PUBLIC NUISANCE, 11—14.

Public Way—

Obstruction on. See PUBLIC NUISANCE, 11—14.

Punishment—

Enhancement of. See SENTENCE, 5.

Q.**Qualification of Jurymen—**

See EVIDENCE, 4.

Question and Answer—

Confession to be rendered in the Form of.
See CONFESSION, 9, 13.

Question of Title—

See PUBLIC NUISANCE, 11, 14.

Questions in Issue—

See EVIDENCE, 4.

Questions of Fact—

Appeal from Verdict of Jury upon. See
APPEAL BY LOCAL GOVERNMENT, 2.

Questions put at length by Court to Witnesses—

See CONFESSION, 7.

Questions put by Police—

Obligation to answer. See FALSE EVIDENCE, 4, 5, 8.

R.**Railway Act—**

RAILWAY ACT (IV. OF 1879), ss. 17, 31—*Passenger not producing season-ticket when called upon—Travelling without a ticket—Order for recovery of fare.* A passenger who has obtained a monthly ticket is liable to be called upon to produce it at any time on the journey which it covers, and if he does not so produce it, he is liable under ss. 17 and 31 of the Railway Act to pay the fare for the journey between the stations for which his ticket was issued. The order under s. 31, in case of his refusal to pay it, should be one merely for recovery of the amount due as the fare, and not an order to pay such sum or any other sum as if it were a fine. A passenger who has such a ticket, which is still in force, and in his possession, cannot be said to be travelling without a ticket within the meaning of s. 31, merely because he does not happen to have the ticket with him, and therefore cannot produce it when called upon to do so.—In the Matter of the Petition of E. G. Buskin; In the Matter of the Petition of C. F. Thomas; E. W. Hart v. E. G. Buskin; E. W. Hart v. C. F. Thomas, I. L. R., 12 Cal. 192 [see p. 665 of this book].

Rash and Negligent Act—

1. RASH AND NEGLIGENT ACT—*Penal Code (Act XLV. of 1860), s. 304A—Direction to jury.* Where an accused was charged with culpable homicide, and the evidence showed that the deceased had an enlarged spleen, and that his death was caused by rupture of the spleen occasioned by blows inflicted by

Rash and Negligent Act (contd.)—

the accused on the body of the deceased, held that it was not sufficient, in order to find the accused guilty of a rash act under s. 304A of the Penal Code, that the jury should be satisfied only of the prevalence of the disease of enlargement of the spleen in the district, and infer therefrom criminal rashness in beating the deceased; but that they should also be satisfied that the accused was aware of the prevalence of such disease in the district, and also aware of the risk to life involved in striking a person afflicted with that disease.—*Empress v. Safatulla*, I. L. R., 4 Cal. 815 [see p. 204 of this book].

2. RASH AND NEGLIGENT ACT—*Kobiraj—Surgical operation—Unskilled medical practitioner—"Good faith"—"Accepting risk"—Penal Code (Act XLV. of 1860), ss. 304A, 88, 52.* A kobiraj operated on a man for internal piles by cutting them out with an ordinary knife. The man died from hæmorrhage. The kobiraj was charged, under s. 304A of the Penal Code, with causing death by doing a rash and negligent act. It was contended that, inasmuch as the prisoner had performed similar operations on previous occasions, it was not a rash act within the meaning of that section, and that, at all events, he was entitled to the benefit of s. 88 of the Penal Code, as he did the act in good faith, without any intention to cause death, and for the benefit of the patient who had accepted the risk. Held that, as the prisoner was admittedly uneducated in matters of surgery, and having regard to the meaning of "good faith" as defined in s. 52 of the Penal Code, he was not entitled to the benefit of s. 88. Held further that s. 88 did not apply to the case, as it was not shown by the accused, on whom the burden of proving that fact lay, that the deceased knew the risk he was running in consenting to the operation, and he could not therefore be said to have accepted the risk. Held also that, under the circumstances, the conviction under s. 304A was a proper one.—*Sukaroo Kobiraj v. Empress*, I. L. R., 14 Cal. 566 [see p. 757 of this book].

See CULPABLE HOMICIDE, 1.

" FALSE CHARGE, 7.

Reasonable Sum—

Security for Good Behaviour to be for a.
See SECURITY FOR GOOD BEHAVIOUR, 1.

Reasons for Conviction—

1. REASONS FOR CONVICTION—*Criminal Procedure Code (Act X. of 1872), s. 227, cl. h—Practice of High Court on revision.* Under cl. h of s. 227 of the Criminal Procedure Code, although a Magistrate is not required to record any evidence, he should, in recording

Reasons for Conviction (contd.)—his reasons for the conviction, state them so, that the High Court, on revision, may judge whether there were sufficient materials before him to support the conviction. Where they were not so stated, the High Court, on motion, set the conviction aside.—*Empress v. Panjab Singh*, I. L. R., 6 Cal. 579 [see p. 296 of this book].

2. REASONS FOR CONVICTION—*Excise Act (Beng. Act VII. of 1878)*, ss. 53, 59, 64—*Beng. Act IV. of 1881*, s. 2—*Selling spirituous liquor without license*—*Reasons for finding of Magistrate in case of conviction to be recorded*—*Criminal Procedure Code (Act X. of 1872)*, s. 227, cl. h.] A Magistrate, in cases where no appeal lies, is bound to record a brief statement of his reasons for convicting an accused. Where a person is arrested, and certain charges are entered against him in the police-book, he should not, on the day of trial, be called upon to meet other charges without previous intimation being given to him of the additional charges.—*Empress v. Radoinath Shaha*, I. L. R., 8 Cal. 195 [see p. 381 of this book].

See SUMMARY TRIAL, 5, 6.

Recalling Witnesses for Prosecution for Cross-examination—

See WITNESSES FOR PROSECUTION, 2.

Receipt for Summons—

Refusal to give. See SUMMONS.

Receiving Stolen Property—

See COMMITMENT, 2.

” SEVERAL OFFENCES.

” STOLEN PROPERTY.

Recognizance—

1. RECOGNIZANCE—*Power of High Court to interfere when forfeited.*] The High Court has no power to reduce the amount of recognizances which have been forfeited, but in a case of hardship the matter should be referred to Government.—*Empress v. Nurul Huqq*, I. L. R., 3 Cal. 757 [see p. 147 of this book].

2. RECOGNIZANCE—*Proceedings on forfeiture of—Evidence—Criminal Procedure Code (Act X. of 1872)*, s. 502.] A Magistrate is not justified in forfeiting a recognizance under s. 502 of Act X. of 1872, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause why the recognizance should not be forfeited has been issued.—*Empress v. Nobin Chundra Dutt*, I. L. R., 4 Cal. 865 [see p. 206 of this book].

3. RECOGNIZANCE—*Recognizance to keep the peace—Form of summons under s. 492 of the Criminal Procedure Code (Act X. of 1872).*] The words of s. 492 of the Code of

Recognizance (contd.)—

Criminal Procedure are directory, and not imperative; and an omission to insert in a summons under that section the amount of the recognizance and security required will not invalidate any subsequent proceedings binding over the parties to keep the peace.—*Abasu Begum v. Umda Khanum*, I. L. R., 8 Cal. 724 [see p. 414 of this book].

4. RECOGNIZANCE—*Recognizance to keep the peace—Power of a District Magistrate to call on a person residing in another district to furnish security—Criminal Procedure Code (Act X. of 1882)*, s. 107—*Procedure.*] The provisions of s. 107 of Act X. of 1882 do not empower a Magistrate to issue process on persons not residing within the limits of his district. The proper course for a Magistrate to pursue, where he believes that certain persons who are resident beyond the limits of his district are likely to commit a breach of the peace within his district, is to cause information of the fact to be given to the Magistrate within whose district such persons reside, and to produce evidence in support of such view, in order that proceedings may be taken against them by a Court which has jurisdiction.—In the Matter of the Petition of Rajendro Roy Chowdhry, I. L. R., 11 Cal. 737 [see p. 650 of this book].

5. RECOGNIZANCE—*Recognizance to keep the peace—Criminal Procedure Code (Act X. of 1882)*, s. 107—*Power of District Magistrate to call on person residing in another district for security.*] A Magistrate has no jurisdiction to take proceedings under s. 107 of the Criminal Procedure Code against a person not personally within his jurisdiction. In the Matter of the Petition of Jai Prokash Lal (I. L. R., 6 All. 26) and in the Matter of the Petition of Rajendro Chunder Roy Chowdhry (I. L. R., 11 Cal. 737) followed. Even assuming there was jurisdiction, it was not a case where the Magistrate should have called upon the petitioner to appear personally, he residing at a distance, there being no special circumstance making his personal attendance necessary, and the Magistrate having power under s. 116 to allow him to appear by a pleader.—In the Matter of the Petition of Dinonath Mullick; Dinonath Mullick v. Girija Prosonno Mookerjee, I. L. R., 12 Cal. 133 [see p. 660 of this book].

See REVISION.

Record—

Of Evidence in Absence of Accused. See EVIDENCE, 6.

To be so framed as to justify Sanction. See SANCTION TO PROSECUTE, 13.

Record of Inferior Court—

1. RECORD OF INFERIOR COURT—*Explanation of order passed—Criminal Procedure*

Record of Inferior Court (contd.)—*Code (Act X. of 1872), s. 295—Indefinite period of imprisonment in default of security, Order for.* Where a Sessions Judge has, under s. 295 of Act X. of 1872, called for the record of an inferior Court, he is, before referring the case to the High Court for orders, bound to call upon the inferior Court for an explanation of the order passed, and should submit such explanation, together with the rest of the record, to the High Court. An order directing an accused "to be imprisoned until he gives security" is bad; a definite period for such imprisonment, not exceeding one year, should be stated in the order.—*Mailamdi Fakir v. Taripulla Pramanik, I. L. R., 8 Cal. 644* [see p. 413 of this book].

2. RECORD OF INFERIOR COURT—*Criminal Procedure Code (Act X. of 1882), s. 435—Further enquiry—Inferior Criminal Court—Magistrate of the District, Powers of.* A Magistrate of a District is competent, under s. 435 of the Criminal Procedure Code, to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own district.—*Opendro Nath Ghose v. Dukhini Bewa, I. L. R., 12 Cal. 473* [see p. 673 of this book].

Recording of Confession—

See CONFESSION, 13.

Recording of Reasons for Conviction—

See REASONS FOR CONVICTION.

Reference to Books on Trial—

See RIGHT OF REPLY, 1.

Reference to District Magistrate—

See JURISDICTION, 6.

Reference to High Court—

REFERENCE TO HIGH COURT—*District Magistrate, Power of—Order of Appellate Court—Jurisdiction—Criminal Procedure Code (Act X. of 1872), ss. 295, 296, 297.* A District Magistrate, being of opinion that the Sessions Judge had, on appeal, improperly set aside a conviction made by a Cantonment Magistrate, referred the matter to the High Court under s. 297 of the Code of Criminal Procedure. Held that the Magistrate had no power to make such a reference.—*Empress v. Ram Lall, I. L. R., 8 Cal. 875* [see p. 432 of this book].

Refreshing Witness's Memory—

1. REFRESHING WITNESS'S MEMORY—*Evidence—Memorandum made by police-officer—Examination of witness—Criminal Procedure Code (Act X. of 1872), ss. 119, 126.* A prisoner on his trial is not entitled to insist that a memorandum made by a police-officer

Refreshing Witness's Memory (contd.)—

under the provisions of s. 119 of the Code of Criminal Procedure shall, in the course of the examination of such officer, be referred to by the latter for the purpose of refreshing his memory. *Reg. v. Uttamchand Kapurchand* (11 Bom. H. C. R. 120) distinguished.—*Empress v. Kali Churn Chunari, I. L. R., 8 Cal. 154* [see p. 376 of this book].

2. REFRESHING WITNESS'S MEMORY—*Evidence—Writing to refresh memory—Right of Counsel to inspect the writing—Neglect to exercise such right—Deposition of medical witness—Criminal Procedure Code (Act X. of 1872), ss. 240, 323—Duty of Judge when charging jury—Constructive murder under s. 34 of Penal Code (Act XLV. of 1860)—Effect on others charged under s. 149—Irregularities in procedure and admission of evidence.* *Per Field, J.*—The grounds upon which the opposite party is permitted to inspect a writing, and to refresh the memory of a witness, are threefold: (i) to secure the full benefit of the witness's recollection as to the whole of the facts; (ii) to check the use of improper documents; (iii) to compare his oral testimony with his written statement. *Per Field, J.*—The opposite party has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness. *Per Field, J.*—Under the provisions of s. 323 of the Code of Criminal Procedure, the examination of a medical witness taken and duly attested may be given in evidence in any criminal trial; but in order that such evidence may be admissible against any individual accused person, the examination must have been taken in the presence of the accused person. *Per Field, J.*—It is the duty of a Judge to give a direction upon the law to the jury so far as to make them understand the law as bearing upon the facts; and if he does not give them an explanation of the law sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection. *Per Field, J.*—Where a prisoner is constructively guilty of murder under s. 34 of the Penal Code, it is doubtful if he can be said to have committed the offence of murder within the meaning of s. 149, so as to make other prisoners, by a double construction, guilty of murder. *Per Field, J.*—Irregularities under s. 240 of the Criminal Procedure Code in the selection of the jurors, and in the admission of the deposition of a medical witness treated, it not being shown that the prisoners had been thereby prejudiced, as

Refreshing Witness's Memory
(*contd.*)—

being objections which ought not to be entertained for the purpose of interfering with the verdict, regard being had to the provisions of s. 283 of the Criminal Procedure Code, and s. 167 of the Evidence Act.—*Empress v. Jhubboo Mahton*, 1. L. R., 8 Cal. 739 [see p. 420 of this book].

See STATEMENTS TO POLICE DURING INVESTIGATION.

Refreshing Witness's Memory from Dying Statement—

See CHARGE, 3.

Refusal—

Of Juror to act. See PUBLIC NUISANCE, 8.

Of Minority of Jury to act. See PUBLIC NUISANCE, 12.

To give Receipt for Summons. See SUMMONS.

To grant Summonses for Witnesses for Defence. See POSSESSION, 2; WITNESSES FOR DEFENCE.

Registration—

Altered Document presented for. See EVIDENCE, 2.

Registration Act—

REGISTRATION ACT (III. OF 1877), s. 82, *cl. a*, and ss. 83, 72, 73—*Prosecution under—False statement before Registrar.* Where the accused was tried for intentionally making a false statement in the course of certain proceedings taken before a Registrar, *held* that, even assuming that such proceedings were taken under s. 72 of the Registration Act, and not as they should have been under s. 73, the appearance of the accused before the Registrar, and his taking no objection to the form of the proceedings, will cure the irregularity for the purposes of a criminal trial under the provisions of the Registration Act. Nor under similar circumstances will the want of verification of a petition of appeal on the part of the applicant, as provided by s. 73 of the Act, oust the jurisdiction of the Criminal Court. *Reg. v. James Berry* (28 L. J., M. C., 86; 8 Cox. C. C. 121); *Queen v. Thomas Fletcher* (L. R., 1 C. C. R. 320); *Turner v. Post-Master-General* (5 B. and S. 756); *Queen v. Hughes* (L. R., 4 Q. B. D. 614; 14 Cox. C. C. 285); *Queen v. Smith* (L. R., 1 C. C. R. 110; 11 Cox. C. C. 101) followed. *Held* also that, except as directed by s. 82 of Act III. of 1877, the Magistrate has no authority on his own mere motion to frame a charge against the accused, in consequence of evidence given in the course of the trial by the Registering Officer, in respect of certain statements made before

Registration Act (contd.)—

him during registration-proceedings.—*Empress v. Batesar Mandal*, 1. L. R., 10 Cal. 604 [see p. 548 of this book].

S. 82. See REVISION, 3.

Ss. 82, 83. See SANCTION TO PROSECUTE, 9.

Registration of Land—

See POSSESSION, 9.

Regulations—

1805. XII. See JURISDICTION, 4.

" XIV. See JUDGMENT, 4.

1806. XVII. See SANCTION TO PROSECUTE, 4.

1807. IV. See GENERAL CLAUSES ACT.

Remand for Re-trial after Dismissal—

See DISCHARGE, 4.

Remedies provided by Law to be first exhausted—

See POSSESSION, 2.

Rent—

Dispute as to Right to collect. See POSSESSION, 14, 23, 25.

Order prohibiting Collection of. See PUBLIC NUISANCE, 19.

Rent Act (Beng. Act VIII. of 1869)—

Distrainment under. See CRIMINAL TRESPASS, 3.

Report of Additional Chemical Examiner—

REPORT OF ADDITIONAL CHEMICAL EXAMINER—*Evidence—Criminal Procedure Code (Act X. of 1882), s. 510.* A document, purporting to be a report under the hand of an "Additional Chemical Examiner" upon a matter or thing submitted to him for analysis and report, cannot be received in evidence under s. 510 of Act X., 1882.—*Empress v. Aulal Muchi*, 1. L. R., 10 Cal. 1026 [see p. 570 of this book].

Report of Magistrate into Cause of Death—

See INQUIRY INTO CAUSE OF DEATH.

Report of Police-officer who is an Accused—

See DISMISSAL OF COMPLAINT, 2.

Representations (Obscene)—

See TRANSFER OF CASE, 3.

Resistance—

To Execution of Legal Process. See SENTENCE, 4.

To Public Servant. See PUBLIC SERVANT, 3.

Retaining Stolen Property—

See STOLEN PROPERTY, 1.

Re-trial—

See ADULTERY, 2.

» DISCHARGE, 1, 4.

Review of Judgment—

REVIEW OF JUDGMENT OF HIGH COURT—*Criminal Procedure Code (Act X. of 1882), s. 369.* The verdict and judgment of a Divisional Bench of a High Court, coupled with the sentence in a criminal case, are absolutely final, and as soon as they have been pronounced and signed by the Judges, the High Court is *functus officio*, and neither the Court itself, nor any Bench of it, has any power to revise that decision, or interfere with it in any way.—In the Matter of the Petition of F. W. Gibbons, I. L. R., 14 Cal. 42 [see p. 713 of this book].

Review of Order—

See PUBLIC NUISANCE, 17.

Revision—

1. REVISION—*Criminal Procedure Code (Act X. of 1872), ss. 294, 297—Power of High Court — "Material error."* In a case of apprehended breach of the peace, the Magistrate bound over the parties in sums of money aggregating on the whole to Rs. 60,000 upwards. The High Court quashed the order, holding that it was altogether unreasonable. *Per Markby, J.*—Ss. 294 and 297, Act X. of 1872, do not debar the High Court from interfering where, in cases requiring the exercise of discretion, it appears upon the face of the proceedings that the Magistrate has exercised no discretion at all, or has exercised his discretion in a manner wholly unreasonable. *Per Mitter, J.*—Under s. 297, the High Court has the power of interfering with judgments, sentences, or orders of Courts subordinate to it, if there has been a material error in any judicial proceeding of such Courts, meaning thereby any error appearing on the face of a judicial proceeding resulting in an unjust order.—In the Matter of Juggut Chunder Chuckerbutty, I. L. R., 2 Cal. 110 [see p. 29 of this book].

2. REVISION—*High Court, Power of, as a Court of—Order of acquittal—Criminal Procedure Code (Act X. of 1872), s. 296.* The High Court, as a Court of Revision, will not interfere with an order of acquittal.—Municipal Committee of Dacca v. Hingoo Raj, I. L. R., 8 Cal. 895 [see p. 436 of this book].

3. REVISION—*Revision on facts—Act X. of 1882, s. 435—Evidence — Registration Act (III. of 1877), s. 82.* Under s. 435 of the Criminal Procedure Code, the High Court has power to go into questions of fact; but it will only exercise this power in cases in which it finds that it will be in the interests of justice to do so. N was charged with having made a false statement before a Sub-Reg-

Revision (contd.)—

gistrar in identifying K, a person who had executed a mortgage-deed in favour of R, and who was a neighbour of his (N's), as being the person to whom R had agreed to advance the money, the consideration of the mortgage. The false statement consisted in his stating to the Sub-Registrar that he "knew K as his neighbour." During the hearing of the case, it was sought to prove a statement made by R to a third party (R having died previous to the institution of the case) to the effect that N had told him certain facts. A memorandum alleged to be in the handwriting of N was also tendered and received in evidence without any further proof as to its being in N's handwriting than that it bore a similarity to another piece of paper proved to bear his handwriting. Held that the statement made by R to the third party was inadmissible and irrelevant, and the memorandum was wrongly received in evidence.—Nobin Krishna Mookerjee v. Rassick Lall Laha, I. L. R., 10 Cal. 1047 [see p. 575 of this book].

4. REVISION—*Criminal Procedure Code (Act X. of 1882), Ch. XXXII.—Sonthal Pergunnahs — Act XXXVII. of 1855, s. 4, cl. 1—Scheduled Districts Act (XIV. of 1874).* Under s. 4 (cl. 1) of Act XXXVII. of 1855 (which is still in force in the Sonthal Pergunnahs) all sentences passed in criminal cases are final. An order under that Act sentencing an accused to imprisonment is not open to revision under Ch. XXXII. of the Code of Criminal Procedure.—Dular Dat Rai v. Nijabat Hosein, I. L. R., 12 Cal. 536 [see p. 681 of this book].

5. REVISION—*Practice—Criminal Procedure Code (Act X. of 1882), s. 435—Revision where lower Court has concurrent jurisdiction with High Court.* The High Court will not entertain an application for revision in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court save on some special ground shown, unless a previous application shall have been made to the lower Court; but in cases in which concurrent jurisdiction is not possessed by the lower Courts, no such general rule exists.—In the Matter of the Queen-Empress v. Reolah and others, I. L. R., 14 Cal. 887 [see p. 781 of this book].

See APPEAL, 5.

» JURISDICTION OF HIGH COURT, 4.

» POSSESSION, 21.

» PUBLIC NUISANCE, 17.

Revival of Prosecution—

REVIVAL OF PROSECUTION—*Presidency Magistrates' Act (IV. of 1877), ss. 82, 86, 87, expl. 2—Examination of witnesses.* A "revival of a prosecution," as mentioned in expl.

Revival of Prosecution (contd.)—

2 of s. 87 of Act IV. of 1877, is not a continuation of the original prosecution from which the accused has been discharged. On the revival of the prosecution, all the witnesses, on whose evidence the prosecution intended to rely, must be examined before the Magistrate, and if any of them were examined at the time of the original prosecution, they must be examined *de novo*.—*Empress v. Chunder Nath Dutt*, I. L. R., 5 Cal. 121 [see p. 214 of this book].

See DISCHARGE, 1—3.

Right—

Of Accused to call for and inspect Statements of Witnesses made to Police. See STATEMENTS TO POLICE DURING INVESTIGATION.

Of Counsel to inspect Writing. See REFRESHING WITNESS'S MEMORY, 2.

Of Fishery in Public River. See FISHERY, 1.

Of Private Defence of Property. See RIOTING, 2.

Of Self-defence. See POSSESSION, 2.

Of Way. See POSSESSION, 8; PUBLIC NUISANCE, 7, 9.

To collect Rents. See POSSESSION, 14, 23, 25.

To Standing Crops. See POSSESSION, 7.

Right of Reply—

1. RIGHT OF REPLY—*Witnesses not called for defence—Reply by prosecutor—Reference to books on trial—Examination of prisoner by Judge—Nature of questions permissible—Questioning jury as to verdict—Criminal Procedure Code (Act X. of 1882), ss. 289, 290, 303, 307, 342.* At the close of the evidence for the prosecution, the attorney for the defence, in answer to the Judge, stated that he meant to call witnesses. The Court then adjourned, and on the following day the attorney stated that, on reconsideration, he did not intend to call witnesses. The Judge allowed the prosecutor to reply. *Held* that, though the strict interpretation of ss. 289, 292 of the Criminal Procedure Code would warrant this course, it was never meant by the Legislature that the prosecutor should have a reply when no witnesses are called for the defence, the object of the law being evidently to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor in such a case as the present. A well-known treatise, such as Taylor's Medical Jurisprudence, may be referred to in the course of trial. *Hatim v. Empress* (1 C. L. R. 86) followed. It is improper on the part of a Judge when examining a prisoner under s. 342 of the Criminal Procedure Code to cross-examine him. The only questions which

Right of Reply (contd.)—

are permissible are such as will enable the prisoner to explain any circumstances appearing in the evidence against him. Although s. 303 of the Criminal Procedure Code empowers a Judge to ask the jury such questions as are necessary to ascertain what their verdict is, it was never contemplated that, on ascertaining that the jury are not unanimous, the Judge should make minute inquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict, according as it coincides with his own opinion or not. Whatever may be the opinion of the Judge, if he goes so far as to ask the jury what is the exact majority, and what is the opinion of the majority, he ought to receive that verdict without hesitation, and, if he differs from it, he should proceed as directed by s. 307. A prisoner, or his Counsel, is at liberty to offer evidence or not, as he thinks proper, and no inference unfavourable to him can be drawn because he takes one course rather than another.—*Hurry Churn Chuckerbutty v. Empress*, I. L. R., 10 Cal. 140 [see p. 517 of this book].

2. RIGHT OF REPLY—*Absence of entry in a book irrelevant—Evidence Act (I. of 1872), s. 34—Reply, Prosecutor's right of—Criminal Procedure Code (Act X. of 1882), ss. 289, 292.* Though, under s. 34 of the Evidence Act, the actual entries in books of account regularly kept in the course of business are relevant to the extent provided by the section, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter. The fact that the accused has, during the cross-examination of the witness for the prosecution, used certain documents, and that such documents have been put in as evidence on his behalf, does not entitle the prosecutor to the right of reply, if, when asked upon the close of the case for the prosecution whether he means to adduce evidence, the accused says that he does not.—*Empress v. Grees Chunder Banerjee*, I. L. R., 10 Cal. 1024 [see p. 569 of this book].

3. RIGHT OF REPLY—*Witness called by Court—Tendering witnesses for cross-examination—Criminal Procedure Code (Act X. of 1882), ss. 289, 540.* The giving of any documentary evidence by an accused person, during the cross-examination of the witnesses for the prosecution, and before he is asked under s. 289 if he means to adduce evidence, does not give a right of reply to the prosecution. *Queen-Empress v. Grees Chunder Banerjee* (I. L. R., 10 Cal. 1024) followed. In a trial before the Sessions Court the prosecution is not bound to tender for cross-examination all witnesses called before

Right of Reply (contd.)—

the committing Magistrate. The Court would not call a witness on whose evidence it could not put implicit reliance.—*Empress of India v. Kaliprosunno Doss and others*, I. L. R., 14 Cal. 245 [see p. 735 of this book].

Riot—

Counter-charges of. See **IRREGULARITY**, 5.
Death caused during. See **CULPABLE HOMICIDE**, 4.

For Possession. See **POSSESSION**, 2.
Parties opposed in. See **SEPARATE CHARGES**, 2.

Riot and Criminal Trespass—

See **SEPARATE TRIAL**, 3.

Riot and Grievous Hurt—

Separate Sentences for. See **SENTENCE**, 6.

Riot and Hurt—

See **SENTENCE**, 7.
» **SEPARATE TRIAL**, 2.

Rioting—

1. **RIOTING—Penal Code (Act XLV. of 1860), s. 156—Manager of indigo-factory.** In order to convict the manager of an indigo-factory under s. 156 of the Penal Code, it must be shown by legal evidence (1) that a riot was committed; (2) that the riot, if committed, was committed for the benefit of the accused; and (3) that the accused had reason to believe that a riot was likely to be committed.—*Brae v. Empress*, I. L. R., 10 Cal. 338 [see p. 537 of this book].

2. **RIOTING—Unlawful assembly—Right of private defence of property—Penal Code (Act XLV. of 1860), ss. 97, 103, 104, 105, 141, 147.** A party of persons, consisting of some five piadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of M for the purpose of either repairing or erecting a bund across it to cause the water to flow down a channel on to the lands of their master T. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M., they proceeded to work at the bund until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with lathies, and headed by the prisoners, who were servants of M, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked T's men, some five of whom were more or less severely wounded with the lathies. The occurrence resulted in the conviction of some of M's servants for rioting s. 147 of the Penal Code. M's people wholly

Rioting (contd.)—

denied any right on the part of T to construct or repair the bund, and had previously denied the existence of such right, and refused permission to T to exercise it. It was contended that the assembly of M's people was not an "unlawful assembly;" that the interference by T's people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so. *Held* that the prisoners had been rightly convicted. *Held* further that, as no right of private defence of property is conferred by the Penal Code, except as against the perpetrators of offences under the Penal Code, and that, as, upon the facts of the case as found, no offence had been committed by T's people, their acts amounting merely to a civil trespass, and that, as there was no pressing or immediate necessity of a kind, shewing that there was not time to have recourse to the protection of the public authorities, no question as to the right of private defence arose in the case. It was further contended that M's people did not assemble to enforce a right or supposed right within the terms of s. 141 of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one. *Held* that they were members of an assembly, the common object of which was, by show of criminal force, and by criminal force, if necessary, to enforce the right to keep the river channel clear by preventing the construction of the bund, and by demolishing it so far as it was constructed, and that the case came within s. 141, para. 4. *Queen v. Mitto Sing* (3 W. R. Cr. 41), *Shunker Singh v. Burmah Mahto* (23 W. R. Cr. 25), and *Birjoo Singh v. Khub Lall* (19 W. R. Cr. 66), referred to and commented on.—*Ganouri Lal Das v. Queen-Empress*, I. L. R., 16 Cal. 206 [see p. 889 of this book].

Rioting and Hurt with Dangerous Weapons—

See **SENTENCE**, 3.

Risk of Death—

See **CULPABLE HOMICIDE**, 2.
» **RASH AND NEGLIGENT ACT**, 2.

River—

Ballast thrown into the. See **MASTER AND SERVANT**.
Fishery in. See **CRIMINAL TRESPASS**, 1.
Strewing Branches on, for Fishing Purposes. See **PUBLIC SPRING**.

Road—

See **POSSESSION**, 8.

Rules under Act V. of 1861—

Power to make. See **POLICE ACT**, 3.
I. L. R., Cal. 134.

Running Stream—

Fishing in Tank connected with. See FISHERY, 2.

Rupture of the Spleen—

Death caused by. See RASH AND NEGLIGENCE ACT, 1.

S.**Salaried Officer of Municipality—**

Disqualification of. See IRREGULARITY, 2.

Same Kind, Offences of the—

Committed in respect of Different Persons. See JOINDER OF CHARGES, 1.

Committed within One Year. See SEPARATE CHARGES, 1.

Trial of. See SEPARATE TRIAL, 1.

Same Offence, Continuance of—

See MUNICIPAL OFFENCES, 4.

Same Transaction—

Charges arising out of. See JOINDER OF CHARGES, 2.

Sanad conferring Title of Dignity:

Not a Valuable Security. See FORGED DOCUMENT, 2.

Sanction to Prosecute—

1. SANCTION TO PROSECUTE—*Reference—Municipal Commissioners—Public servant—Act IV. of 1877 (Presidency Magistrates' Act), ss. 39, 240—Penal Code (Act XLV. of 1860), ss. 11, 21, des. 10, ill. 1.* A Municipal Corporation is not a public servant within the meaning of s. 39 of Act IV. of 1877, and may, therefore, be prosecuted under the Penal Code without the preliminary sanction of the Government required by that section.—*Empress v. Municipal Corporation of the town of Calcutta, I. L. R., 3 Cal. 758 [see p. 147 of this book].*

2. SANCTION TO PROSECUTE—*Power of District Magistrate to proceed where prosecutor has not availed himself of the sanction—Amendment of charge—Criminal Procedure Code (Act X. of 1872), ss. 450, 470* [Where sanction has been given under s. 468 of Act X. of 1872 by a Deputy Magistrate to a person to prosecute another for bringing a false charge, and such sanction is not proceeded under, it is open to the District Magistrate to take up the case under s. 142 without complaint.—*Empress v. Nipcha, I. L. R., 4 Cal. 712 [see p. 201 of this book].*

3. SANCTION TO PROSECUTE—*Ss. 182, 211, of the Penal Code (Act XLV. of 1860)—Power of Deputy Magistrate to question sanction.* [A Deputy Magistrate has no power to question an order made by his superior, sanctioning a prosecution under ss. 182 and 211 of the Penal Code. Whether such sanction has been rightly or wrongly given is a question for the accused to raise before a com-

Sanction to Prosecute (contd.)—

petent Court—*Empress v. Irad Ally, I. L. R., 4 Cal. 869 [see p. 208 of this book].*

4. SANCTION TO PROSECUTE—*For giving false evidence—Criminal Procedure Code (Act X. of 1872), s. 468—Jurisdiction to give sanction—Case settled without evidence—Duties of Judge—Prosecution for false evidence on verified petition, when such verification is unnecessary.* [The Courts that have jurisdiction to grant a sanction to proceedings under s. 468 of Act X. of 1872 are the Court before which the offence was alleged to have been committed, and the Courts to which such Court is subordinate. *Per Garth, C.J.*—Where a case is settled without evidence being gone into, the Court in which the suit was brought, even if it have power to sanction criminal proceedings against any of the parties to such suit under s. 468 of Act X. of 1872, is guilty of great impropriety and indiscretion in so doing, inasmuch as it can have had no opportunity of judging of the *bona fides* of the claim or defence. *Semble.*—A petition presented under Reg. XVII. of 1806, not requiring verification, cannot, from the fact of it being verified unnecessarily, be made the subject of a prosecution for giving false evidence.—*Juggut Chunder Mozumdar v. Kasi Chunder Mozumdar, I. L. R., 6 Cal. 440 [see p. 276 of this book].*

5. SANCTION TO PROSECUTE—*Sanction to prosecution for making a false charge—Penal Code (Act XLV. of 1860), s. 211.* [A sanction for a prosecution for making a false charge under s. 211 of the Penal Code without hearing all the witnesses whom the person accused of making the false charge wishes to produce, is illegal. The High Court has power to quash an illegal commitment at any stage of the case.—*Empress v. Shibo Behara, I. L. R., 6 Cal. 584 [see p. 298 of this book].*

6. SANCTION TO PROSECUTE—*Presidency Magistrates' Act (IV. of 1877), ss. 41, 42, 43, 168—General and specific sanction—Order of discharge—Superintendence of High Court—Charter Act (24 & 25 Vic. c. 104), s. 15.* [The only course to be pursued where it is sought to set aside an order of discharge made by a Presidency Magistrate is that laid down in s. 168 of Act IV. of 1877; and as by that section there is no appeal allowed to a complainant who is a private individual, it is not open to him, by invoking the aid of the High Court under s. 15 of the Charter, to obtain under the Court's extraordinary powers that which he might obtain had he a right of appeal.—In the Matter of Poona Churn Pal, I. L. R., 7 Cal. 447 [see p. 353 of this book].

Sanction to Prosecute (contd.)—

7. SANCTION TO PROSECUTE—*For making a false charge—Penal Code (Act XLV. of 1860), s. 211—Criminal Procedure Code (Act X. of 1872), s. 468.*] A Magistrate should not direct a prosecutor to be put upon his trial under s. 211 of the Penal Code without first giving him an opportunity of obtaining a judicial inquiry into the charge originally preferred by him. The sanction to prosecute, contemplated in s. 468 of the Criminal Procedure Code, is not a direction to prosecute, but is a permission granted to a private person to exercise his own unfettered discretion as to whether he will take proceedings or not.—*Giridhari Mondul v. Uchit Jha*, I. L. R., 8 Cal. 435 [see p. 393 of this book].

8. SANCTION TO PROSECUTE—*Criminal Procedure Code (Act X. of 1882), s. 195, cl. c, para. 2—Notice, when necessary, prior to sanction.*] A sanction to prosecute, when applied for subsequently to the termination of the proceedings in the course of which the offence is alleged to have been committed ought not to be granted, unless the person against whom the sanction is applied for had had notice of the application, and an opportunity of being heard.—*Abbilakh Singh v. Khub Lall*, I. L. R., 10 Cal. 1100 [see p. 587 of this book].

9. SANCTION TO PROSECUTE—*Proceedings under s. 82 of Act III. of 1877—Registration—Act III. of 1877, ss. 82, 83.*] It is not necessary that sanction should be given before instituting a charge under s. 82 of the Registration Act.—*In the Matter of Gopi Nath v. Kuldip Singh*, I. L. R., 11 Cal. 566 [see p. 633 of this book].

10. SANCTION TO PROSECUTE—*Fresh sanction granted more than six months after expiry of prior sanction—Grounds upon which such fresh sanction should not be granted—Criminal Procedure Code (Act X. of 1882), s. 195.*] Sanction was granted to prosecute a defendant for forgery and perjury alleged to have been committed by him in a civil suit, which was decided against him on the 22nd August 1882. The defendant then preferred an appeal, which was dismissed on the 9th August 1883. The plaintiff commenced criminal proceedings against the defendant, under the sanction, on the 23rd July 1884; but, such proceedings having been commenced more than six months after the date of the sanction, the charge was dismissed. The plaintiff then, on the 20th August 1884, applied for a fresh sanction, which was granted on the 13th April 1885. *Held* that, assuming that the Munsif, who granted the fresh sanction, had power to do so—as to which the Court expressed no opinion—such fresh sanction should not have been granted, unless some explanation was given for the omission to

Sanction to Prosecute (contd.)—

commence proceedings within six months; and, as no such explanation was given, or any special grounds shown why a fresh sanction should be given, the Munsif did not exercise a sound discretion in granting such fresh sanction, and consequently his order was set aside.—*Joydeo Singh v. Harihar Pershad Singh*, I. L. R., 11 Cal. 577 [see p. 638 of this book].

11. SANCTION TO PROSECUTE—*Criminal Procedure Code (Act X. of 1882), s. 195—Notice to accused.*] No notice is necessary to the person against whom it is intended to proceed, before the Court, before which the alleged offence has been committed, can, under s. 195 of the Criminal Procedure Code, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section.—*In the Matter of the Petition of Krishnanund Das; Krishnanund Das v. Hari Bera*, I. L. R., 12 Cal. 58 [see p. 658 of this book].

12. SANCTION TO PROSECUTE—*Criminal Procedure Code (Act X. of 1882), s. 487—Judicial proceeding—Criminal appeal, Hearing of, by District Judge who has granted sanction to prosecute—Penal Code (Act XLV. of 1860), s. 210.*] A complainant applied to a Munsif for sanction to prosecute a decree-holder for an offence under s. 210 of the Penal Code, and, upon the Munsif's refusing such application, preferred an appeal to the District Judge, who granted the sanction asked for. The decree-holder, having been prosecuted and convicted before a Deputy Magistrate, preferred an appeal, which came on for hearing before, and was disposed of by, the same District Judge, who had granted the sanction. *Held* that the words, "shall try any person," as used in s. 487 of the Code of Criminal Procedure, include the hearing of an appeal, and that the hearing of the appeal from the order of the Munsif refusing sanction was a judicial proceeding within the meaning of the Code, and consequently that, under the provisions of s. 487, the District Judge had no jurisdiction to entertain the appeal against the judgment and sentence passed by the Deputy Magistrate.—*In the Matter of Madhub Chunder Mozumdar v. Novodeep Chunder Pundit*, I. L. R., 16 Cal. 121 [see p. 888 of this book].

13. SANCTION TO PROSECUTE—*Criminal Procedure Code (Act X. of 1882), s. 195—Sanction to prosecute—Notice to accused—Revisional power, Exercise of, by High Court.*] When Subordinate Courts grant sanction to prosecute under s. 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the

Sanction to Prosecute (contd.)—

record whether the application for sanction has been properly granted or not. A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted." There was no further record of the proceedings. Immediately on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications. The attorney for the complainant, who had expressed his willingness to have the application heard and disposed of there and then, intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the following day without notice to and in the absence of the complainant or his attorney, and the Magistrate granted the sanction asked for. On an application to the High Court to revoke the sanction, *held* that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard. *Held*, further, that the mere fact of the charge laid by the complainant not having been proved was not in itself sufficient ground for granting sanction to prosecute him under ss. 182 and 211 of the Penal Code, and as, beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction, it should be revoked.—*Kedarnath Das v. Mohesh Chunder Chuckerbutty* and another, I. L. R., 16 Cal. 661 [see p. 949 of this book].

14. **SANCTION TO PROSECUTE—Criminal Procedure Code (Act X. of 1882), ss. 195, 439, 476—Order for prosecution—Jurisdiction of High Court in revision to quash orders under s. 476 of the Criminal Procedure Code.** The High Court is competent in the exercise of its revisional powers to interfere with an order of a Subordinate Court, whether made under s. 195 or under s. 476 of the Criminal Procedure Code, directing the prosecution of any person for offences referred to in those sections. The High Court, under s. 439, has the powers conferred on a Court of appeal by s. 423 to alter or reverse any such order. Before a Court is justified in making an order under s. 476, directing the prosecution of any person, it ought to have before it direct evidence, fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to

Sanction to Prosecute (contd.)—

in that section, or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted. When a Subordinate Magistrate, after trying a case, sent the record to the District Magistrate with a suggestion that certain persons ought to be prosecuted under s. 211 of the Penal Code, the High Court held that this did not constitute a sanction to prosecute. *Queen v. Baijoo Lal* (I. L. R., 1 Cal. 450) and *In the Matter of the Petition of Kali Prosunno Bagchee* (23 W. R. Cr. 39) followed.—*In the Matter of the Petition of Khepu Nath Sikdar and others v. Grish Chunder Mukerji*, I. L. R., 16 Cal. 730 [see p. 969 of this book].

15. **SANCTION TO PROSECUTE—Sessions Judge, Jurisdiction of—Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X. of 1882), ss. 195, 487—Penal Code (Act XLV. of 1860), s. 196.** A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure. *Madhub Chunder Mozumdar v. Novodeep Chunder Pundit* (I. L. R., 16 Cal. 121) overruled. *Empress v. D'Silva* (I. L. R., 6 Bom. 479) referred to.—*Queen-Empress v. Sarat Chandra Rakhit*, I. L. R., 16 Cal. 766 [see p. 976 of this book].

See APPEAL, 2.

» FALSE CHARGE, 8.

» FALSE EVIDENCE, 7.

» FALSE INFORMATION, 2.

Search for Unlicensed Arms—

By whom to be conducted. See ARMS ACT.

Search-warrant—

Form and Validity of. See INSPECTION OF DOCUMENTS.

Second Prosecution for Same Offence on Different Date—

See MUNICIPAL OFFENCES, 4.

Secondary Evidence of Confession—

See CONFESSION, 4.

Security—

Indefinite Period of Imprisonment in Default of. See RECORD OF INFERIOR COURTS.

Security for Good Behaviour—

1. SECURITY FOR GOOD BEHAVIOUR—*Criminal Procedure Code (Act X. of 1872), s. 505.* On a requisition from the High Court a Magistrate is bound to state the grounds upon which he fixed the amount of security. A person from whom security for good behaviour is demanded should have a fair chance afforded him to comply with the required conditions of security.—*Empress v. Dedar Sircar, I. L. R., 2 Cal. 384* [see p. 47 of this book].

2. SECURITY FOR GOOD BEHAVIOUR—*Criminal Procedure Code (Act X. of 1872), ss. 505, 506*—Deposit of cash in lieu of security-bond for good behaviour. The powers given by ss. 505, 506 of Act X. of 1872 should be exercised with extreme discretion; the former of these sections is not intended to apply to persons of a "by no means reputable character." An order requiring persons to deposit cash in lieu of entering into a bond as security for their future good behaviour is bad in law.—*Empress v. Kala Chand Dass, I. L. R., 6 Cal. 14* [see p. 251 of this book].

3. SECURITY FOR GOOD BEHAVIOUR—*Criminal Procedure Code (Act X. of 1872), ss. 504, 505.* An accused person was convicted of theft, and sentenced to two years' rigorous imprisonment; and was further ordered to enter into his own recognizances for Rs. 50, and find two sureties, each for a like sum, for his good behaviour for one year after the term of his imprisonment had expired; in default to suffer rigorous imprisonment for one year. Held that the latter part of the order was bad, and that the Magistrate should have proceeded under the provisions of s. 504, cl. 2 of the Code of Criminal Procedure. *Empress v. Par-tab (I. L. R., 1 All. 666)* followed.—*Tamiz Mandal v. Umid Karigar, I. L. R., 9 Cal. 215* [see p. 465 of this book].

4. SECURITY FOR GOOD BEHAVIOUR—*Criminal Procedure Code (Act X. of 1882), ss. 109, 110, 112.* Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence, and that he should be clearly informed of the accusation which he has to meet.—*Empress v. Ishwar Chandra Sur, I. L. R., 11 Cal. 13* [see p. 592 of this book].

5. SECURITY FOR GOOD BEHAVIOUR—*Criminal Procedure Code (Act X. of 1882), ss. 110, 118, 123.* No appeal lies to the High Court from an order passed by a District Magistrate under the provisions of s. 123 of the Criminal Procedure Code, and on reference by the Magistrate, confirmed by the Sessions Judge under the same section, requiring a person to be detained in prison,

Security for Good Behaviour *ctd.*: until he should provide security for his good behaviour.—*Chand Khan v. Empress, I. L. R., 9 Cal. 878* [see p. 496 of this book].

6. SECURITY FOR GOOD BEHAVIOUR—*Criminal Procedure Code (Act X. of 1882), ss. 110, 112.* The mere fact that a person from whom security is required has been previously convicted of offences against property is not sufficient to justify proceedings under s. 110 of the Code of Criminal Procedure, unless there be additional evidence that the person complained against has done some act or resumed avocations indicating on his part an intention to return to his former course of life.—In the Matter of the Petition of Haidar Ali, I. L. R., 12 Cal. 520 [see p. 678 of this book].

Security to Keep the Peace—

1. SECURITY TO KEEP THE PEACE—*Criminal Procedure Code (Act X. of 1872), ss. 47, 491*—District Magistrate—Withdrawal of case—*Act XI. of 1874, s. 6.* The provisions of s. 47 of the Code of Criminal Procedure, Act X. of 1872, as amended by s. 6 of Act XI. of 1874, are wide enough to empower a District Magistrate to withdraw a case falling under s. 491 of the same Code.—In the Matter of the Petition of Dinendro Nath Shaniai, I. L. R., 8 Cal. 851 [see p. 430 of this book].

2. SECURITY TO KEEP THE PEACE—*Magistrate of the District—Appellate Court—Criminal Procedure Code (Act X. of 1882), ss. 106, 423.* The Magistrate of a District when acting as an Appellate Court is not competent to make an order under s. 106 of the Criminal Procedure Code (Act X. of 1882), requiring the appellant to furnish security for keeping the peace.—In the Matter of the Petition of Aslu and others; *Aslu v. Queen-Empress, I. L. R., 16 Cal. 779* [see p. 979 of this book].

Security to Produce Person before Police—

SECURITY TO PRODUCE PERSON BEFORE POLICE—*Security-bond—Criminal Procedure Code (Act X. of 1882), s. 514.* As there is no provision in the Criminal Procedure Code authorizing a police-officer to take a surety-bond for the production of any person before the police, such a bond is *ab initio* void; and a Magistrate has no power to alter it, and impose fresh obligations thereunder.—In the Matter of Chandra Sekhar Rai, I. L. R., 11 Cal. 77 [see p. 594 of this book].

Seizure of Cattle—

See CATTLE-TRESPASS ACT.

Self-defence, Right of—

See POSSESSION, 2.

Sentence—

1. SENTENCE—*Criminal Procedure Code (Act X. of 1872), s. 36*—Confirmation of sentence by Sessions Judge.—S. 36 of the Criminal Procedure Code, as regards the necessity for confirmation of the sentence by the Sessions Judge, refers to cases in which the sentence of imprisonment is a sentence of upwards of three years, without including any additional sentence as to fine or whipping.—*Empress v. Shumsher Khan, I. L. R., 6 Cal. 624* [see p. 303 of this book].

2. SENTENCE — Cumulative sentence — Practice—Separate charges—*Criminal Procedure Code (Act X. of 1872), s. 454, ill. f—Penal Code (Act XLV. of 1860), ss. 147, 148, 324.* Under s. 454 of the Criminal Procedure Code, the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code, must not exceed that which may be awarded for the graver offence. *Quare.*—Whether separate convictions under ss. 147, 324 of the Penal Code are legal?—*Empress v. Jubbud Kazi and Golab Khan, I. L. R., 6 Cal. 718* [see p. 310 of this book].

3. SENTENCE — Cumulative sentence — Practice—Conviction of rioting and causing hurt by dangerous weapons—Distinct offences—Separate charges—*Penal Code (Act XLV. of 1860), ss. 71, 148, 149, 324—Criminal Procedure Code (Act X. of 1872), ss. 35, 235—Criminal Procedure Code (Act X. of 1872), ss. 314, 454—Act VIII. of 1882, s. 4.* The offences of rioting armed with a deadly weapon, and voluntarily causing hurt with a dangerous weapon to two persons, are distinct offences; and a person charged with such offences can be convicted and sentenced in respect of the rioting, and of the hurt caused to each of the persons injured. A and B were charged with rioting armed with deadly weapons, under s. 148 of the Penal Code; and they were also charged under s. 324, coupled with s. 149, with causing hurt by a dangerous weapon to X; and B was further charged, under s. 324, with causing a like hurt to Y; A being also charged under s. 324, coupled with s. 149, in respect of the hurt caused by B to Y. A and B were convicted on all the charges, and separate sentences, to take effect in succession, were awarded in respect of each offence charged. The offences under s. 324 were committed during the riot. Held that the several acts with regard to which the prisoners were charged did not fall within the provisions of s. 71 of the Penal Code, inasmuch as it was not found that the causing of the hurt was the force or violence which alone constituted the rioting, and that, consequently, under s. 235 of the Criminal Procedure Code, the several sentences passed were strictly legal.—*Loke Nath Sarkar v. Empress, I. L. R., 11 Cal. 349* [see p. 617 of this book].

Sentence (contd.)—

4. SENTENCE—Cumulative sentence—Separate convictions for more than one offence where acts combined form one offence—*Penal Code (Act XLV. of 1860) ss. 143, 147, 324, 353 (Act VIII. of 1882), s. 4—Criminal Procedure Code (Act X. of 1872), s. 235.* Four persons were charged with being members of an unlawful assembly consisting of themselves and others, the common object of which assembly was resisting the execution of a legal process, namely, the arrest of a judgment-debtor by a Civil Court peon, who went with a warrant for his arrest accompanied by other persons, A and B, for the purpose of identifying him, and with using force or violence in prosecution of the common object, such force or violence consisting of an assault on the Civil Court peon and another by means of a dangerous weapon on A. The Deputy Magistrate convicted all the accused of offences under ss. 147 and 353 of the Penal Code, and sentenced them to six months' rigorous imprisonment under the former section and two months' rigorous imprisonment under the latter. He further convicted one of the accused of an offence under s. 324 in respect of the assault on A, and sentenced him to one month's rigorous imprisonment in respect of that offence, and directed that the sentences were to take effect one on the expiry of the other. Held that the offence of rioting was completed by the assault on A, and that the assault on the peon was a further offence under the first sub-section of s. 235 of the Code of Criminal Procedure. Held further that, even if A had not been assaulted, the conviction and sentences passed for rioting and the assault on the peon were legal, inasmuch as the acts of the accused taken separately constituted offences under ss. 143 and 353 of the Penal Code, and, combined, an offence under s. 147; and under s. 235, sub-s. 3 of the Code of Criminal Procedure, the accused might be charged with and tried at one trial for the offence under s. 147, and those under ss. 143 and 353, and therefore also separately convicted and sentenced for each such offence, provided the punishment did not exceed the limit imposed by s. 71 of the Penal Code, as amended by s. 4 of Act VIII. of 1882, which limit had not been exceeded in the present case.—In the Matter of Chandra Kant Bhattacharjee and others; Chandra Kant Bhattacharjee v. Queen-Empress, I. L. R., 12 Cal. 495 [see p. 676 of this book].

5. SENTENCE — Penal Code (Act XLV. of 1860), ss. 75, 179, 511—Attempt to commit an offence—Enhancement of sentence for previous conviction—Previous conviction.] A person who has been convicted of the offence of theft (an offence punishable under Ch.

Sentence (contd.)—

XVII. of the Penal Code) does not, on being convicted of an attempt to commit the offence of theft, become liable to the enhanced punishment allowed by s. 75 of the Penal Code. — *Queen-Empress v. Sricharan Bauri*, I. L. R., 14 Cal. 357 [see p. 739 of this book].

6. SENTENCE—*Separate sentences for rioting and grievous hurt—Penal Code (Act XLV. of 1860), ss. 71, para. 1, 144, 147, 148, 324, —Act VIII. of 1882—Criminal Procedure Code (Act X. of 1882), s. 35.] Per Curiam (Tottenham, J., dissenting).*—Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code. *Empress v. Ram Parthab* (I. L. R., 6 All. 121) approved. *Loke Nath Sarkar v. Queen-Empress* (I. L. R., 11 Cal. 349) overruled.—*Nilmony Poddar v. Queen-Empress*, I. L. R., 16 Cal. 442 [see p. 920 of this book].

7. SENTENCE—*Cumulative sentences—Rioting—Distinct offences—Conviction for rioting and causing hurt and grievous hurt—Separate conviction for more than one offence when acts combined form one offence—Abetment of grievous hurt during riot—Penal Code (Act XLV. of 1860), ss. 147, 323, 325.]* Six accused persons were charged with and convicted of rioting, the common object of which was causing hurt to two particular men. Four of the accused were also charged with and convicted of, respectively, causing hurt during the riot to the two men and a woman, and were sentenced to separate terms of imprisonment under ss. 147 and 323 of the Penal Code. *Held* that the sentences were legal. During the course of a riot, in which X was attacked and beaten by several of the rioters, one of them K inflicted grievous hurt on X by breaking his rib with a blow struck with a lathi; K and three others of the rioters were charged with offences under ss. 147 and 325 of the Penal Code, and K was convicted under those sections. The other three were convicted under s. 147 and also under s. 325 read with s. 109. Separate sentences were passed on K and also on the other three for each of the offences. *Held* that the sentences on K were legal, but that, as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt, although they had each of them assaulted X, the conviction of them under s. 325 read with s. 109 could not be supported. —In the Matter of the Petition of Mohur Mir and others *v. Queen-Empress*; and In the Matter of the Petition of Kali Roy and

Sentence (contd.)—

others *v. Queen-Empress*, I. L. R., 16 Cal. 725 [see p. 966 of this book].

See ENHANCEMENT OF SENTENCE.

» JURISDICTION, 2.

» REVISION, 4.

» SUMMARY TRIAL, 1.

Separate Charges—

1. SEPARATE CHARGES—*Practice—Distinct offences—Criminal Procedure Code (Act X. of 1872), ss. 532, 553, 554, (ill. b), 555.]* S. 453 of the Criminal Procedure Code simply places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in the section, however, to prevent an accused from being separately charged and tried on the same day for any number of distinct offences of the same kind committed within the year. — *Ram Manikya Chakroborty v. Dononjoy Baraj*, I. L. R., 3 Cal. 540 [see p. 126 of this Book].

2. SEPARATE CHARGES—*Charges, Distinct and separate, tried simultaneously by a jury—Parties opposed in rioting—Consent by pleaders on behalf of accused to irregular procedure—Examination of accused by Sessions Judge—Criminal Procedure Code (Act X. of 1872), ss. 243, 250, 264, 265.]* Members of two opposing parties in a riot were, under two distinct committals, sent up for trial before the Sessions Judge and a jury. After the close of the case for the prosecution in one of these cases, the Sessions Judge with the consent of the pleaders representing the accused, postponed the taking of the evidence for the defence, and proceeded to examine the witnesses for the prosecution in the counter-case before the same jury. The Court then took the evidence of the witnesses for the defence in the first, and in the counter-case in the order named, and, after hearing the address of the various pleaders for the defence, and the reply of the Government Pleader, proceeded to sum up the facts in both cases to the jury, who returned a verdict in respect of all the accused. *Held* that the procedure resorted to by the Judge was a practical violation of the salutary rule which necessitated the keeping of trials in such cases distinctly separate, and that its adoption having materially prejudiced the interests of the accused, the convictions should be set aside. *Queen v. Sheikh Bazu* (B. L. R., Sup. Vol., 750; 8 W. R., Cr. Rul. 47) distinguished. *Held* further that the defect in the procedure could not be cured by the consent of the pleaders for the defence to the arrangement suggested by the Court. The authority given to a Sessions Court to examine an accused does not contemplate the cross-examination of such accused, nor can

Separate Charges (contd.)—

the Judge endeavour, by a series of searching questions, to force the accused to criminate himself. The real object involved in the power given to the Court under s. 250 of the Code of Criminal Procedure is to enable the Judge to ascertain from time to time from the accused (especially if he be undefended) such explanation as he may desire to give regarding any statement made by the witnesses, or, at the close of the case for the prosecution, to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused in the commission of the offence with which he stands charged. —*Hossein Buksh v. Empress*, I. L. R., 6 Cal. 96 [see p. 258 of this book].

See JURY, 4

» SENTENCE, 2, 3.

Separate Charges for Distinct Offences—

See SEPARATE TRIAL, 3.

Separate Convictions for more than one Offence—

See SENTENCE, 4, 7.

Separate Sentences for Rioting and Grievous Hurt—

See SENTENCE, 6.

Separate Trial—

1. SEPARATE TRIAL—*Penal Code (Act XLV. of 1860)*, ss. 167, 466, 471—*Criminal Procedure Code (Act X. of 1872)*, ss. 445, 446, 453—*Offences of the same kind—Amendment of charge.* The prisoner was committed for trial on fifty-five charges, including three charges under ss. 167, 466, and 471 of the Penal Code. At the trial before the District Judge sitting with assessors, the Court informed the prisoner that the trial would be confined to the three charges last mentioned. The prisoner was convicted on these, but the Court allowed evidence to be adduced by the prosecution on all the remaining charges, and in respect of these the prisoner was acquitted. On appeal to the High Court, held that the District Judge should have exercised the powers conferred on him by ss. 445 and 446 of the Code of Criminal Procedure, and then have proceeded to hold separate trials; that he should not have tried together the charges under ss. 167 and 466 of the Penal Code, as the offences were not of the same kind within the meaning of s. 453 of the Code of Criminal Procedure; but the convictions on these charges were upheld, as it did not appear that the prisoner had been prejudiced by the mode of trial adopted.—*Empress v. Sreenath Kur*, I. L. R., 8 Cal. 450 [see p. 396 of this book].

Separate Trial (contd.)—

2. SEPARATE TRIAL—*Committal on two separate charges—Trial as for one offence—Criminal Procedure Code (Act X. of 1872)*, s. 454—*Separate trial.* Where persons are charged with rioting and also with causing hurt, although they may be tried as for one offence under s. 454 of the Criminal Procedure Code, it is not illegal to try them for both offences separately.—*Ameruddin v. Farid Sarkar*, I. L. R., 8 Cal. 481 [see p. 401 of this book].

3. SEPARATE TRIAL—*Criminal Procedure Code (Act X. of 1882)*, ss. 233, 234, 537—*Separate charges for distinct offences.* Five persons were charged with having committed the offence of rioting on the 5th December; four out of those persons, and one F, were charged with having committed the offence of criminal trespass on the 9th December. These two cases were taken up and tried together in one trial, and were decided by one judgment. Held that the trial was illegal, and the defect was not cured by s. 537 of the Criminal Procedure Code.—In the Matter of the Petition of Chandi Singh and others; *Queen-Empress v. Chandi Singh and others*, I. L. R., 14 Cal. 395 [see p. 744 of this book].

See FALSE EVIDENCE, 5.

» JOINDER OF CHARGES, 1.

» SEPARATE CHARGES, 2.

Servant—

Criminal Act of. See MASTER AND SERVANT.

Sessions Court—

Addition of Charges at. See EVIDENCE, 4.
Cannot commit to itself Case not exclusively triable by itself. See JURISDICTION, 1.

Sessions Judge—

Confirmation of Sentence by. See SENTENCE, 1.
Examination of Accused by. See SEPARATE CHARGES, 2.
Directing Further Inquiry and Commitment. See DISCHARGE, 9.
Directing Re-trial in a Case of Adultery, Illegality of. See ADULTERY, 2.
Disagreeing with Verdict of Jury. See APPEAL, 1.
Duty of, in summing up to Assessors. See ASSESSORS.
Jurisdiction of. See SANCTION TO PROSECUTE, 15.

Several Claimants—

Joint Hearing of Case of. See POSSESSION, 22.

Several Offences—

SEVERAL OFFENCES—*Penal Code (Act XLV. of 1860)*, ss. 411, 413—*Offences of dif.*

Several Offences (contd.)—

ferent kinds—Criminal Procedure Code (Act X. of 1872), ss. 283, 453—Defect in procedure—Reduction of punishment—Course to be followed at trial.] A prisoner cannot be tried at the same trial for receiving or retaining (s. 411, Penal Code), and habitually receiving or dealing in (s. 413), stolen property. The proper course is to try the accused first for the offences under s. 411, and if he is convicted to try him under s. 413, putting in evidence the previous convictions under s. 411, and proving the finding of the rest of the property in respect of which no separate charge, under s. 411, could be made or tried by reason of the provisions of s. 453 of the Criminal Procedure Code.—In the Matter of the Petition of Uttom Koondoo, I. L. R., 8 Cal. 634 [see p. 412 of this book].

Shall Answer all Questions—

Meaning of the Expression. See EVIDENCE, 4.

Showing Cause against Commitment—

Opportunity of. See DISCHARGE, 5.

Signs observed at Post-mortem Examination—

May be put to Expert Witness. See CONFESION, 14.

Singhbhum—

Residents of, convicted at Mohurbhunj. See JURISDICTION, 4.

Sleeping Apartment—

See CRIMINAL TRESPASS, 4.

Snake-charmer causing Death by Negligence—

See CULPABLE HOMICIDE, 3.

Special Court at Rangoon—

Power of, to hear Appeal from Sentence of Judicial Commissioner. See JURISDICTION, 2.

Spirituous Liquor includes Tari—

See CANTONMENTS ACT.

Spleen—

Death caused by Rupture of. See RASH AND NEGLIGENT ACT.

Splitting up Offence—

See SUMMARY TRIAL, 2, 4.

Stamp—

1. STAMP—Stamp Act (XVIII. of 1869), s. 29, and sch. ii., art. 38—*Instrument of transfer—Prosecution by Collector—Intention to evade payment of stamp-duty.]* The accused was prosecuted under Act XVIII. of 1869, s. 29, for executing a document on insufficiently stamped paper. The document recited that, "whereas A and B have sold to me 2 gundas 3 cowries of land under a kobala,

Stamp (contd.)—

dated the 9th of Jeyt 1283, in lieu of a consideration of Rs. 695, and whereas I have returned to the vendors in all 4 cottas of land worth about Rs. 25, and whereas in lieu of the said land the said vendors have given me 4 cottas of zeraft land held by them, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me the purchaser; hence I have executed this chitti by way of conveyance or deed of exchange, which may be of service when required." This document bore a stamp of eight annas, and it was executed only by the accused and presented by him for registration. *Held* that the document was an instrument of transfer within the meaning of art. 38, sch. ii., Act XVIII. of 1869. *Held* also that a Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider whether a person prosecuted under s. 29, Act XVIII. of 1869, had any intention to defraud by evading payment of stamp-duty. — *Empress v. Dwarkanath Chowdhry*, I. L. R., 2 Cal. 399 [see p. 48 of this book].

2. STAMP—Stamp Act (XVIII. of 1869), ss. 29, 43—*Procedure—Magistrate authorized to prosecute.]* A Magistrate who has been authorized by the Collector of a district, under s. 43 of the Stamp Act, to prosecute offenders against the stamp-laws, is not competent also to try persons whom he prosecutes. The Collector should appoint some person other than a Magistrate to conduct the prosecutions.—*Empress v. Gangadhar Bhunjoo*, I. L. R., 3 Cal. 622 [see p. 135 of this book].

3. STAMP—Stamp Act (I. of 1879), ss. 37, 40—*Arbitration—Award—Evasion payment of stamp-duty.]* Six persons acted as arbitrators in a dispute between two of their fellow-villagers, and delivered their award in writing. Subsequently, the award was filed in evidence by one of the disputants in a civil suit in the Court of the Munsif of Cuttack, who, on the ground that the document bore no stamp, impounded it, and forwarded it to the Collector, who ordered the writer to be prosecuted. The Deputy Magistrate, to whom the case was referred, summoned the six persons who had acted as arbitrators, and fined them Rs. 25 each. On a reference to the High Court by the District Magistrate, *held* that the conviction was illegal, and should be set aside. *Held* also that the procedure laid down in s. 37 of the Stamp Act must be strictly followed; and that, before a prosecution can be instituted under s. 40, the Collector is bound to form an opinion as to whether the offence was committed with the intention of evading payment of the proper

I. L. R., Cal. 135.

Stamp (contd.)—

duty.—*Empress v. Soddanund Mahanty*, I. L. R., 8 Cal. 259 [see p. 389 of this book].

4. **STAMP**—*Stamp Act (I. of 1879)*, s. 3. cl. 17, and art. 52, sch. i.—*Receipt—Acknowledgment.* An entry made by a creditor in the khata-book of the debtor, and signed by him for the payment of a sum of money in discharge of a debt, is a "receipt" within the meaning of s. 3, cl. 17, of the Stamp Act, and, as such, must be stamped under art. 52, sch. i. of that Act.—*Empress v. Juggernath*, I. L. R., 11 Cal. 267 [see p. 611 of this book].

Standing Counsel—

Right of, to conduct Prosecution. See CONDUCT OF PROSECUTION.

Standing Crops—

Right to. See POSSESSION, 7.

Statement—

Of Accused to Magistrate in Foreign Language how to be recorded. See CHARGE, 2.

Of Accused to Police during Investigation. See CONFESSION, 14.

Of Mukhtar as to Faulty Record. See DISCHARGE, 9.

To Third Person injured. See EVIDENCE, 5.

Statements to Police during Investigation—

1. **STATEMENTS TO POLICE DURING INVESTIGATION**—*Evidence—Criminal Procedure Code (Act X. of 1872)*, ss. 119, 323—*Statements of witnesses to police-officer during investigation—Refreshing memory—Medical witnesses, Evidence of—Opinion of experts how elicited—Examining at Sessions trial of medical witness who has been examined before Magistrate—Post-mortem examination reports.* In giving evidence, a police-officer may refresh his memory by referring to documents in which he has, under s. 119 of Act X. of 1872, reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses. The evidence of a medical man, who has seen, and has made a *post-mortem* examination of, the corpse of the person touching whose death the inquiry is, is admissible firstly, to prove the nature of injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death. A medical man, who has not seen the corpse, is only in a position to give

Statements to Police during Investigation (contd.)—

evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness's opinion on those facts. S. 323 of Act X. of 1872 does not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who has been examined before the Magistrate and in every case in which the deposition taken by the Magistrate is essentially deficient, or requires further elucidation, such witness should be called and examined by the Sessions Judge. A medical man, in giving evidence, may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom.—*Rogni Singh v. Empress*, I. L. R., 9 Cal. 455 [see p. 480 of this book].

2. **STATEMENTS TO POLICE DURING INVESTIGATION**—*Criminal Procedure Code (Act X. of 1882)*, ss. 161, 172, 211—*Statements of witnesses recorded by police-officers investigating under Ch. XIV. of the Criminal Procedure Code, Right of accused to call for and inspect—Police-diaries.* Statements of witnesses recorded by a police-officer while making an investigation under s. 161 of the Criminal Procedure Code form no portion of the police-diaries referred to in s. 172, and an accused person on his trial has a right to call for and inspect such statements, and cross-examine the witnesses thereon.—*Bikao Khan and others v. Queen-Empress*, I. L. R., 16 Cal. 610 [see p. 940 of this book].

See FALSE EVIDENCE, 8.

Statutes—

3 & 4 Wm. IV.—

c. 85. See JURISDICTION OF HIGH COURT, 1.

11 & 12 Vic.—

c. 11, s. 12. See MAINTENANCE, 2.

16 & 17 Vic.—

c. 95. See JURISDICTION OF HIGH COURT, 1.

17 & 18 Vic.—

c. 77. See JURISDICTION OF HIGH COURT, 1.

c. 104, ss. 243 (cls. 1 and 2), 288. See MERCHANT SEAMEN'S ACT.
s. 267. See MERCHANT SHIPPING ACT.

24 & 25 Vic.—

c. 67, s. 23. See JURISDICTION OF HIGH COURT, 1.

c. 104. See JURISDICTION OF HIGH COURT, 2.

Statutes (contd.)—

c. 104, ss. 9, 11, 13. See JURISDICTION OF HIGH COURT, 1.

ss. 13, 15. See COMMITMENT, 1.

s. 14. See TRANSFER OF CASE, 44.

s. 15. See PUBLIC NUISANCE, 16, 17, 19; SANCTION TO PROSECUTE, 6.

43 & 44 Vic.—

c. 16, s. 10. See MERCHANT SEAMEN'S ACT.

Stolen Property—

1. **STOLEN PROPERTY—Criminal Procedure Code (Act X. of 1872), s. 66—Dishonestly retaining in British territory property stolen beyond British territory.** A Nepalese subject, having stolen cattle in Nepal, brought them into British territory, where he was arrested, and sentenced to one year's rigorous imprisonment. *Held* that he could not be tried for the theft itself, but that he might be convicted of dishonestly retaining the stolen property. *Reg. v. Lakhya Govind* (I. L. R., 1 Bom. 50) followed.—*Empress v. Sunker Gope*, I. L. R., 6 Cal. 307 [see p. 273 of this book].

2. **STOLEN PROPERTY—Penal Code (Act XLV. of 1860), s. 411—Receiver of stolen property—Presumption as to possession of property after theft—Possession of stolen property.** A common brass drinking cup was stolen in October 1883, and was discovered in the possession of the accused in September 1884. *Held*, in a case in which the accused was tried for receiving stolen property, that his possession of the stolen property, coupled with the fact that he had failed to give an account as to how he became possessed of the property, would, under ordinary circumstances, raise a probable presumption of his guilt; but where, as in this case, such possession was not a recent possession, but one eleven months subsequent to the act of theft, the presumption against him was so slight that, taken by itself, he ought not to be called upon to explain how his possession was acquired. The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen. *Rex v. Adam* (3 C. and P. 600), *Rex v. Cooper* (3 C. and R. 318), *Rex v. Partridge* (7 C. and P. 551), followed.—*Ina Sheikh v. Empress*, I. L. R., 11 Cal. 160 [see p. 608 of this book].

3. **STOLEN PROPERTY—Evidence—Penal Code (Act XLV. of 1860), s. 411.** To constitute the offence of receiving stolen property, there must be some proof that some person other than the accused had possession of the property before the accused got possession of it.—*Ishan Muchi v. Queen-Empress*, I. L. R., 15 Cal. 511 [see p. 836 of this book].

Stolen Property (contd.)—

See COMMITMENT, 2.

” FALSE INFORMATION.

” SEVERAL OFFENCES.

Strewing Branches on River for Fishing Purposes—

See PUBLIC SPRING.

Strict Proof of Marriage—

See ADULTERY, 1.

Subordinate Magistrate (First Class) not Inferior to District Magistrate—

See ACQUITTAL, 2.

Sub-Registrar—

False Statement before. See REVISION, 3.

Sudden Death—

Omission to report. See CAUSING DISAPPEARANCE OF EVIDENCE; INFORMATION TO POLICE.

Suit for Declaration of Right, and Confirmation of Possession—

See PUBLIC NUISANCE, 13.

Suit out of which Criminal Prosecution arises—

Judgment in. See EVIDENCE, 1.

Summary Decision of Bench of Magistrates—

When no Appeal lies to District Magistrate from. See APPEAL, 4.

Summary Jurisdiction—

See TRANSFER OF MAGISTRATE.

Summary Punishment—

Jurisdiction of High Court as to. See CONTEMPT OF COURT.

Summary Trial—

1. **SUMMARY TRIAL—Offence punishable by fine and confiscation—Act XXI. of 1856, s. 49—Offences triable in a summary way—Summons-cases—Sentence—Criminal Procedure Code (Act X. of 1872), ss. 4, 8, 148, 149, 222.** An offence under s. 49 of Act XXI. of 1856 can be tried summarily under s. 222 of the Criminal Procedure Code, the confiscation provided by s. 49 being merely a consequence of the conviction, and not forming part of the punishment for the offence.—*Empress v. Baidanath Das*, I. L. R., 3 Cal. 366 [see p. 118 of this book].

2. **SUMMARY TRIAL—Unlawful assembly armed with a deadly weapon—Penal Code (Act XLV. of 1860), ss. 143, 144.** No Magistrate is entitled to split up an offence into its component parts for the purpose of giving himself summary jurisdiction. If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to show from

Summary Trial (contd.)—

the deposition of the complainant that the circumstances of aggravation are really mere exaggeration and not to be believed. Therefore, a Magistrate, when he has before him a person charged with having been armed with a deadly weapon while a member of an unlawful assembly, is not at liberty to disregard that part of the charge which charges the prisoner with having been armed with a deadly weapon, and so to give himself jurisdiction to try the case summarily, and then, by inflicting a sentence of imprisonment not exceeding three months, to deprive the prisoner of his right of appeal.—*Empress v. Abdool Karim*; *Empress v. Golam Mahomed*, I. L. R., 4 Cal. 18 [see p. 157 of this book].

3. SUMMARY TRIAL—*Magistrate, Jurisdiction of—Criminal trespass—Mischief—Penal Code (Act XLV. of 1860), s. 427—Criminal Procedure Code (Act X. of 1882), s. 260.* A person may be tried summarily for criminal trespass and mischief unless there is a *bond-fide* claim of right depriving the Magistrate of jurisdiction. *Shakur Mahomed v. Chunder Mohan Sha* (21 W. R. Cr. 38) disapproved.—*Gamirullah Sabkar v. Abdul Sheikh*, I. L. R., 10 Cal. 408 [see p. 542 of this book].

4. SUMMARY TRIAL—*District Magistrate's office—Deputy Magistrate placed in charge of current duties of District Magistrate's office—Jurisdiction—Criminal Procedure Code (Act X. of 1882), s. 437—Penal Code (Act XLV. of 1860), ss. 379, 417—Splitting of charges for purpose of jurisdiction.* A Deputy Magistrate, placed in charge of the current duties of the District Magistrate's office, is not thereby vested with jurisdiction under s. 437 of the Code of Criminal Procedure. Where an accused is charged with offences, one of which is triable summarily, and the other not so triable, it is not open to a Magistrate to discard the latter charge, and to proceed to try the case summarily.—*Ramanund Mahton v. Koylash Mahton*, I. L. R., 11 Cal. 236 [ss p. 610 of this book].

5. SUMMARY TRIAL—*Presidency Magistrate—Conviction in non-appealable case—High Court as a Court of Revision—Criminal Procedure Code (Act X. of 1882), ss. 370, 437.* In every case which is not appealable to the High Court, a Presidency Magistrate should state his reasons for convicting the prisoner, so that the High Court may judge as to whether there were sufficient materials before the Magistrate to support the conviction. In a case where the accused was convicted of theft and sentenced to six months' rigorous imprisonment, the notes of the evidence taken by the Magis-

Summary Trial (contd.)—

trate did not afford sufficient materials upon which the prisoner could be legally convicted, and the Magistrate had omitted to record his reasons for the conviction under s. 370, cl. i, of the Code of Criminal Procedure. Held by the High Court as a Court of Revision that the conviction and sentence must be set aside, notwithstanding the provisions of s. 437 of the Code of Criminal Procedure.—In the Matter of the Petition of Yacoob; *Yacoob v. Adamson*, I. L. R., 13 Cal. 272 [see p. 702 of this book].

6. SUMMARY TRIAL—*Criminal Procedure Code (Act X. of 1882), s. 370, cl. i.—Conviction, Reasons for.* The meaning of s. 370 (cl. i.) of Act X. of 1882 is that, where the offence found is sufficiently grave to involve a fine of Rs. 200 or imprisonment as the substantive sentence, the Magistrate is bound to record his reasons for the conviction, so as to enable the party to bring the matter up to the High Court; but in petty cases, which can be met by a fine of a few rupees, the decision of the Magistrate may be recorded shortly. A sentence of a fine of Rs. 10, and imprisonment in default of payment of the fine, is not a sentence of imprisonment within the meaning of the section.—*Moteeram v. Belaseeram*, I. L. R., 14 Cal. 174 [see p. 733 of this book].

7. SUMMARY TRIAL—*Magistrate, Power of, to try case summarily—Criminal Procedure Code (Act X. of 1882), s. 260—Criminal trespass—Penal Code (Act XLV. of 1860), s. 447.* A complainant applied to a Magistrate for process against certain persons under ss. 447, 146, 148, and 149 of the Penal Code. The Magistrate, having perused the petition of the complainant and examined him on oath, issued summonses against the persons named under those sections. The complainant was not himself an eye-witness of the occurrence, and merely stated in his petition and evidence what he had been told by his servants. Subsequently, before the accused appeared, the Magistrate examined an eye-witness, and issued a fresh summons under s. 447 only, and then proceeded to try the case summarily, and convicted one of the accused. It was contended that he had no power so to try and dispose of the case. Held that the Magistrate had power to try the case summarily. When a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences. During the pendency

Summary Trial (contd.)—

of a civil suit, certain persons, on behalf of the plaintiff, went on to the premises belonging to the defendant for the purpose of making a survey and for getting materials for a hostile application against the defendant. They went (some of them armed) and without the permission of the defendant, and in his absence; and when the defendant's servants objected to their action, they persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting. *Held* that their actions amounted to criminal trespass.—*Golap Pandey v. R. H. Boddam*, 1. L. R., 16 Cal. 715 [see p. 958 of this book].

Summing up—

Defect in. See EVIDENCE, 4.

In a Trial with Assessors. See ASSESSORS.

Summoning Witnesses for Defence—

See WITNESSES FOR DEFENCE.

Summons—

SUMMONS—*Refusal to give receipt for— Penal Code (Act XLV. of 1860), s. 173.* A refusal to give a receipt for a summons is not an offence under s. 173 of the Penal Code. *Reg. v. Kalya bin Fakir* (5 Bom. H. C. Rep., Cr. Ca., 34) followed.—In the Matter of Bhoobuneshwur Dutt, 1. L. R., 3 Cal. 621 [see p. 135 of this book].

Summons and Warrant Cases—

See JOINDER OF CHARGES, 2.

Summons Cases—

Trial of. See SUMMARY TRIAL, 1.

Superintendence of High Court—

See PUBLIC NUISANCE, 16, 17.

Suspension of Pleader—

See LEGAL PRACTITIONERS' ACT, 1.

Suspicion—

Cognisance of Offence on. See FALSE CHARGE, 11.

Suspicious Death—

Omission to report. See CAUSING DISAPPEARANCE OF EVIDENCE.

Suttee—

See CULPABLE HOMICIDE.

Symbolical Possession—

See POSSESSION, 20.

T.

Tangible Immoveable Property—

See POSSESSION, 14, 17, 19, 23, 25.

Tank connected with Running Stream—

Fishing in. See FISHERY, 2.

Tari or Toddy is Spirituous Liquor—

See CANTONMENTS ACT.

Taylor's Medical Jurisprudence—

See RIGHT OF REPLY, 1.

Tea-garden—

Manager of, ordered to discontinue Holding of Market. See PUBLIC NUISANCE, 17.

Temple—

Arms kept in a. See ARMS ACT.

Temporary Order in Urgent Case of Nuisance—

See PUBLIC NUISANCE, 7, 15 to 19.

Tendering Witnesses for Cross-examination—

See RIGHT OF REPLY, 3.

Theft—

See ABETMENT OF ABETMENT.

» CONFESSION, 12.

» DISCHARGE, 3.

» FISHERY, 1, 2.

» GOVERNMENT CURRENCY NOTE.

» JOINDER OF CHARGES, 1.

» SANCTION TO PROSECUTE, 13.

» SECURITY FOR GOOD BEHAVIOUR, 3.

» STOLEN PROPERTY.

» SUMMARY TRIAL, 5.

Third Person—

Statement made by Person injured to. See EVIDENCE, 5.

Thoroughfare—

Obstruction on. See PUBLIC NUISANCE, 3, 9.

Three Offences of Same Kind—

Charge of. See IRREGULARITY, 4.

Tidal Navigable River—

Obstruction on. See PUBLIC NUISANCE, 1.

Time—

At which Magistrate is to determine who was in Possession. See POSSESSION, 13.

Exclusion of, in obtaining Copy of Judgment. See APPEAL, 6.

From which an Order of Appointment dates. See JURISDICTION, 3.

Title—

Bond-fide Dispute as to. See PUBLIC NUISANCE, 10.

Decision on, by Civil Court. See POSSESSION, 9.

Evidence of. See POSSESSION, 10.

Question of. See POSSESSION, 20; PUBLIC NUISANCE, 11, 14.

Toddy or Tari is Spiritual Liquor—

See CANTONMENTS ACT.

Trader at Haut—

See PUBLIC NUISANCE, 18.

Transfer of Case—

1. TRANSFER OF CASE—*Criminal Procedure Code (Act X. of 1872), s. 64—Power of Judge acting in English Department.* An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits, or affirmation in the usual way.—*Queen v. Zuhiruddin, I. L. R., 1 Cal. 219* [see p. 8 of this book].

2. TRANSFER OF CASE—*Act X. of 1875 (High Courts' Criminal Procedure Act), s. 147—Case transferred to High Court—Refund of fine on quashing conviction—Notes of evidence taken by Magistrate.* The High Court has no power, under s. 147, Act X. of 1875, to order a fine to be refunded on quashing a conviction. The Court, in this instance, decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial.—*Morad Ali v. Hadjee Jeebun Bux, I. L. R., 1 Cal. 354* [see p. 15 of this book].

3. TRANSFER OF CASE—*Act X. of 1875 (High Courts' Criminal Procedure Act), s. 147—Case transferred to High Court—Notice to prosecutor—Penal Code (Act XLV. of 1860), ss. 292, 294—Specific charge—Procedure on transfer to High Court.* In an application for the transfer of a case under s. 147, Act X. of 1875, in which the prisoner has been convicted, and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *prima facie* cause shown, that the case be removed, without notice to the Crown. *Semble.*—A charge under ss. 292, 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should, in his decision, state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under s. 147, Act X. of 1875, may either try the case *de novo*, or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained.—*Queen v. Upendronath Doss, I. L. R., 1 Cal. 356* [see p. 16 of this book].

4. TRANSFER OF CASE—*Criminal Procedure Code (Act X. of 1872), s. 64—Grounds necessary to obtain transfer of criminal case to another district when application is opposed by accused.* Before the transfer of a case from one Criminal Court to another

Transfer of Case (contd.)—

can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable.—*Empress v. Nobo Gopal Bose, I. L. R., 6 Cal. 491* [see p. 282 of this book].

4½. TRANSFER OF CASE—*Refusal by Judges to hear affidavits in support of application—Application to the Chief Justice to appoint another Bench to hear and determine case—Interlocutory order in criminal matters, Finality of—High Court Charter Act (24 and 25 Vic., c. 104), s. 14.* Where a rule had been obtained on behalf of a prisoner, calling on the prosecution to show cause why the case should not be transferred for trial to some other Court of Session than that in which it was then pending, on the ground that such strong feeling and prejudice existed in the district against the accused as to render it unlikely that he would get a fair trial, a Division Bench of the High Court, duly constituted, consisting of two Judges, refused to allow the affidavits in support of the application to be read, and discharged the rule. Subsequently, an application was made to the Chief Justice to appoint another Bench of the High Court to hear and determine the rule, on the ground that it had not been heard, and that, consequently, the order passed by the Bench discharging it was null and void. *Held* that the Chief Justice, having once appointed a Bench under s. 14 of the Charter Act (24 and 25 Vic., c. 104) to hear any particular case, has no power to interfere when the case has been disposed of by that Bench. *Held* also that the refusal of the Bench to hear the affidavits read, if an error at all, was simply one of law in the course of dealing with a matter clearly within their jurisdiction; and that, therefore, the decision could not be treated as a nullity, or its legally questioned by the Chief Justice. *Held* further that, whether the judgment had been signed or not, previous to the application being made to the Chief Justice, an interlocutory order of such a nature in a criminal matter is not final, but may be reviewed or reconsidered, or a similar application may be entertained, as often as the Court in its discretion may think proper.—*In the Matter of Abdool Sobhan, I. L. R., 8 Cal. 63* [see p. 372A of this book].

5. TRANSFER OF CASE—*Transfer of class of cases from Subordinate Magistrate—Criminal Procedure Code (Act X. of 1872), s. 48—Notice to the parties before the transfer is made.* Before a Magistrate of a district can transfer a case from a Court subordinate to him to any other Subordinate Court,

Transfer of Case (contd.)—

notice of such intended transfer should be served upon the parties, so as to enable any or either of the parties to come forward and show cause why such transfer should not be made.—*Teacotta Shekdar v. Ameer Majee*, Hafiz Paikar, I. L. R., 8 Cal. 393 [see p. 392 of this book].

6. TRANSFER OF CASE—*Burmah Courts—Criminal Procedure Code*, s. 178—*Reference to High Court—Burmah Courts' Act (XVII. of 1875)*, s. 80.] The Local Government has no power, under s. 178 of the Code of Criminal Procedure, to transfer for trial to the Court of a Commissioner a criminal case duly committed for trial to the Court of the Recorder of Rangoon; but the Local Government has the power to transfer a case from the District of Rangoon to the Sessions division of Pegu.—*Empress v. Nga Tha Moun*, I. L. R., 10 Cal. 643 [see p. 551 of this book].

Transfer of Case before Police Magistrate to High Court—

See MANDAMUS.

Transfer of Magistrate—

TRANSFER OF MAGISTRATE — *Powers of Magistrates—Summary jurisdiction—Criminal Procedure Code (Act X. of 1872)*, ss. 56, 222 — *Furlough*.] The petitioner had been convicted by Mr. Carnegie, the Assistant Commissioner of Kamrup, in the exercise of a summary jurisdiction under s. 222 of Act X. of 1872. This officer was, in the year 1872, in charge of the Jorhat Division in the District of Sibsagar, "with first-class powers and powers under s. 222" of the Act. In 1874 he proceeded on furlough to England, and, on his return in 1875, was posted to the District of Kamrup, and invested with the powers of a Magistrate of the first class. Held that s. 56 of Act X. of 1859 did not apply, and that Mr. Carnegie had no summary jurisdiction in Kamrup. *Per Markby, J.*, on the ground that, by the terms in which the Government had conferred that jurisdiction on Mr. Carnegie, it had in effect "directed," within the meaning of s. 56 of Act X. of 1872, that he should not exercise that jurisdiction anywhere but in Sibsagar. *Per Mitter, J.*, on the ground that the office to which Mr. Carnegie was appointed in Kamrup was not equal to, or higher than, that which he had held in Sibsagar. *Quare per Markby, J.*, whether the posting of Mr. Carnegie to Kamrup, after his return from furlough, was a transfer from Sibsagar within the meaning of s. 56 of Act X. of 1872.—In the Matter of Pursooram Borooah, I. L. R., 2 Cal. 117 [see p. 31 of this book].

Transferred Case—

See JURISDICTION, 2.

Trespass—

See SUMMARY TRIAL, 5.

Trespass during Riot—

See SEPARATE TRIAL, 3.

Trial—

Deposition at. See POSSESSION, 3.

Trial by Assessors—

Summing up in a. See ASSESSORS.

Trial of British Seamen for Offences committed on British Ship on High Seas—

See MERCHANT SHIPPING ACT.

Trial to be Separate in Case of Perjury—

See FALSE EVIDENCE, 5.

Tributary Mehals—

See JURISDICTION OF HIGH COURT, 3, 4, 7.

Truth—

Witnesses not likely to speak the. See WITNESSES FOR PROSECUTION, 3.

U.

Unanimous Verdict—

Judge dissenting from. See JURY, 4.

Unlawful Assembly—

UNLAWFUL ASSEMBLY—*Penal Code (Act XLV. of 1860)*, s. 143.] On the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a dispute of long standing between the accused and certain other parties regarding the possession of certain land; that neither of the parties was in undisturbed possession of the land; that the accused went to sow the land with indigo, accompanied by a body of men armed with latties; that they were prepared to use force if necessary; and that the lattials kept off the opposite party by brandishing their weapons while the land was sowed. Held that the accused were rightly convicted of being members of an unlawful assembly under s. 143 of the Penal Code. *Sunker Singh v. Burmah Mah-to* (23 W. R. Cr. 25) distinguished.—*Pearcy Mohun Sircar v. Empress*, I. L. R., 9 Cal. 639 [see p. 489 of this book].

See CONFESSION, 7.

» CULPABLE HOMICIDE, 4.

» FISHERY, 1.

» JURY, 4.

» RIOTING, 2.

» SENTENCE, 4.

Unlawful Assembly armed with Deadly Weapon—

See SUMMARY TRIAL, 2.

Unlawful Detention—

UNLAWFUL DETENTION FOR AN UNLAWFUL PURPOSE—*Criminal Procedure Code (Act X. of 1882), s. 551—Infant, Custody of.* A Hindu girl, under the age of 14 years, went of her own accord to a Mission House, where she was received and allowed to remain. The mother and husband of the girl thereupon applied to the Magistrate, who took proceedings under s. 551 of the Criminal Procedure Code. The Lady Superintendent of the Mission House denied that the girl was legally married, and alleged that she was practically being brought up with the connivance of the mother to a life of prostitution. The Magistrate, after recording evidence, found that the girl was legally married; that the other allegation was not established; and that, although she went to and remained in the Mission House of her own free will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that there were no facts established which would disentitle the husband or the mother to the custody of the girl, and passed an order under the section directing the girl to be restored to her mother. *Held* upon the facts as found by the Magistrate, as it was immaterial whether the girl did or did not consent to remain at the Mission House, there was an unlawful detention within the meaning of these words as used in the section, as the girl was kept against the will of those who were lawfully entitled to have charge of her. *Held* also that s. 551, applying only as it does to women and female children, must not be construed so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian, but that the purpose, whether entertained towards a woman or a female child, must be in itself unlawful. *Held*, consequently, that, in the circumstances of the case, there was no detention for an unlawful purpose, and that the Magistrate had no power to make the order. *Held* further that, although the Magistrate had no power under the section to make the order he did, it did not follow that the Court should direct the girl to be restored to the custody of the Lady Superintendent, even if it had the power to do so, and that, having regard to the circumstances of the case, there was nothing to justify such an order being passed.—*Abraham v. Mahtabo*, I. L. R., 16 Cal. 487 [see p. 924 of this book].

Unnatural Death—

Omission to report. See **CAUSING DISAPPEARANCE OF EVIDENCE; INFORMATION TO POLICE.**

Unskilled Medical Practitioner—

See **RASH AND NEGLIGENT ACT, 2.**

Urgent Cases of Nuisance—

Temporary Order in. See **PUBLIC NUISANCE, 15—19.**

Using Forged Document—

See **FORGED DOCUMENT.**

" **JURY, 5.**

V.**Vagueness of Charge—**

See **FALSE EVIDENCE, 1.**

Valuable Security—

Sanad conferring Title of Dignity not a.

See **FORGED DOCUMENT, 2.**

Venomous Snake—

Negligence in Respect of. See **CULPABLE HOMICIDE, 3.**

Verdict of Jury—

See **JURY.**

Appeal upon Facts from. See **APPEAL BY LOCAL GOVERNMENT, 2.**

Sessions Judge disagreeing with. See **APPEAL, 1.**

Verdict on Offence proved, though not charged—

See **JURY, 4.**

Vexation and Delay—

See **POSSESSION, 2.**

Village Chaukidar—

Extortion committed in Presence of. See **EXTORTION.**

W.**Waiver by Accused—**

Effect of. See **IRREGULARITY, 1.**

Waiving of Privilege—

See **EUROPEAN BRITISH SUBJECT.**

Warrant—

Attachment on Expired. See **PUBLIC SERVANT, 3.**

Warrant and Summons Cases—

See **JOINDER OF CHARGES, 2.**

Warrant Case—

Absence of Complainant in. See **DISCHARGE, 6.**

Way—

Right of. See **PUBLIC NUISANCE, 7, 9.**

Withdrawal—

By Magistrate of a Case of Public Nuisance. See **PUBLIC NUISANCE, 4.**

Of Case by Magistrate. See **SECURITY TO KEEP THE PEACE, 1.**

Of Pardon. See **PARDON.**

Witness called by Court—

Right of Accused to cross-examine. See **CROSS-EXAMINATION.**

Witnesses—

- Depositions of, not the Property of Police. See LEGAL PRACTITIONERS' ACT, 1.
- Duty of Magistrate to summon. See POSSESSION, 14.
- Evidence of, taken on Commission, when Admissible. See EVIDENCE, 2.
- Examination of. See REVIVAL OF PROSECUTION.
- For Defence, Examination of. See POSSESSION, 2.
- Magistrate when not a Competent. See DISCHARGE.
- Not called for Defence. See RIGHT OF REPLY.
- Oral Evidence at Sessions Court as to Statements of, in Magistrate's Court. See DISCHARGE, 9.
- Statements of, to Police during Investigation. See STATEMENTS TO POLICE DURING INVESTIGATION.
- Tendering of, for Cross-examination. See RIGHT OF REPLY, 3.
- To be left to Pleaders for Examination or Cross-examination. See CONFESION, 7.

Witnesses for Defence—

1. WITNESSES FOR DEFENCE—*Evidence—Summoning witnesses—Refusal of a Magistrate to summon prisoner's witnesses—Criminal Procedure Code (Act X. of 1872), s. 359.* A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds specified in s. 359 of the Criminal Procedure Code; and if he does refuse, he is bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed.—*Deela Mahton v. Sheo Dyal Kori*, 1. L. R., 6 Cal. 714 [see p. 309 of this book].
2. WITNESSES FOR DEFENCE—*Summoning and attendance of—Compelling attendance of—Evidence—Criminal Procedure Code (Act X. of 1882), s. 257.* Certain witnesses who had been summoned for the accused failed to appear on the day of trial, and the Deputy Magistrate refused to adjourn the hearing, or to issue fresh processes for the attendance of the defendants' witnesses, on the ground that they were all friends of the accused, who would come to Court if the accused desired it. The prisoners were convicted. *Held* that the conviction must be set aside, the Magistrate having once granted processes, he was bound to assist the accused in enforcing the attendance of his witnesses.—*Empress v. Dhananjoi Chaudhuri*, 1. L. R., 10 Cal. 931 [see p. 557 of this book].

Witnesses for Prosecution—

1. WITNESSES FOR PROSECUTION — *Criminal Procedure Code (Act X. of 1872), s. 215—Evidence for the prosecution—Examination of witnesses.* A Magistrate is bound, before he discharges an accused person under s. 215 of the Criminal Procedure Code, to examine all the witnesses, and should not refuse to examine witnesses simply because their evidence will be to the same effect as that already taken for the prosecution.—*Johardi Sheik v. Hematulla*, 1. L. R., 3 Cal. 389 [see p. 122 of this book].
2. WITNESSES FOR PROSECUTION — *Recalling witnesses, Time for—Right of accused to recall witnesses for prosecution—Criminal Procedure Code (Act X. of 1872), ss. 217, 218.* Readings ss. 217 and 218 of the Criminal Procedure Code together, it appears that, if an accused person desires to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire is when the charge is read over to him, and he is called upon to make his defence; and although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case, the accused has no right to insist upon the witnesses being recalled.—*Faiz Ali v. Koromdi*, 1. L. R., 7 Cal. 28 [see p. 324 of this book].
3. WITNESSES FOR PROSECUTION — *Evidence—Duty of prosecution—Inferences to be drawn on failure to call witnesses—Misdirection.* It is *prima facie* the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution, and who must be able to give important information. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. No such corresponding inference can be drawn against an accused.—*Empress v. Dhunno Kazi*, 1. L. R., 8 Cal. 121 [see p. 373 of this book].
4. WITNESSES FOR PROSECUTION—*Duty of the prosecution to produce.* Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses in Court on the part of the prosecution that they had been examined by the committing Magistrate against the express wish of the police-officer in charge of the prosecution, *held* that that was not a valid ground for the non-production of the witnesses in the Sessions Court. In conducting a case for the prosecution, all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court
1. L. R., Cal. 136.

Witnesses for Prosecution (ctd.)—
and examined. — *Empress v. Ram Sahai Lall*, I. L. R., 10 Cal. 1070 [see p. 579 of this book].

Words said to be Obscene—

See **TRANSFER OF CASE**, 3.

Worship—

Confiscation of Arms used for Purposes of. See **ARMS ACT**.

Writing to refresh Memory—

See **REFRESHING WITNESS'S MEMORY**, 2.

Wrongful Confinement—

WRONGFUL CONFINEMENT—Penal Code
(*Act XLV. of 1860*), s. 346.] In an order to

Wrongful Confinement (ctd.)—
render a person liable under s. 346 of the Penal Code, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered.—*Empress v. Sreenath Banerjee*, I. L. R., 9 Cal. 221 [see p. 467 of this book].

See **FALSE CHARGE**.

Wrongful Loss—

See **POSSESSION**, 2.

Wrongful Restraint—

See **MISCHIEF**, 1.

Ex. f. m.



